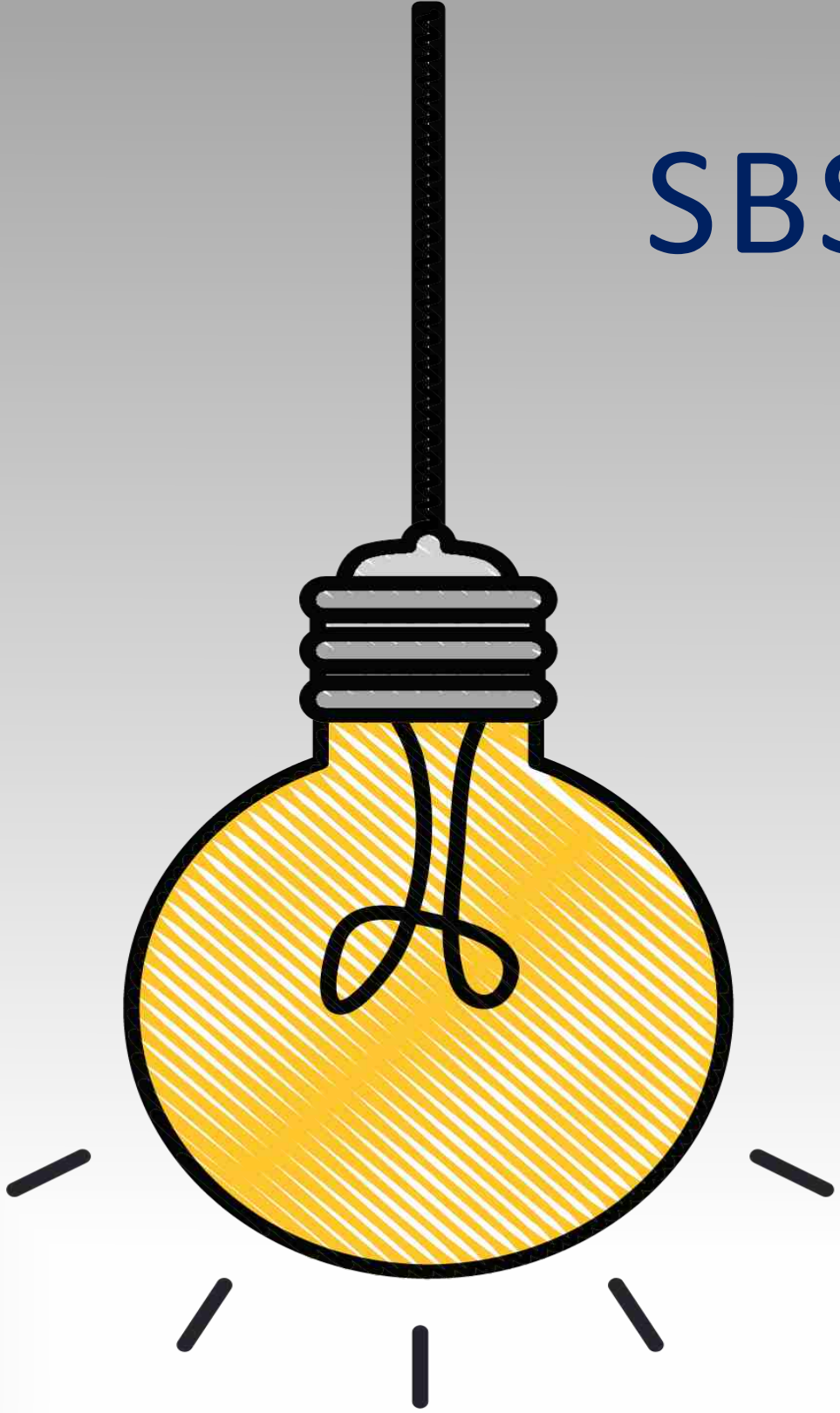

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SBS AND COMPANY LLP

CHARTERED ACCOUNTANTS

Contents

Dear Readers,

In this edition, we have come up with an article on powers of NCLAT to recall its own Order, and the decision of the 5 member bench of the NCLAT, Principal Bench, was upheld by the Supreme Court.

The next article ison scope of taxes covered under the Double Taxation Avoidance Agreement. The scope of taxes under the Double Taxation Avoidance Agreement is crucial in determining the amount of credit of taxes, paid in the country of source, that can be claimed in the country of residence. Further, scope of tax plays a vital role in determining the rate of withholding tax under section 195 of the Income Tax Act, 1961 while remitting the amount to a non-resident.

We have also collated certain important judgments under direct tax and indirect tax laws, provided our comments wherever necessary.

I hope that you will have good time reading this edition and please do share your feedback.

Thanking You,

Suresh Babu S

Founder & Chairman

Insolvency and Bankruptcy Code

Power of NCLAT to Recall its orders

Whether the NCLAT has the power to "Review"and "Recall" its own Orderremained a debated question. However the Apex Court in the matter of M/s. Amtek Auto Limited, had cleared the air that NCLAT is well empowered to recall its own order. In this Article, the trail of the case, which ultimately landed in the lap of the Apex court, which upheld the decision of the 5 member bench of the NCLAT is discussed in detail.

Contributed by CS D.V.K.Phanindra
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Vide Order[1] Dt:31.07.2023, the Hon'ble Supreme Court, had dismissed the appeal filed against the Order[2] of a Five Member Bench of the Hon'ble National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, New Delhi, and affirmed the decision of the NCLAT, that NCLAT is empowered only to "Recall" its judgment, under Rule 11 of NCLAT Rules, 2016, and not to "Review" them. Please read our Article[3] on inherent powers of NCLT to recall its order.

Facts of thecase [4]:

Before the Hon'ble NCLT:

1. In relation to default in repayment of Debt on account of Term Loan, Cash Credit and WCDL, M/s. Corporation Bank (Now Union Bank of India)-Financial Creditor, filed Section 7 Application before the Hon'ble NCLT, Chandigarh Bench (Adjudicating Authority) against M/s.Amtek Auto Limited (Corporate Debtor). Finding the application complying the requirements of the code, the Adjudicating Authority vide Order[5] Dt: 24.07.2017, admitted the application, putting the Corporate Debtor in the CIRP, and declaring moratoriumprohibiting all of the following:

   a) the institution of suits or continuation or pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

[1]Civil Appeal No. 4620/2023 (Union Bank of India vs. Financial Creditors of M/s Amtek Auto Limited & Ors.)
[2]2023 SCC OnLine NCLAT 283; [2023] 152 taxmann.com 106 (Order Dt: 25.05.2023, in I.A. No. 3961 of 2022 in CA(AT) (Ins.) No. 729 of 2020) 5 Member Bench, NCLAT, Principal Bench, New Delhi.
[3]Power of NCLT to recall it own order was discussed in the December, 2022 edition of wiki, which can be accessed at https://sbsandco.com/blog/sbs-wiki-e-journal-dec-2022
[4]Reference, facts and emphasis, only to the extent relevant to the context herein, forms part of this Article.
[5]2017 SCC OnLine NCLT 15755; CP(IB) No.42/Chd/Hry/2017, NCLT, Chandigarh Bench (Corporation Bank vs. Amtek Auto Ltd.,)

b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of security Interest Act, 2002 (54 of 2002);

d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

2. An Interim Resolution Professional was appointed, and the Committee of Creditors was constituted.

3. Union Bank of India (formerly Corporation Bank) and other creditors filed their claims in pursuance of the public announcement, in Form C dated 04.08.2017 as on the insolvency commencement date, for an aggregate amount of Rs. 876 Crores. The Resolution Professional on verification and collation of the claim filed by the Financial Creditor verified an amount of Rs. 836 Crores as **'financial debt'** of the Appellant. The Appellant was included as a member of the Committee of Creditors (CoC), and was assigned voting right of 6.64% in the CoC, based on its financial debt.

4. After much deliberations and process, the Resolution plan submitted by M/s. DVI PE (Mauritius) Ltd and M/s.Deccan Value Investors LP, (Successful Resolution Applicants) **(SRAs),** was approved by the CoC withmajority voting share of 70.07% on 11.01.2020.Union Bank of India was a dissenting member of the CoC. The Resolution Professional filed an Application[6] with the Adjudicating Authority for approval of the Resolution Plan.

5. On the other hand, Union Bank of India-Financial Creditor, filed an Application[7] , against the Resolution Professional of the Corporate Debtor and SRAs, under Section 60 (5) (c) of the I&B Code read with Rule 11 of the NCLT Rules seeking the following directions/reliefs:

a. Allow the instant Application filed by the Applicant and direct the IRP to get the Resolution Plan modified so as to comply with Regulation 42 and 44 of the Liquidation Process Regulation 2016;

[6]2020 SCC OnLine NCLT 1426;(Order Dt:09.07.2020 in I.A. No. 225/2020 in CP(IB) No. 42/Chd/Hry/2017, NCLT, Chandigarh Bench)

[7]2020 SCC OnLine NCLT 1426;(Order Dt:09.07.2020 inI.A. No 222/2020 in CP(IB) No. 42/Chd/Hry/2017, NCLT, Chandigarh Bench)

b. Direct the Respondent Resolution Professional to not to deduct the amount of Rs. 34 crores from the final payment to be made to Applicant as per the scheme of distribution of amount under Resolution Plan; and

c. Direct the Respondent Resolution Professional to further include amount of Rs.6,22,58,072.64 towards LC payments and Rs. 61,39,000/- towards Bank Guarantee (BG) payments and the total admitted claim of the Applicant.

6. The Adjudicating Authority, vide Order Dt:09.07.2020 allowed the Application filed by the Resolution Professional, approving the Resolution Plan; and rejected the Application filed by the Union Bank ofIndia.

7. Aggrieved with the Order of the Adjudicating Authority, the Financial Creditor, filed Appeal challenging the Order Dated 09.07.2020 in IA 222/2020, before the Hon'ble NCLAT ("Appellate Authority") Principal Bench, New Delhi.

APPEAL [8] before Hon'ble NCLAT:

Submissions on behalf of the Appellant Financial Creditor:

8. In the said appeal, the Appellant Financial Creditor, arrayed the RP and the 2 SRAs (detailed Supra), as the Respondents, and did not implead the CoC as one of the Respondents.

9. It was the submission of the Appellant Financial Creditor that the Appellant is one of the dissenting Secured Financial Creditors allotted the 'Liquidation value as per the allocation sheet and, therefore, approved by the CoC. The claim of Rs. 39.61 crores were erroneously rejected by the IRP only because the same was not crystallised.

10. It was submitted that the Non Fund based Facility has been issued in favour of the beneficiary/vendors for the purchase of various types of steels and other alloys. The Authority also noted that the RP, failed to appreciate that the Corporate Debtor is liable to pay the suppliers/beneficiaries during the CIRP period. The Appellant Financial Creditor, did the same by debiting the cash credit account of the Corporate Debtor as instructed by RP. Therefore, the payments consequently made to such beneficiaries by debiting the Corporate Debtor's account are misconceived as recovery towards the dues.

[8] 2022 SCC OnLine NCLAT 778; NCLAT, Principal Bench, New Delhi (CA(AT) (Ins.) No. 729 of 2020)

11. It was further argued that the RP had misled the CoC by not placing all the facts and records, with specific reference to his requests for debiting the current account of Corporate Debtor or issuance of fresh NFB Facility. It was further submitted that RP had also misled the CoC by stating that the Appellant had made a recovery of ₹ 34 Crores when the vendors of the Corporate Debtor were the ultimate beneficiaries under the NFB Facility, and accordingly, the decision taken by the CoC was based on the incorrect information provided by RP.

12. It was further argued that the Adjudicating Authority failed to consider that the Appellant was, a dissenting Financial Creditor, and is entitled to liquidation value according to Section 53 of the IBCode. Therefore, it did not comply with Regulations 42 & 44 of the IBC (Liquidation Process) Regulations, 2016.

13. Further the observations of the Adjudicating Authority in the Impugned Order that the Appellant Financial Creditor, has not objected to the said actions of RP in the CoC meetings, was not correct, as the Appellant had refuted the actions of RPthrough E-mail correspondences, which the Adjudicating Authority had overlooked. Accordingly, the Adjudicating Authority has misconstrued the payments made to the beneficiaries/vendors as recovery by the Appellant Financial Creditor.

Submissions on behalf of the RP:

14. It was submitted that RP in terms of the duty cast under Section 20 & 25of the IB Code to continue and maintain the business of the Corporate Debtor as a going concern, and accordingly had requested the Appellant to continue and maintain the NFB Facility limits at the current level as being drawn by the Corporate Debtor prior to the insolvency commencement date. The said request was made on account of the business requirement of the Corporate Debtor.

15. It was further submitted that in the present case, the Resolution Plan submitted by the SRA is silent on the manner of distribution todissenting creditors. Even otherwise, it is the CoC and not theRP of the Corporate Debtor who is cast with theduty to decide and supervise the manner of distribution inter-secreditors. Therefore, the alleged grievance of the Appellant being amember of the CoC itself against the RP is totally misconceived and also contrary to law.

16. It was submitted that the Hon'ble Supreme Courtin Swiss Ribbons Private *Limited Vs. UOI*[9] , has categorically held that "the resolution professional is a facilitator ofthe resolution process, whose administrative functions are overseen bythe CoC and the NCLT.

[9]2019) SCC Online SC 73

17. It was further submitted that RP had suggested the COC, Two (02) options to **(I)** either treat the illegal recovery is made by the Appellant as interim finance under the IB Code or **(ii)** sent to deduction of the amount of illegally recovered amount by the Appellant, out of distribution amount payable to the Appellant under the Resolution Plan. Accordingly, the COC, upon deliberation, consented to deduction of the said amount from the distribution amount owed to the Appellant under the Resolution Plan submitted by the SRA.

Findings/Observations and Order [10] of the Hon'ble NCLAT:

18. The Appellate Authority noted that the RP has admitted that a Letter of Credit Bank Guarantee has been issued favouring the beneficiary/vendor to purchase various steels and other alloys to keep the Corporate Debtor as a going concern. However, the RP has failed to appreciate that the Corporate Debtor is liable to pay the suppliers/beneficiaries under the LCs/BG during the CIRP period. The payments consequently may be made to beneficiaries by debiting to the Corporate Debtor's account have been misconceived as recovery towards Appellant's dues and thereby caused massive loss to the Appellant in denying its claim.

19. The Appellate Authority also noted that the RP had suggested the COC two options to either treat the illegal recovery is made by the Appellant as interim finance under the IB Code or sent to deduction of the amount of illegally recovered amount by the Appellant, out of distribution amount payable to the Appellant under the Resolution Plan, to which the COC agreed for deduction of the said amount from the distribution amount owed to the Appellant under the Resolution Plan.

20. The Appellate Authority observed that the RP should have explored the possibility to see whether the alleged amount could have been treated as 'Insolvency Resolution Process cost' was to be decided in Section 5 (13) of the Insolvency and Bankruptcy Code 2016, but the RP left it to the discretion of CoC to either treat the alleged amount as an 'interim finance' under the IB Code or deduct that amount out of the distribution amount payable to the Appellant under the Resolution Plan.

21. The Appellate Authority noted that while honouring the LCs and BGs issued on behalf of the Corporate Debtor, the Appellant being the Financial Creditor, it had not unduly

[10] 2022 SCC OnLine NCLAT 778; (Order Dt: 27.01.2022 in CA(AT) (Ins.) No. 729 of 2020,NCLAT, Principal Bench, New Delhi).

enriched itself. No amount has been credited towards the loan account of the Corporate Debtor, and the debit transactions are related to the payments made to the supplier/vendor/beneficiary of LC/BG. Therefore, it is incorrect to say that the appellants have made a recovery of the said amounts. On the contrary, the said LCs/BCs continued during the CIRP period. The payment was made to the suppliers of the Corporate Debtor on the instructions of the RP to keep the Corporate Debtor as a going concern. The Corporate Debtor has received the goods under the said LCs and BG's during the CIRP period, and the Corporate Debtor is liable to pay the suppliers under IB Code. Accordingly, the same ought to have been considered as CIRP cost,

22. The Appellate Authority referred to the provisions of Sec 53(1) of the IBCode, which mandates the priority of payment for the Insolvency Resolution Process Cost and the Liquidation costs. However, in the instant case, the RP firstly insisted the Appellant Bank continue Letter of Credit Bank Guarantee Facility during CIRP at the current level to keep the Corporate Debtor as a going concern, *but made erroneous recommendation to the CoC to either consider payment against LC/BG as CIRP Cost or deduct that amount from out of the amount allotted to the Appellant's share under the Approved Resolution Plan.*

23. The Appellate Authority observed that the Appellant never recovered any amount from the payment of Rs. 34 crores, as has been misrepresented by RP. The Appellate Authority also noted that the observation of the Adjudicating Authority in the impugned Order Dt: 09.07.2020, that the Appellant has not objected to the said actions of RP. in the COC meetings is contrary to the materials placed before the Adjudicating Authority, which the Adjudicating Authority has overlooked, and accordingly, the Appellate Authority noted that Adjudicating Authority has misconstrued the payment made to the Appellant's beneficiaries/vendors as recovery and dismissed the IA No. 222 of 2020 of the Appellant, and **allowed the Appeal in part**, to the extent of direction to the:

a. Resolution Professional to not to deduct the amount of Rs. 34 crores from the final payment to be made to Applicant as per the scheme of distribution of amount under Resolution Plan;

24. Aggrieved with the above Order of the Appellate Authority, all the other Financial Creditors in the CoC otherthan Union Bank of India, preferred an Appeal with the Hon'ble Supreme Court, challenging the Order Dated: 27.01.2022.

APPEAL[11] to Hon'ble Supreme Court:

25. Through the RP, all the other Financial Creditors in the CoC, filed the Appeal against the Order of the Appellate Authority Dt:27.01.2022,in particular the observations of the Appellate Authority against the Resolution Professional, at para 10.28 of the Order (italicised and underlined at Point.22 above).

26. Post the admission of the Appeal before the Apex Court, the said appeal was withdrawn seeking permission to file a review application before the National Company Law Appellate Tribunal (NCLAT), Principal Bench, New Delhi. The Hon'ble Apex court made the following order[12] :

"The application for leave to appeal is allowed. Shri Shanjay Bhatt, learned counsel appearing on behalf of the appellant seeks permission to withdraw the present appeal with a liberty to file a review application before the National Company Law Appellate Tribunal, Principal Bench, New Delhi (NCLAT) on the observations made by it in para 10.28 of the impugned judgment. The permission is accordingly granted. The Civil Appeal stands dismissed as withdrawn with the above liberty. All the contentions which will be available to the parties are kept open."

[11]Civil Appeal No.2663 of 2022 (Civil Appeal Diary No.5609 of 2022).
[12]Order Dt:01.04.2022 in Civil Appeal No.2663 of 2022.

27. By virtue of the liberty granted by the Apex Court, the Financial Creditors in the CoC, filed a Review application with the National Company Law Appellate Tribunal (NCLAT), Principal Bench, New Delhi.

REVIEW APPLICATION[13] before Hon'ble NCLAT:

Submission of the Parties:

28. On behalf of the Financial Creditors in CoC other than Union Bank of India, it was submitted that theAppellant, was not a party in CA (AT) (Ins) No. 729 of 2020. An Appealhad to be filed before the Hon'ble Apex Court, to challenge some observationsmade by the Appellate Authority against the RP, in Para 10.28 of the said order.The Appeal was filed and later withdrawn, seeking liberty to file a Review Application before the Appellate Authority, and this Review Application was filed with the Appellate Authority, pursuant to the liberty granted by the Apex Court. It was submitted that the Applicants had invoked the provisions of Rule 11 of the NCLAT Rules, 2016 which providesinherent powers to the Appellate Authority.

29. On behalf of Union Bank of India, it was submitted that at the specific request by the Appellant before the Apex Court, the Apex Court while permitting to withdraw the

[13]Review Appl. No.01 of 2022 in CA(AT) (Ins.) No. 729 of 2020; NCLAT, Principal Bench, New Delhi.

appeal, granted liberty to the Appellant to file a Review Application before the Appellate Authority. There is express no provision in the IB Code for filing such an application. It was further submittedthat until and unless the remedy of review is provided in the statute, itcannot be invoked.

Findings/Observations and Order [14] of the Hon'ble NCLAT:

30. The Appellate Authority noted that the law is well settled that an application for review against the order of the Tribunal can only be maintained if the remedy of review is provided in the Code.

31. It was further noted that, in the order dated 01.04.2022, passed by the Hon'ble Supreme Court, permission was granted to the Appellant as sought by the Appellant to file the review application *but it does not mean that the review application is maintainable before the Appellate Authority in the absence of provision of review in the Code which is a complete in itself.*

32. The Appellate Authority held that the review application is maintainable before it, as there is no provision for "Review" in the Code, and directed that Appellant may take recourse to its other remedy in accordance with law in case it is still aggrieved against the order dated 27.01.2022 or a part of it.

33. On the non-maintainability of the Review Application, the Financial Creditors in the CoC other than Union Bank of India, filed an Application to recall the Order Dt; 27.01.2022, in CA(AT) (Ins.) No. 729 of 2020, before the Hon'ble NCLAT ("Appellate Authority") Principal Bench, New Delhi.

RECALL APPLICATION[15] before the Hon'ble NCLAT:

Submissions on behalf of Financial Creditors in the CoC:

34. It was submitted that the application is filed to recall the judgment Dt: 27.01.2022, and is not for review of the judgment, as a review application already filed was not entertained by the Appellate Authority, vide order Dt: 02.09.2022 in the review application. The present recall application is made before the Appellate Authority to avail other remedies in accordance with law, under Rule 11 of NCLAT Rules, 2016.

[14]Order Dt: 02.09.2022, in Review Application. No.01 of 2022 in CA(AT) (Ins.) No. 729 of 2020; NCLAT, Principal Bench, New Delhi.

[15]I.A. No. 3961 of 2022 in CA(AT) (Ins.) No. 729 of 2020) 3 Member Bench of NCLAT, Principal Bench, New Delhi.

35. It was further submitted that the present recall application is filed, as in the said Appeal/Order Dt:27.01.2022, the Applicant was not a party, and the Resolution Plan approved by the CoC, was modified by virtue of Order Dt: 27.01.2022, without hearing the Applicant.

36. It was further argued that the Applicant thus is not praying for recall of the order on merits of the judgment rather Applicant is praying for procedural review, which is permissible in the facts of the present case. It is submitted that under inherent powers this Tribunal can recall an order which has been passed adversely affecting the rights of the parties to the proceedings. The following judgements of the Hon'ble Apex Court were referred by the counsel for the Applicants, in support of the power to Recall.

(a) A. R. Antulay Vs. R.S. Nayak & Another[16]

(b) AsitKumar Kar Vs. State of West Bengal & Ors.[17]

© Budhia Swain & Ors. Vs. Gopinath Deb & Ors.[18]

37. It was further submitted that the Appellate Authority has power to recall the judgment which is passed ex-parte and said jurisdiction is vested with the Appellate Authority and the fact that the Appellate Authority has no power to review cannot take away the jurisdiction of the Appellate Authority to recall the judgment delivered in violation of principles of natural justice.

38. To support the above, it was submitted that the Applicant which was the CoC and has approved the Resolution Plan was a necessary party in the Appeal filed by the Union Bank of India and without Applicant being party to the Appeal Resolution Plan approved by the CoC was been modified, accordingly, the order of the Appellate Authority was in violation of principles of natural justice, that the Applicant being not before the Appellate Tribunal in the Appeal, which gives them the right to make prayer for setting aside the ex-parte order.

39. The Applicant sought for the following reliefs:

(a) Allow the present application and recall the order dated 27.01.2022 passed by this Appellate in Company Appeal (AT) (Ins) No. 729/2020.

(b) (b) Direct ad interim stay of the operation of the order dated 27.01.2022 passed by this Hon'ble Appellate Tribunal in Appeal (AT) (Ins) No. 729/2020 till disposal of the present Recall Application.

[16](1988) 2 SCC 602,
[17](2009) 2 SCC 703
[18](1999) 4 SCC 396

© *Pass any other order which this Hon'ble Appellate Tribunal may deem fit in eyes of equity, justice and good conscience taking into account the specific facts and circumstances of the case.*

Submissions on behalf of Union Bank of India:

40. It was contended that the Recall Application is not maintainable since Review Application No. 01/2022 filed by the Applicant has already been rejected by the Appellate Authority. The Hon'ble Supreme Court had granted liberty to the Applicant to file a Review Petition which having been filed and dismissed no further remedy can be availed by the Applicant.

41. It was further argued that Rule 11 cannot be invoked for passing an order which is not provided for in the IB Code. There being no provision for review in the IB Code, the present ***Recall Application which is review in disguise cannot be entertained.***

Submissions on behalf of Resolution Professional:

42. On behalf of the RP it was argued that the Recall Application is not maintainable, as the Review Application filed by the Applicant was already dismissed by this Tribunal on 02.09.2022. the following Two judgments of three member bench of the Appellate Authority, were heavily relied on by the counsel for the RP:

(a) *Agarwal Coal Corporation Private Limited Vs Sun Paper Mill Limited & Anr. ;*[19]

(b) *Rajendra Mulchand Varma & Ors VS K.L.J Resources Ltd & Anr.*[20]

Findings/Observations and Order[21] of the Hon'ble NCLAT:

43. The Appellate Authority heard the parties only on the question *"whether the Recall Application, is maintainable or not",* and considered respective submissions of the parties regarding above aspect only.

44. The Appellate Authority noted that the IB Code does not contain any statutory provision conferring power of review to the Appellate Tribunal which is a well settled preposition. The present Review application has been filed under Rule 11 of the NCLAT Rules, 2016, which is to the following effect:

[20][2022] 134 taxmann.com 181 (NCL-AT)[25-10-2021] (I.A. No.265 of 2019 in CA(AT) (Ins.) No. 419 of 2019, 3 Member Bench, NCLAT, Principal Bench, New Delhi.)

[21]2022 SCC OnLine NCLAT 402; Dt:11.10.2022 (I.A. No. 3303/2022 in Company Appeal (AT) (Ins.) No. 359 of 2020, 3 Member Bench, NCLAT, Principal Bench, New Delhi.)

[22]2023 SCC OnLine NCLAT 66; (Order Dt: 09.02.2023, in I.A. No. 3961 of 2022 in CA(AT) (Ins.) No. 729 of 2020) 3 Member Bench of NCLAT, Principal Bench, New Delhi.

*"**11. Inherent Powers.** – Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."*

45. The Appellate Authority analysed the judgements of the Apex Court, **submitted by the Applicant** in support of Recall:

(a) ***In re A. R. Antulay Vs. R.S. Nayak & Another:*** the Apex Court held that where a judgment is delivered against a party who is notheard, he can very well ask for setting aside the judgment.

(b) I***n re. Asit Kumar Kar Vs. State of West Bengal & Ors.:***the Apex Court in the said judgment noted the distinction between review and recall petition. There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

© ***In re. Budhia Swain & Ors. Vs. Gopinath Deb & Ors:*** The Hon'ble Apex Court clearly laid down that when a judgment is rendered in ignorance of the fact that a necessary party had not been served at all or heard, the power to recall can be used.

46. The judgements **submitted by the Respondents,** in support of their stand that the Appellate Authority does not have authority to Review or Recall:

(a) ***Agarwal Coal Corporation Private Limited Vs Sun Paper Mill Limited & Anr.:***

(i) *The Appellate Authority held that it is not in dispute that as against the judgment dated 16.10.2019 in Comp App (AT)(Ins) No.412/2019 passed by this ''Appellate Tribunal'' dismissing the Appeal, the Applicant/Appellant has not preferred an ''Appeal'' to the Hon'ble Supreme Court of India as per Section 62 of the I&B Code, 2016. Therefore, it is crystalline and clear that the judgment dated 16.10.2019 passed by this Tribunal in Comp. Appl. (AT)(Ins) No.412/2019 between the parties inter se has become 'conclusive', 'final' and 'binding', thereby cannot be Recalled or Reviewed.*

(ii) The Appellate Authority also held that although the application is styled as recall application, it is application praying for review.

(iii) It was also noted b the Appell ate Authority that there is no express provision for ''Review'' under the National Company Law Appellate Tribunal Rules, 2016. Moreover, the Applicant/Appellant cannot fall back upon Rule 11 of the NCLAT Rules, 2016 which provides for "inherent powers''. In fact, Rule 11 of NCLAT Rules, 2016 is not a substantive Rule which showers any power or jurisdiction upon the ''Tribunal''. Undoubtedly, the 'Tribunal'' has no power to perform an act which is prohibited by Law.

(b)***Rajendra Mulchand Varma & Ors VS K.L.J Resources Ltd & Anr.:*** In this case, the Adjudicating Authority heavily relied on judgment of the Appellate Authority in Agarwal Coal Corporation Private Limited (Supra), and held that in the absence of any power of review or recall, order of the Appellate Authority cannot be reviewed or recalled.

47. The Appellate Authority observed that althoughit had dealt with both the concepts of review and recall butdistinction between "review" and "recall" has not been noticed. The Appellate Authority further observed that there is nodispute to the preposition that no power of review is vested with it,*but power to recall judgment can very well be exercised under Rule 11 inan appropriate case. It further noted that when anapplication is styled as recall but in essence is review application, the saidapplication cannot be entertained.*

48. From the judgements of the Apex Court, the Appellate Authority noted that there is clear distinction in concept of "review" and "recall". "Recall" can beasked only as procedural infirmity like order passed without necessaryparty/service to the necessary party or affected party not being heard bythe Court. The Appellate Authority also noted 2 judgments of CoordinateBench of this Tribunal, relied upon by the Respondents, *where review and recall has been treated as alike.*

49. Accordingly, the 3 member bench was of the view that it would be appropriate that the issue on hand needs to be referred to a larger bench todecide following questions framed:

(a)Whether this Tribunal not being vested with any power to review the judgment can entertain an application for recall of judgment on sufficient grounds ?

(b)Whether judgment of this Tribunal in "I.A. No. 265 of 2020 in Company Appeal (AT) (Ins.) No. 412 of 2019, Agarwal Coal Corporation Private Limited Vs Sun Paper Mill Limited & Anr." and "I.A. No. 3303/2022 in Company Appeal (AT) (Ins.) No. 359 of 2020, Rajendra Mulchand Varma & Ors Vs K.L.J Resources Ltd & Anr." can be read to mean that there is no power vested in this Tribunal to recall a judgment?

(c) Whether the judgment of this Tribunal in "Agarwal Coal Corporation Private Limited Vs Sun Paper Mill Limited & Anr." and "Rajendra Mulchand Varma & Ors Vs K.L.J Resources Ltd. & Anr." lays down the correct law?

50. Accordingly, the matter was directed to be placed before a larger bench of the Appellate Authority (5 Member bench).

Before the 5 Member Bench of the Hon'ble NCLAT:

Submissions on behalf of Financial Creditors in the CoC:

51. On behalf of the Applicants, it was reiterated that the Appellate Authority is preserved by virtue of Rule 11 of the NCLATRules, 2016 and in exercise of inherent power, Tribunal can recall thejudgment, as the Applicants were not made a party to the Appeal. It is submitted that there is no quarrel that this Tribunal has notbeen vested with power to review its judgment but power to recall a judgmentis very much there with this Tribunal which can be exercised in appropriatecase.

52. In addition to the cases referred before the 3 Member bench, the Applicants also relied on further judgements of the Apex Court, wherein distinction has been drawn between jurisdiction to review and jurisdiction torecall a judgment. It was submitted that jurisdiction to recall is jurisdictionwhich is inherent in Court as well as in Tribunal which exercises judicialpower of State. It is submitted that a judgment delivered by this Tribunalwithout necessary party being before the Tribunal, can be recalled in exercise of jurisdiction of this Tribunal which is preserved by virtue of Rule 11 of the NCLAT Rules, 2016.

53. *It was further argued that the judgment of 3 member bench of the Appellate Authority in "Agarwal Coal Corporation Private Limited" and "K.L.J ResourcesLtd." (Supra) holding that the Appellate Authority can neither exercise jurisdiction to reviewnor jurisdiction to recall does not lay down correct law.*

54. It was further submitted that there is nojurisdiction in the Tribunal to review a judgment but Tribunal has amplejurisdiction to recall a judgment on the Tribunal being satisfied that therebeing procedural error in delivering a judgment by the Tribunal which needscorrection. *It was also submitted that the Applicant herein is not contending that those applications which are disguised asrecall petition but in actual are review petition should be entertained by thisCourt. This Tribunal need not entertain any recall petition which is in essencea review petition.*

Submissions on behalf of Union Bank of India:

55. For Union Bank of India it was argued that inI.A. No.222/2020 which was filed by the Union Bank of India before theAdjudicating Authority, only party impleaded was the Resolution Professional,hence, by challenging the order of Adjudicating Authority rejecting the saidapplication on 09.07.2020, Union Bank of India was not required to impleadany other party to the Appeal. It was submitted that there is no error in thejudgment of the Appellate Authority Dt: 27.01.2022 which need to be recalled. Thejudgment was delivered by hearing all the parties to the Appeal. The reviewapplication filed by the Applicant having been rejected by the Appellate Authority, norecall application can be entertained.

Findings/Observations and Order[22] of the 5 Member Bench of Hon'ble NCLAT:

56. The Appellate Authority noted that it is constituted under Section 410 of the Companies Act, 2013. Section 424 deals with the procedure before Tribunal and Appellate Tribunal.

57. The Appellate Authority also noted that Rule 11 of the NCLAT Rules, 2016, is akin to Section 151 of the Code of Civil Procedure. The Court as well as Tribunals exercise juridical power of the State while performing adjudicatory functions. The Apex Court in the matter of Harinagar Sugar Mills Ltd. vs. ShyamSunder Jhunjhunwala & Ors[23] *held that procedures of Court and Tribunal maydiffer but the functions are not essentially different.*

58. The Appellate Authority noted that the inherent power of the Courts and that of the Tribunals are thepowers which are not conferred to it but those powers are inherent in theCourts and Tribunals by strength of duty to do justice to parties before it. The said inherent power by a Court or Tribunal can be exercised to do justicebetween the parties,

[22]2023 SCC OnLine NCLAT 283; [2023] 152 taxmann.com 106 (Order Dt: 25.05.2023, in I.A. No. 3961 of 2022 in CA(AT) (Ins.) No. 729 of 2020) 5 Member Bench NCLAT, Principal Bench, New Delhi.
[23]AIR 1961 SC 1669

which exercise, *however, in no manner should contravene any express provision of the statute.*

59. The Appellate Authority also took note of the further case laws relied upon by the Applicant in support of their claim that the Appellate Authority is empowered to recall:

(a)***Grindlays Bank Ltd. vs. Central Government Industrial Tribunal & Ors:***[24]In this case, Industrial Tribunal has given an award; an application was filed for setting aside the award; there was no express provision in the Industrial Disputes Act, 1947 and Rules framed thereunder providing for setting aside ex-parte order. The Hon'ble Supreme Court held that even though there was no express provision to set aside the award, the Tribunal has jurisdiction to pass the order, which is ancillary and incidental power to discharge its functions effectively.

The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. ……*no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex-debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal.*

(b)***Kapra Mazdoor Ekta Union vs. Birla Cotton Spinning & Weaving Mills Ltd. & Anr :***[25] In this case the Apex Court held that power of Court or Quasi-judicial Authority to review its judgment must be conferred by law expressly whereas procedural reviewis different which is inherent in the Court or Tribunal.

© ***SERI Infrastructure Finance Ltd. vs. Tuff Drilling Pvt. Ltd."*** [26]: The Apex Court relied on the judgement of the Apex Court in Grindlays Bank Ltd (Supra).

60. On the analysis of the judgments of the Apex Court, the Appellate Authority, noted that the Apex court had clearly laid down that there is a distinction between "review" and "recall". The power toreview is not conferred upon this Tribunal but power to recall its judgment

[24]1980 (Supp) SCC 420

[25](2005) 13 SCC 777
[26](2018) 11 SCC 470

isinherent in this Tribunal since inherent power of the Tribunal are preserved,powers which are inherent in the Tribunal as has been declared by Rule 11of the NCLAT Rules, 2016.

61. The Appellate Authority held that the Power of recall is not power of the Tribunal torehear the case to find out any apparent error in the judgment which is thescope of a review of a judgment. Power of recall of a judgment can be exercisedby this Tribunal when any procedural error is committed in delivering theearlier judgment; for example; necessary party has not been served ornecessary party was not before the Tribunal when judgment was deliveredadverse to a party. There may be other grounds for recall of a judgment. Wellknown ground on which a judgment can always be recalled by a Court isground of fraud played on the Court in obtaining judgment from the Court, and concluded that it need not furtherelaborate the circumstances where power of recall can be exercised, for the purpose of answering the questions referred to the 5 member bench by the 3 member bench of the Appellate Authority, and passed the following Order in connection with the reference made to it:

(a) **Question 1:** This Tribunal is not vested with any power to review the judgment, however, in exercise of its inherent jurisdiction this Tribunal canentertain an application for recall of judgment on sufficient grounds.

(b) **Question 2 & 3:**The judgment of this Tribunal in "Agarwal CoalCorporation Private Limited vs Sun Paper Mill Limited & Anr." And"*Rajendra Mulchand Varma & Ors vs K.L.J Resources Ltd & Anr."* observing that this Tribunal cannot recall its judgment does not lay down the correct law.

Aggrieved with the above Order of the Appellate Authority that it has powers to recall its order, Union Bank of India, preferred an Appeal with the Hon'ble Supreme Court, challenging the Order of the Appellate Authority Dated: 25.05.2023.

APPEAL[27] to Supreme Court:

Deciding[28] the Appeal filed by Union Bank of India, the Apex Court, was in agreement with the view/decisionof the Five member Bench of the Appellate Authority (NCLAT), and did not interfere with the impugned judgment/Order Dt: 25.05.2023.

In relation to the stand of Appellants i.e., Union Bank of India, to urge on the facts of the case, the Apex Court, held that the same would be a matter

[27]Civil Appeal No.4620/2023.
[28]Order Dt: 31.07.2023, in Civil Appeal No.4620/2023.

to be considered, dependent on the fate, when the matter is placed before the appropriate Bench, to be decided on merits.

The matter being cleared by the Apex Court, the Recall Application No. I.A. No. 3961 of 2022 in CA(AT) (Ins.) No. 729 of 2020), is to be heard by the Appellate Authority. As on the date of penning this Article the case is posted for hearing on 18.08.2023, before the Appellate Authority.

Conclusion:

With this judgement the law is settled, and there is a clear demarcation as to the power of the of the Tribunals in respect of "review" and "recall" its own judgement and shall stand as precedent for future cases.

Direct Tax

Scope of treaty – Taxes covered under the DTAA.

The word 'TAX' is defined under section 2(43) of the Income Tax Act to mean income tax chargeable under the provisions of the Act. The definition under the Act seems to be simpler, however, it has a different meaning when one tries to interpret the provisions of the Double Taxation Avoidance Agreement between two countries. Section 90/90A of the Act provides a way to access the Double Taxation Avoidance Agreement. By virtue of these provisions, it is possible to reduce the possible double taxation when there is cross border transaction. In this regard, Article 23B of the Double Taxation Avoidance provides mechanism for elimination of double taxation. However, in order to avail such a relief, it is required to understand the scope of taxes covered under such an agreement. In this Article, scope of taxes under the DTAA has been covered in detail.

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Introduction:

1. DTAA[1] has been entered into between various countries or tax jurisdictions in order to provide relief to the taxpayer from the potential double taxation. This relief is generally provided by sharing the taxation rights between countries viz interest, dividend, royalty/FTS, or bay of Article 23A/23B of the DTAA i.e., providing exemption to the income earned in source state or providing credit of taxes paid in the source state.

2. Article 23B of the OECD MTC[2] deals with the credit of taxes paid in source country. Article 23B states that income tax paid in the country of source shall be allowed as a deduction while computing the income tax payable in the country of resident. Which means that in order to obtain the credit in the resident state, such tax paid in the country of source shall be covered within the scope of a treaty. In this Article, the concept of taxes covered in the context of treaties entered into by India has been discussed.

[1]Double Taxation Avoidance Agreement.

[2]OECD Model Tax Convention

Taxes Covered:

3. Article 2 of OECD MTC deals with the concept of 'Taxes Covered' under the treaties. Article 2 of OECD MTC has been reproduced below:

   1. *This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.*

   2. *There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.*

   3. *The existing taxes to which the Convention shall apply are in particular:*
      a) (in State A): .....
      b) (in State B): .....

   4. *The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.*

4. Para 1 of Article 2 states that tax may be levied by the country or its political subdivisions or local authorities (states, regions, municipalities etc.) Further, the taxes may be levied by direct assessment or by way of deduction at source. With regard topara 2 of Article 2, Commentary on OECD MTS states that social security charges or any other similar charges shall not be considered as taxed for the purpose of the treaty. Further, it states that, with regard to penalties and interest, members may clarify whether these amounts can be considered as taxes or not by bilateral negotiations.

5. Unlike para 1 and para 2, para 3 of Article 2 lists out the taxes covered under the treaty. Though para 3 contains a list of taxes which are levied by the countries at the time of signing the treaty, similar taxes which may be levied subsequently by each country may also be included by virtue of para 4 of Article 2.

In the context of Income Tax Act - India:

6. Though India has entered to treaty with many counties in the world, for the reference, treaty between India-USA has been considered for the discussion. Article 2 of India-USA treaty has been reproduced below:

1. The existing taxes to which this Convention shall apply are:

(a) in the United States, the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax, the personal holding company tax, and social security taxes), and the exercise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations (hereinafter referred to as "United States Tax"); provided, however, the Convention shall apply to the exercise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to exemption from such taxes under this or any other Convention which applies to these taxes ; and

(b) in India:

(i) the income-tax including any surcharge thereon, but excluding income-tax on undistributed income of companies, imposed under the Income-tax Act ; and

(ii) the surtax(hereinafter referred to as "Indian tax").

Taxes referred to in (a) and (b) above shall not include any amount payable in respect of any default or omission in relation to the above taxes or which represent a penalty imposed relating to those taxes.

2. *The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws and of any official published material concerning the application of the Convention.*

Taxes paid in USA:

7. Para 1 of Article of India-USA treaty states that following taxed imposed by the USA shall be covered within the scope of the treaty:

- The Federal income tax imposed by the IRS excluding accumulated earning tax, the personal holding company tax and social security taxes;

- The exercise taxes imposed on insurance premiums paid to foreign insurers (subject to condition that the risk covered by such premiums are not reinsured with a person not entitled to exemption from tax).

8. From the above, it can be understood that only federal taxes paid in USA are covered by Article 2 of the treaty. However, in the USA, in addition to federal tax, states also levytaxes on income earned by a person in a particular state. This creates a lot of litigation in India as income tax authorities denies giving credit of state tax levied in the USA while computing the income tax payable in India.In this regard, many judicial fora have analysed the concept of foreign tax credit in the treaty.

9. **The Hon'ble Mumbai Tribunal in the case of Tata Sons Ltd[3] has held that:**

'There cannot obviously be a tax payment which is neither treated as admissible expenditure, because it is treated as an Income-tax, nor is it taken into account for tax credits, because it is not to be treated as Income-tax. It was incorrect to proceed on the assumption that State Income-tax paid in USA, or in Canada, cannot be taken into account for the purposes of computing admissible tax credits. It was so for the elementary reason that the provisions of a tax treaty, based on which tax credits are said to be inadmissible, cannot be pressed into service to decline a benefit to the assessee which is otherwise available to him, even in the absence of such a tax treaty, under the provisions of the Income-tax Act.'

10. **The Hon'ble Karnataka High Court in the case Wipro Ltd[4] of has held that:**

Even in the absence of an agreement under Section 90 of the Act, by virtue of the statutory provision, the benefit conferred under Section 91 of the Act is extended to the income tax paid in foreign jurisdictions. India has entered into agreement with the Federal Country and not with any State within that country. In order to extend the benefit of this, relief or avoidance of double taxation, aforesaid explanation explicitly makes it clear that income tax in relation to any country includes the income tax paid to the Government of any part of that country or a local authority in that country. Therefore, even though, India has not entered into any agreement with the State of a Country and if the assessee has paid income tax to that State, the income tax paid in relation to that State is also eligible for being given credit to the assessee in India.'

11. The above rulings have been followed by the Hon'ble Hyderabad Tribunal in the case of Pritesh Rajesh Kotak[5] , Ahmedabad Tribunal in the case of Dr. Rajiv I. Modi[6] and Delhi Tribunal in the case of Aditya Khanna[7] . From the above it can be evident that if the state tax paid by the assessee in foreign jurisdiction is not covered by Article 2 of the treaty, same

[3][2011] 10 taxmann.com 87 (Mum.)

[4][2015] 62 taxmann.com 26 (Karnataka)
[5]ITA No. 1983/Hyd/2017
[6][2017] 86 taxmann.com 253 (Ahmedabad - Trib.)
[7][2019] 105 taxmann.com 323 (Delhi - Trib.)

shall be allowed as credit by invoking the provisions of section 91 of the ITA.

12. Further, if the amount of taxes paid in source country is not allowed as deduction under section 90/91 of ITA, it can be allowed as expense under section 37 of the ITA as the same shall not be covered as tax as stated under section 40(a)(ii). This view has been upheld by the Hon'ble Bombay High Court in the case of Reliance Infrastructure Ltd[8] and Mumbai Tribunal in the case of Bank of India[9].

Taxes paid in India:

13. In the above para, the treatment of taxes paid in foreign county has been discussed. Now, it is important to discuss issued related to taxes paid in India. Though the taxes paid in India is allowed as credit in the resident country, as the amount has to be payable in India, certain issues have become litigative.

14. **Whether tax includes surcharge and cess:**Article 10 (income from dividend), Article 11 (income from interest) and Article 12 (income from royalty/FTS) of a treaty provides concessional rate of tax in the country of source. For example, Article 10 of India-USA states that dividend income is taxable in India at the rate of 15 percent (if the beneficial owners is a company holding 10 percent voting in the Indian company). Under the provisions of the ITA, tax shall be increased by applicable surcharge and cess. The question arises is whether similar provisions are applicable to rate provided in the treaty as well.Let us examine the provisions of Article 2 of treaty which states tax includes surtax[10] . Whether the word surtax means surcharge and cess payable under domestic law.

15. **In this regard, the Hon'ble Kolkata Tribunal in the case of DIC Asia Pacific Pte. Ltd.[11] has held that:**

'*We have also noted that Article 2(1) of the applicable tax treaty provides that the taxes covered shall include tax and surcharge thereon. Once we come to the conclusion that education cess is nothing but an additional surcharge, it is only corollary thereto that the education cess will also be covered by the scope of Article 2. Accordingly, the provisions of Articles 11 and 12 must find precedence over the provisions of the Income Tax Act and restrict the taxability, whether in respect of income tax or surcharge or additional surcharge – whatever name called, at the rates specified in the respective article.*'

[8][2016] 76 taxmann.com 257 (Bombay)
[9][2021] 125 taxmann.com 155 (Mumbai - Trib.)
[10]Reference to India-USA treaty.
[11][2012] 22 taxmann.com 310 (Kol.)

16. **Mumbai Tribunal in the case of Sunil V. Motiani[12] has held that:**

'Tax has been defined in article 2(2)(b) as per which income-tax included surcharge. Therefore, tax referred to in article 11(2) at the rate of 12.5 per cent also includes surcharge. Further, nature of education cess and surcharge being same education cess and surcharge cannot be levied separately and will be included in tax rate of 12.5 per cent.'

17. **The Hon'ble Kolkata Tribunal in the case of BOC Group Ltd[13] has held that:**

'We find that the Article 2 of the India UK Treaty provides that income tax including any surcharge thereon and it further provides that this convention shall also apply to any identical or substantially similar taxes which are imposed by either contracting state after the date of signature of this convention in addition to or in place of the taxes of the contracting state referred to in paragraph 1 of this article. Hence by this, it can safely be concluded that the levy of education cess though introduced from Finance Act, 2004 which is much after the date of signing of this convention would also be made applicable while determining the tax rates under the convention. It is well settled that the education cess is nothing but an additional surcharge.

When the Article 2 states that surcharge is included in income tax and the tax rate of 15% for fee for technical services is prescribed in Article 13 shall have to be deemed to include surcharge and since cess is nothing but an additional surcharge, the tax prescribed under DTAA @ 15% in the instant case shall be deemed to included surcharge and education cess.'

The above view has been followed by various Tribunals including the Delhi Tribunal in the case of JCDecaux S.A.[14] and Magotteaux International SA[15] . Given the above, it can be understood that the rate of tax provided in respective articles of treaty are final and no separate surcharge and cess can be levied separately.

18. **Whether dividend distribution tax is covered under the treaty:** Before the amendment by the Finance Act, 2020, dividend distributed by the Indian company is liable to tax under section 115-O at the rate of 15 percent plus surcharge and cess ('DDT'). Though section 115-O is not effective at present, let us proceed to analyse whether the concessional

[12][2013] 33 taxmann.com 252 (Mumbai - Trib.)
[13][2015] 64 taxmann.com 386 (Kolkata - Trib.)
[14][2021] 123 taxmann.com 221 (Delhi - Trib.)
[15][2022] 141 taxmann.com 8 (Delhi - Trib.)

rate provided in the treaty can be claimed by the non-resident investor. This is because, DDT is payable by the Indian company distributing the dividend to its shareholders and same was exempt in the hands of the shareholder.

19. In this regard, the Hon'ble Delhi Tribunal in the case of Giesecke &Devrient (India) (P.) Ltd.[16] has held that:

'65. A conjoint reading of the Memorandum to Finance Bill, 1997, 2003 and 2020 would show that levy of DDT was merely for administrative conveniences and withdrawal of DDT is keeping in mind that revenue was across-the-board, irrespective of marginal rate, at which recipient is otherwise taxed.

66. To recapitulate, the DDT is levy on the dividend distributed by the payer company, being an additional tax is covered by the definition of 'Tax' as defined u/s 2(43) of the Act which is covered by the charging section 4 of the Act and charging section itself is subject to the provisions of the Act which would include section 90 of the Act.

67. In our humble opinion, the liability to DDT under the Act which falls on the company may not be relevant when considering applicability of rates of dividend tax set out in the tax treaties. The generally accepted principles relating to interpretation of treaties in the light of object of eliminating double taxation, in our view does not bar the application of tax treaties to DDT.'

The above view has been followed by Hon'ble Kolkata Tribunal in the case of Indian Oil Petronas (P.) Ltd .[17]

20. However, the Special bench of Hon'ble Mumbai Tribunal in the case of Total Oil India (P.) Ltd[18] has held that:

"80. A reading of Article 10 of the model OECD DTAA shows that Dividends paid by a company which is a resident of a Contracting State, say India to a resident of the other Contracting State (say France) may be taxed in that other State (France). However, if the beneficial owner of the Dividend is a resident in France, the tax so charged shall not exceed specified percent. The first condition is that the non-resident in France should be taxed in India. We have to look at the DTAA from the recipients taxability perspective. DDT is paid by the domestic company resident in India. It is a tax on its income and not tax paid on behalf of the shareholder. In such circumstances, the domestic company u/s.115-O does not enter the domain of DTAA at all."

[16][2020] 120 taxmann.com 338 (Delhi - Trib.)

[17][2021] 127 taxmann.com 389 (Kolkata - Trib.)

[18][2023] 149 taxmann.com 332 (Mumbai - Trib.) (SB)

21. Conclusion:Given the above, taxes covered by the treaty are to be carefully analysed with regard to the treaties entered by India with various countries. Some countries may expressly include certain taxes under the purview of the treaty. The treaty between India-Hungary states that when the company paying the dividends is a resident of India the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend. Further, while determining the tax payable, it is required to analyze the MFN clause as well.

1. **Bombay High Court in the case of Vinod Metal[1] - Voluntary deposit made under Section 73(5) of CT Act can used as a consideration for compliance with Section 107(6) of CT Act.**

In the present case, the petitioner has already made a deposit of tax under Section 73(5) of CT Act, which he wants to adjust against the said deposit as the pre-deposit for filing a statutory appeal under Section 107 of CT Act. However, there is no such functionality available in the portal that leads him to file this writ petition describing the functionality issue in GSTIN portal, that prevented him to file an appeal under Section 107 of CT Act.

The petitioner also contended that such technicalities imbedded in the electronic system governing filing of appeals cannot defeat a statutory remedy of an appeal and render the assessee remediless. Accordingly, he was prayed to consider the voluntary payment made under Section 73(5) of CT Act as pre-deposit in compliance with the Section 107(6) of CT Act.

In contrast, respondent contended that the interplay between Section 73(5) and 107(6) of CT Act are distinct and separate. Adjustment of voluntary paid tax cannot be adjusted against the pre-deposit as the legislature has provided a remedy to file an appeal by making such percentage as pre-deposit mandate. They also submitted that the electronic portal has application throughout the country and such a prayer as made by the Petitioner would disturb as to what is prevalent.

After hearing both parties submissions the HC held that if the petitioner has made a deposit of tax in event of any liability, that deposit made will be considered for assessment. The Same was upheld by the Supreme Court in the case of VVF (India) Ltd [2].By the referring to the said decision it held that the petitioner has voluntary made the payment under protest and that can be reckoned for the purposes of a pre-deposit. Accordingly, it allowed the writ petition and directed to consider the voluntary payment as pre-deposit in compliance with the Section 107(6) of CT Act.

2. **Madras High Court in the case of Luminous Power Technologies Private Limited[3] –Issuance of Credit/Debit note arises only where there is an adjustment to tax liability, and it can only be raised by the supplier.**

In the given case, the petitioner has transported the goods to the place of recipient but on the way due to heavy pour of rains, the goods transported got damaged and the same has not been accepted for delivery by the recipient. Later, the

[1]2023-VIL-515-BOM

[2]2021-VIL-92-SC

[3]2023-VIL-558-MAD

deteriorated goods are transferred back to the supplier place without any delivery challan/credit note but with the fresh e-way bills.

On the way back to the supplier place, the respondent has detained the goods on the ground that there was no delivery challan nor debit/credit note and imposed penalty under Section 129 of CT Act on the ground that no proper document is available. Further, the petitioner has contended that said detention is incorrect since the question of issuing credit note does not arises in this case as the recipient has not accepted the delivery of goods. By referring to the provisions of Section 138A of CT Act, contended that since the invoice along with the e-way bill are the documents available with the person in charge of the conveyance, invoking of penalty under Section 129 of CT Act is unsustainable and prayed for quashing the notice.

Later, the supplier is also paid the penalty under protest and released the detained goods due to the risk of further deterioration of said goods. In contrast respondent contented that, since the petitioner has paid the penalty then the proceedings relating to the same is deemed to be concluded and no final order is required to passed.

After hearing both parties contentions the Honourable High Court (HC) held that the question of raising of Credit/Debit Note arises only when there is a tax adjustment in the invoice already raised. Hence, in this case the question of raising such credit note does not arise. Therefore, the detention of goods in this case is illegal and unwarranted on the ground that goods are accompanied by the e-way bills, which are generated for the return of the goods. Further, the HC held that since there is no option available to the petitioner to pay the amount under protest, they had paid the tax along with penalty and they have released the said goods. Accordingly, this writ petition is allowed and impugned notice has been set aside.

3. <u>Calcutta High Court in the case of Suncraft Energy Private Limited[4] - The supplier has not shown an invoice in GSTR-1 and accordingly the recipient is not eligible to avail credit as the tax charged has not been deposited to the Government.</u>

In the given case, the petitioner has received a provision of services from the supplier, but the supplier fails to upload the invoice relating to the said supply in his GSTR-1. However, the petitioner has made the payment of tax along with value of services provided while effecting said supply.

[4]2023 (8) TMI 174 - CALCUTTA HIGH COURT

The respondent has issued a notice demanding the excess ITC claimed by the petitioner when compared with the credit available in GSTR-2A with the credit claimed in GSTR-3B. To the said notice, the petitioner has countered the allegation made in the notice, but the respondent has confirmed the said demand along with interest and penalty. Aggrieved by the said order, petitioner has preferred this writ petition.

After hearing both parties contention Honourable High Court (HC) held that the Appellant has fulfilled all the conditions laid down in Section 16(2) of CT Act. Even after fulfilling all the conditions, the respondent has erred in reversing the credit availed and directing the appellant to deposit tax which was already paid by him at the time of effecting the supply.

By referring to the press release issued by PIB on 18.10.2018[5] , it was contented that there shall not be any automatic reversal of input tax credit from buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller however, reversal of credit from buyer shall also be an option available with the revenue authorities toaddress exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc.

`Further HC has referred to Bharti Airtel Ltd[6] case and held that the GSTR-2A is a facility for taking a confirm decision while doing such self-assessment. Non-performance or non-operability of Form GSTR-2A or for that matter, other forms will be of no avail because the dispensation stipulated at the relevant time obliged the registered persons to submit return on the basis ofsuch self-assessment in Form GSTR-3B manually on electronic platform.

In the present case, the HC held that Appellant contentions were never considered, and the said order is passed only on the ground that supplier has failed to file his GSTR-1. Respondent has never gone to the facts of the appellant which substantiate that the conditions prescribed in Section 16(2) of CT Act is complied. Further, to resort the reversal of tax by the recipient can only be done when the supplier fails in payment of tax. In the present case, there are no facts that supplier has failed to pay the tax. Therefore, HC held that the demand raised against the appellant is not sustainable and set aside the order passed and accordingly, writ petition is allowed.

[5]https://pib.gov.in/Pressreleaseshare.aspx?PRID=1550035

[6]2021 (11) TMI 109 - SUPREME COURT

1. **Madras high Court in the case of M. Kumudhavalli[1] - Provisional attachment made under the Benami Act by the Initiating Officer during Director's Judicial custody is held tenable in law.**

The case before the Honorable Madras high Court is whether the provisional attachment made by the Initiating officer under section 24 of the Prohibition of Benami Property Transactions Act, 1988 during the time of judicial custody of the directors of the company (for brevity 'the petitioners') is to be held valid or not?

The facts of the case were the petitioners were booked for the offence under the provisions of IPC and were kept under judicial custody under the provisions of Benami Act till 24.03.2023.Meanwhile, the Initiating officer issued a show cause notice under section 24(1) of the Benami Act during January and February of 2023 for provisional attachment of the properties of the company and the directors and made provisional attachment under section 24(3) of Benami Act. The petitioners came to know of the provisional attachment when they came out of judicial custody on 24.03.2023.

The petitioners argued that the provisional attachment was not valid in law as no notices were served on them physically. It was also argued that before issuing notice under section 24(1) and before making provisional attachment under section 24(3) of the Benami Act, the initiating officer has to form reasons to believe that the property suspected to beheld benami is at the risk of being alienated. When the suspected benamidar is in judicial custody, it is inconceivable that the property could be alienated. Hence, the petitioners argued that the initiating officer has not applied his mind to the situation in provisionally attaching of the property.

The Hon'ble Court has explained that as per Section 24(1) of Benami Act, a prima facie suspicion that the property may be alienated is sufficient to make the provisional attachment and it is only the preliminary step before confiscation. Moreover, the benamidar has ample opportunities to make submissionsbefore Adjudicating Authority to prove that the attachment is bad. Further, the FIR was registered in 2020 and the attachment is made two years after such registration. Hence, the period of two years from the registration of the case is held to be sufficient to the initiating officer to form a suspicion that it might be a benami transaction and hence, he can be deemed to

[1][TS-454-HC-2023(MAD)]

be having formed reasons to believe under section 24(1).

Therefore, the Court has held that the provisional attachment is purely valid in law since the conditions under section 24(1) are duly met and the petitioner has the remedy to oppose such attachment before the Adjudicating Authority.

Our Comments:

The prima facie condition for making provisional attachment under section 24(3) is that the initiating officer has to form reasons to believe that the property could be alienated. The fact that the directors of the company were under the judicial custody and the notice has not been served on them physically could not be made as an excuse, when the initiating officer has proper justification in forming the opinion. In the current case, the period of two years available till the time of provisional attachment can be deemed to be sufficient to have reasons to form such an opinion. Moreover, the petitioners have reasonable opportunity before Adjudicating Authority to challenge the attachment made.

2. Delhi High Court in the case of Hindustan Coco Cola Beverages Pvt. Ltd[2] - Quashes the Penalty order passed after 11 years of completion of assessment. Also held that the initiation of penalty proceedings under section 275 commences from the date of proposal made but not the date of issue of Show Cause Notice.

The facts of the case were the assessee is under scrutiny for AY 2005-06 and addition is made by the assessment order passed in 2008. After a period of eleven years from passing the assessment order, the penalty proceedings were initiated under section 271C of the Income Tax Act, 1961 (for brevity 'the IT Act') by initiating a proposal from JCIT on 27.03.2019 and issuing a show cause notice by AO on 23.04.2019 and the penalty order was passed on31.10.2019.

The revenue contended that as per section 275(1)©the penalty proceedings have to be completed within the end of the financial year in which the proceedings are initiated or within six months from the end of the month of initiating the penalty proceedings, whichever is later. Hence, there is a bar of limitation for the closure of penalty proceedings however, there is no fixed date for the commencement of the period of limitation under any provisions of the IT Act

[2][TS-480-HC-2023(DEL)]

and therefore, the AO has to be allowed to initiate the proceedings even after eleven years of time.

The hon'ble court relied on the ruling of the co-ordinate bench in the case of Clix Capital Services Pvt. Ltd. Vs. DCIT[3] wherein it was held that the penalty ought to be levied within a reasonable period of time and the discretion to decide the point of time for initiation of the proceedings should not be given to revenue as it can be taken undue advantage of such power.

Finally, the revenue contended that by considering the date of SCN i.e., 23.04.2019as the date of initiation of the penalty proceedings for the purpose of section 275(1)©and penalty order being passed within six months i.e., 31.10.2019, it should be held valid. The Court, however, has held that the word 'initiated' would mean an act which get triggered on the date when the proposal for penalty proceedings were made, which is 27.03.2019 in the current case but not on the date of SCN. This is because it would again let the discretion to AO for initiating the proceedings at his desired time. Hence, the six-month period would expire on 30.09.2019 and hence, the penalty order is held to be time barred.

[3]2023/DHC/001703

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