SBS wiki

monthly e- Journal

| Volume - 118 | May - 2024 |
| For Private Circulation Only |

www.sbsandco.com

sbs and company llp

SBS AND COMPANY LLP

CHARTERED ACCOUNTANTS

May 2024

Foreword

Dear Readers,

In this edition, we have come up with an article on acquisition of business by asset purchase or capital. There are situations wherein entity may wish to exit from the business leaving immovable property to the buyer. Tax implications on transfer of business by acquisition of assets are different from that of acquisition of capital. In this article, tax implications in business acquisition through asset and capital has been discussed.

The next article is on recent contrary decisions of 2 benches of the NCLT, on authority of a Power of Attorney/GPA holder to initiate a Section 7 proceedings, under the IB Code, against the Corporate Debtor, and whether the Power of Attorney/GPA holder can be considered as "Authorised Person" or "Authorised Representative", under the AA Rules, and also whether the Power of Attorney/GPA, is to be backed by a Resolution of the Board of Directors of the FC.

We have also collated certain important judgments under direct tax and 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

Articles of the Month

Income Tax

BUSINESS ACQUISITION - ACQUISITION OF ASSET VS CAPITAL

The concept of business restructuring is an evolving concept every day as world has become global village for business. There are various types of business restructuring viz. amalgamation, merger, demerger, acquisition of a business as a whole etc. When there are immovable properties in the books of account and does not have other assets/discounted the business, the question arises is whether is better to transfer the business through the purchase of assets or capital acquisition. In this Article, we dealt with the concept of acquisition of business by another person when transferor has immovable properties in its assets.

-Contributed by CA Narendra
narendrar@sbsandco.com

When a business entity has decided to acquire another business entity which has immovable properties alone in its assets, the new entity is having following options for such acquisition.

- Acquisition of Assets.
- Acquisition of Capital of business.

When a person decides to acquire another business entity, the question arises is whether the acquisition shall be made by acquiring assets of the business or by acquiring capital in that business.

Let us discuss the implications above option under the provisions of the income tax laws in India in the hands of transferor and transferee. As various sections are involved in the subject matter under both the options, let us proceed to analyse both the options on a comparative basis.

From the transferor perspective:

Particulars	Option 1- Asset Acquisition	Option 2- Capital Acquisition
Transferor	M/s ABC Private Limited	Shareholders of M/s ABC Private Limited.
Nature of asset transferred	Capital asset being an immovable property.	Capital asset being shares in the company.

In the hand of transferor	As transferor transfers capital assets, income shall be chargeable to tax under section 45 of the ITA. Section 45 (1) states that any profit or gain arising from transfer of capital asset shall be chargeable to tax in the year in which such transfer takes place.	As transferor transfers capital assets, income shall be chargeable to tax under section 45 of the ITA. Section 45 (1) states that any profit or gain arising from transfer of capital asset shall be chargeable to tax in the year in which such transfer takes place.
Nature of gain Section 2(29AA) read with section 2(42A)	If the immovable property being a land or building is held for a period of more than 24 months, gain is treated as long-term capital gain otherwise, gain is treated as short-term capital gain.	**Unlisted shares:** If shares are held for a period of more than 24 months, gain is treated as long term capital gain otherwise, gain is treated as short term capital gain.
Benefit of indexation	If gain arises on transfer of long capital asset, benefit of indexation is available. However, if such asset is depreciable asset, gain on transfer of capital asset is treated as short term capital gain irrespective of period of holding.	If gain arises on transfer of long capital asset, benefit of indexation is available.
Rate of Tax	Long term capital gain on transfer of immovable property is taxable at the rate of 20 percent. Short term capital gain (including gain on transfer of depreciable asset) is taxable at normal tax rate.	Long term capital gain on transfer of shares of a private limited company is taxable at the rate of 20 percent. Short term capital gain on such transfer is taxable at normal tax rate.
Remarks:	» In this scenario, capital gain is chargeable to tax in the hands of the private limited company.	» In this scenario, capital gain is chargeable to tax in the hands of shareholders of the private limited company.

	» Such gain is being a long-term capital asset is chargeable to tax at the rate of 20 percent. » However, if business contains building on which is depreciation is claimed, gain of transfer of such asset is treated a short term capital gain and chargeable to tax at the rate of normal tax rate applicable. » Further, stamp duty and registration charges need to be paid on transfer of such capital asset.	» Asset being immovable property lies with the company, the requirement to pay registration charges and stamp duty does not arise. » Further, applicable stamp duty needs to be paid for transfer of shares.

While reading the above provisions, the option of capital acquisition seems to be more tax effective than asset acquisition. However, facts of each case need to be analysed for determining the best possible option as tax liability changes based on the various parameters viz. nature of assets of the entity, accumulated reserves of such entity and period of existence of the entity etc.

Let us take an example that M/s ABC Private Limited is having the following balance sheet as on the date of transfer.

Liabilities	Amount	Assets	Amount
Capital	300	Land	300
Reserves	200	Building	200
Liabilities	100	Cash in hand	100
Total	**600**	**Total**	**600**

Now, M/s PQR Private Limited wishes to acquire land and building from M/s ABC Private Limited at an agreed price of Rs. 800 (Rs.500 is with regard to land and Rs.300 is with regard to building on such land). Now, let us proceed to analyse the tax implication on the transfer of the above assets under both the options available.

Particulars	Option 1- Asset Acquisition		Option 2- Capital Acquisition
Asset transferred	Land	Building	Shares
Nature of gain	Long term	Short term	Long term
Full value of consideration (Rs.)	500.00	300.00	800.00
Cost of Acquisition	300.00		300.00
Indexed cost of acquisition/Depreciated value	475.50[1]	200.00	475.50
Capital Gain	24.50	100	324.50
Tax	**4.90**	**25**	**64.90**
Total Tax		**29.90**	**64.90**

From the above case study, the option of acquisition of assets by outright sale is more effective as transferor is liable to tax of Rs.29.90 and further, transferee is eligible to claim depreciation on building value of Rs.300. However, stamp duty registration charges are to be borne by the transferee for acquisition of assets.

Given the above, it may be difficult to comment on the best possible option and cost analysis needs to be undertaken for each case separately based on the facts of the case for determining the best option in order to transfer business property. The option of acquisition of shares may be seems to tax effective if:

- The cost of acquisition of shares is more than the cost of acquisition of assets.
- The value of depreciable assets is more than other assets.
- The entity does not have significant assets other than immovable properties.

[1] Approx value of indexation.

From the transferee perspective:

Particulars	Option 1- Asset Acquisition	Option 2- Capital Acquisition
Transferee	M/s PQR Private Limited	M/s PQR Private Limited
Nature of asset acquired	Capital asset being an Immovable property.	Capital asset being shares in the company.
Tax implications in the hands of transferee	Amount paid for acquisition of immovable property is considered as cost of acquisition as per section 43(1). Further, depreciation is available on amount of building portion.	Amount paid for acquisition of shares is considered as cost of acquisition. Further, entity is in existence in the name of ABC Private Limited till further change.

However, the above analysis may not be applicable for partnership firms as taxation of partnership firm is different from private limited company. Let us analyse the above two options for a partnership firm. Let us take an example that M/s ABC and Co is having the following balance sheet as on the date of transfer.

Liabilities	Amount	Assets	Amount
Capital	500	Land	300
		Building	200
Liabilities	100	Cash in hand	100
Total	**600**	**Total**	**600**

Now, the partner of M/s PQR and Co wishes to acquire land and buildings from M/s ABC and Co at an agreed price of Rs. 800 (Rs.500 is with regard to land and Rs.300 is with regard to building on such land). Now, let us proceed to analyse the tax implication on the transfer of the above assets under both the options available. In option -2, new partners bring capital equivalent to value of business and existing partners retire by taking the enhanced capital.

Particulars	Option 1- Asset Acquisition		Option 2- Capital Acquisition[2]
Asset transferred	Land	Building	Retirement of partner as specified in section 45 (4) of ITA.
Nature of gain	Long term	Short term	Long term
Full value of consideration (Rs.)	500.00	300.00	800.00
Cost of Acquisition	300.00		500.00
Indexed cost of acquisition/Depreciated value	475.50	200.00	500.00
Capital Gain	24.50	100	300.00
Tax	**4.90**	**25**	**60.00**
Total Tax		**29.90**	**60.00**

From the above, it appears that acquisition through asset purchase seems to be tax effective. However, it is also required to note that the additional amount offered to tax under section 45(4) can be adjusted against the cost of acquisition of assets in future years as specified in section 48(iii) read with rule 8AB. Accordingly, the tax liability on asset acquisition or capital acquisition changes from a case-to-case basis.

Further, in addition to the above options, section 50B of the Act provides a special mechanism for computation of capital gains when there is a slum sale of an undertaking. Section 50B of ITA states that any profits or gains arising from the slump sale effected in the previous year shall be chargeable to tax as capital gains arising from the transfer of capital assets and shall be deemed to be the income of the previous year in which the transfer took place. The computation mechanism has also been provided in section 50B.

[2] For detailed study on capital gains under section 45(4), please read our article at partner-vis-a-vis-capital-gains-version-20.pdf (sbsandco.com)

Corporate Laws

IS A BOARD RESOLUTION REQUIRED BY POWER OF ATTORNEY/GPA HOLDER TO FILE AN APPLICATION UNDER SECTION 7, IBC?

In the cases discussed in the below article, the authority of a Power of Attorney/GPA holder to initiate a Section 7 proceedings, under the IB Code, against the Corporate Debtor, and whether the Power of Attorney/GPA holder can be considered as "**Authorised Person"** or **"Authorised Representative"** in Form-1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, were decided by two co-ordinate benches of the NCLT i.e., Mumbai Bench and Hyderabad Bench, resulting in contradicting orders, wherein the Mumbai Bench has held that the Power of Attorney/GPA holder is authorised to initiate the proceedings, and no authority is required in the form of a Board Resolution. However, to the contrary, the Hyderabad Bench of the NCLT, has held that a Power of Attorney holder will be entitled to initiate a Section 7 proceedings against the Corporate Debtor, only if the Power of Attorney, is supported/ratified by a resolution passed by the Board of Directors of the Financial Creditor. Let us go through the ratio-decidendi of both the decisions.

-Contributed by CS D V K Phanindra
phanindra@sbsandco.com

In the matter of **Punjab National Bank v. Arshiya Limited**[3], the Hon'ble National Company Law Tribunal, Mumbai Bench, has held that a Power of Attorney/GPA holder of a Financial Creditor, is authorised to initiate proceedings under Section 7, of the Insolvency and Bankruptcy Code, 2016 ("**IB Code**"), against the Corporate Debtor, without the specific requirement a Board Resolution from the Directors/Board of the Financial Creditor.

Facts of the case:

M/s. Punjab National Bank, **("Financial Creditor"/ "FC")** sanctioned a loan to M/s. Arshiya Northern FTWZ Limited **("ANFL" / "Principal Borrower")**, on the basis of the Corporate Guarantee granted by **M/s. Arshiya Limited ("AL"/ "Corporate Debtor/CD" / "Corporate Guarantor")**, in the capacity of the holding company of Arshiya Northern FTWZ Limited **("ANFL"/ "Principal Borrower")**

The Principal Borrower defaulted on the repayments and accordingly was classified as a

[3] CP (IB) No. 3143/MB/2019, NCLT, Mumbai Bench, Order Dt: 23.04.2024

Non-Performing Asset ("**NPA**"). A Notice under section 13(2) SARFAESI, was issued by the FC to the Principal Borrower, seeking repayment of the outstanding debt amounting to Rs.322,23,46,819/- as on 31.07.2015, together with interest.

The FC initiated Corporate Insolvency Resolution Process ("**CIRP**") process against the Principal Borrower, and the Adjudicating Authority vide order[4], put the Principal Borrower to CIRP.

The FC also filed a Section 7 application for initiating CIRP, read with Rule 4 of AA Rules[5], against the Corporate Guarantor, i.e., **M/s. Arshiya Limited**, being the Corporate Debtor herein, for a total default amount of Rs.193,24,35,349.59 (Rupees One Hundred Ninety-Three Crore Twenty Four Lakh Thirty Five Thousand Three Hundred Forty Nine and Fifty Nine Paise only). The said application of the FC was through Mr. Dinesh Solanki, its Chief Manager and signatory, authorised vide Authorisation Letter dated 13.08.2019.

During the course of submissions, it was argued on behalf of the CD that the application was not maintainable and defective, on account of various reasons[6], inter-alia, one the reason being that the absence of proper authorisation to Mr. Dinesh Solanki, Chief Manager, who had filed the Application on behalf of the FC. It was argued that merely because the FC provided the authority letter Dt:13.08.2019 and the General Power of Attorney (GPA) Dt:29.10.1999, the appointment of Mr. Dinesh Solanki as authorised representative of the FC under Rule 2(6) of the National Company Law Tribunal Rules, 2016 (NCLT Rules) does not become valid. A power of attorney holder cannot be considered to be authorised to file an application under the IB Code and only authorised representatives, having specific Board Resolution, are eligible to file a Section 7 application, in accordance with the Ministry of Corporate Affairs ("**MCA**") Notification Dt:27.02.2019[7].

Analysis by the Adjudicating Authority:

The Adjudicating Authority noted that decisions of the various NCLTs and NCLATs, that the moment debt and default have been established, an application under the IBC must be admitted unless it is incomplete.

With regard to the contention of the CD that there was no authorisation to Mr. Dinesh Solanki, Chief Manager of the FC, under authority letter Dt:13.08.2019 to file the Section 7 application on its behalf, the Adjudicating Authority noted that the GPA Dt:29.10.1999, grants sufficient authority to file the Application. The Adjudicating Authority also

[4] CP No.1245(IB)-MB-V/2021; NCLT, Mumbai Bench; Order Dt: 14.11.2022.
[5] The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
[6] Re. this case, the scope of this article is limited to the "**issue of Authority of GPA**" and other reasons of the case are not being dealt with.
[7] Notification No. S.O. 1091(E) dated 27.02.2019

cited Rule 10 of the AA Rules, Part III of the NCLT Rules, relating to institution of proceedings, petition, appeals, etc., have been made applicable to applications under Sections 7, 9 and 10 of the IBC, till such time separate rules of procedure for conduct of proceedings under the IBC are notified. That means, till dedicated rules of procedure for conducting CIRP under the IBC are notified by the Central Government, NCLT Rules will apply to every application under Sections 7 to 10 of the IBC.

The Adjudicating Authority observed that in terms of Rule 2(6) of the NCLT Rules, an "**Authorised Representative**" is defined "***as a person authorised in writing by a party to present his case before the Tribunal as the representative of such party***" as provided under Section 432 of the Companies Act, 2013. Section 432 of the Act, which deals with '**right to legal representation**' of a party to any proceeding, inter alia, states that "***a party to proceeding may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal***". Hence, it can be seen that Section 432 of the Act only deals with persons authorised to appear and present a case before the Tribunal.

Accordingly, the Adjudicating Authority noted that that "***persons authorised to file applications before the Tribunal***" are different from "***persons authorised to appear and present cases***". A GPA holder is different from the authorised person referred to in Section 432 of the Act, read with the definition of "**Authorised Representative**" under Rule 2(6) of the NCLT Rules.

The Adjudicating Authority noted that the GPA giving authorisation in favour of Mr. Dinesh Solanki, provides as below, which clearly shows that Mr. Dinesh Solanki has valid authorisation to file the Application:

*"To take criminal proceedings/action and take **insolvency and liquidation proceedings** against the debts of the said Bank, to appear and **act in a court of insolvency and Liquidation Judge** and before the Official Receiver and Liquidator, to file claims prove debts of the said Bank **in the insolvency and Liquidation courts** and before the Official Receiver or Liquidator, to oppose discharge of the insolvent and to collect/receive dividend declared by the insolvency or liquidation court in respect of any insolvency or liquidation case".*

The Adjudicating Authority further noted that the Notification Dt:27.02.2019, issued in exercise of the powers conferred under Section 7(1) of the IB Code, the MCA notified persons who may initiate CIRP against CDs on behalf of the FCs viz., guardians, executors, trustees, etc., including a person duly authorised by the Board of Directors of a Company.

The Adjudicating Authority also noted that Sub-section (1) of Section 7 of the IB Code, provides that *"A financial creditor either **by itself** or jointly with other financial creditors**, or any other person on behalf of the financial creditor,** as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating Authority when a default has occurred."*

The Adjudicating Authority concluded that a joint reading of Section 7(1) of the IBC and MCA notification Dt:27.02.2019, abundantly makes it clear that the present Application is a one which has been filed **by the FC itself**, i.e., M/s. Punjab National Bank, and ***not by any other person on behalf of the FC***. The FC itself has filed the Application through its authorised officer, being the Chief Manager. Thereby, the Chief Manager has sufficient authority to file the Application for and on behalf of the FC. Similar stand/view taken by the bench in the matter of ***Edelweiss Asset Reconstruction Company Ltd. Vs. NCR Rail Infrastructure Ltd.***[8], was also referred in arriving at the decision.

Accordingly, the Adjudicating Authority held that Mr. Dinesh Solanki, Chief Manager is adequately authorised by the FC to file the Application, thereby concluding that under Section 7(1) of the IB Code, an application filed by a GPA holder is considered as filed by the FC itself only and not by any person on behalf of the FC. Accordingly, there is no requirement of a separate Board Resolution in favour of the GPA holder, and the application filed by a GPA holder on behalf of the FC cannot be termed as defective.

Having seen the reasoning of the Hon'ble Mumbai Bench regarding the authority of Power of Attorney Holder, let us proceed with the second case/judgement, in a similar matter, dealt by the Hon'ble Hyderabad Bench.

In the matter of **Axis Bank Limited v. Karvy Forde Search Pvt Ltd**[9], the Hon'ble National Company Law Tribunal, Hyderabad Bench, has held that a petition under Section 7 of the Insolvency and Bankruptcy Code (IBC) cannot be filed by a '**Power of Attorney**' holder unless duly authorized by a Board Resolution from the Directors/Board of the Financial Creditor.

Facts of the case:

The Petition is filed under Section 7 of the IB Code, by M/s. Axis Bank Limited (**"Financial Creditor"/ "FC"**) against M/s. Karvy Forde Search Private Limited (**"Corporate Debtor"/ "CD"**) for initiation of CIRP, for a default of Rs.16,22,02,417.07 (Rupees Sixteen Crores Twenty-Two Lakhs Two Thousand Four Hundred

[8] CP(IB) No. 1079/MB-VI/2022, NCLT, Mumbai Bench; Order Dt: 07.03.2024.

[9] CP (IB) No.249/7/HDB/2022, NCLT, Hyderabad Bench, Order Dt: 05.03.2024

and Seventeen and Seven Paise only), outstanding as on 31.05.2022. The said application was filed on behalf of the FC by one Mr. Raghuram Moguluru, Power of Attorney Holder of FC.

Among other objections raised by the CD that the application was not maintainable and defective, on account of various reasons[10], inter-alia, one the reason being that the *signatory* to the present petition being the holder of a '**Power of Attorney**' which power since was not backed by any Board Resolution.

Basis the submissions made by the parties, the Adjudicating Authority, proceeded to first deal with the issue of maintainability, before deciding other issues, as the finding on the maintainability has a clear bearing on the other issues involved in the case on hand, and framed other questions, the following question:

"Whether the present petition filed under section 7 I& B Code, 2016 by the holder of a Power of Attorney not backed by Board Resolution is *not maintainable*? if so, whether the present Company Petition is liable to be *rejected*?"

The Adjudicating Authority noted that the present company Petition, is under section 7 of IBC, was filed on behalf of the FC, by Mr. Raghuram Moguluru, a holder of a '**Power of Attorney**' Dt:23.08.2011.

On behalf of the FC, it was vehemently contended that non-filing of the Board Resolution in respect of the Power of Attorney Dt:23.08.2011, is a '**curable defect**' and the same having been cured by filing the Board Resolution Dt:23.08.2017, the so-called objection stands rectified. Hence the plea that the agent/signatory to the present power of attorney i.e., Mr. Raghuram Moguluru, is not competent to file the present application on behalf of the Financial Creditor, no more stands ground.

The counsel for the FC also relied on the ruling in of the Hon'ble NCLAT in **Vijay Kumar Singhania vs Bank of Baroda**[11], supporting his above stand and contented that the present application is maintainable.

On behalf of the CD, it was argued that, in the absence of any Board resolution of the principal, ratifying the power of attorney Dt:23.08.2011, the petition filed on the strength of the said power of attorney is not maintainable, and in this regard, reliance was placed to the ruling in, **Palogix Infrastructure Private Limited vs ICICI Bank Limited**[12], wherein it was held that only an "**authorised**

[10] Re. this case, the scope of this article is limited to the "**issue of Authority of PoA Holder**" and other reasons of the case are not being dealt with.

[11] Company Appeal (AT) (Ins) No.1058 of 2023, NCLAT, New Delhi; Order Dt: 13.12.2023 (arising out of Order in CP (IB) 29(ND/2023; Dt: 26.07.2023, NCLT, New Delhi Bench).

[12] (2017) SCC Online

person" as distinct from "**Power of Attorney Holder**" can make an application under section 7 and required to state his position in relation to "**Financial Creditor**".

The counsel for the CD relied on the MCA Notification Dt: 27.02.2019, in exercise of its powers under Section 7(1) of the IBC, where in it notified the *specific category persons* who may file an application on behalf of a financial creditor (excerpts reproduced below):

"...the Central Government hereby notifies following persons who may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority, on behalf of the financial creditor: -
(i) a guardian;
(ii) an executor or administrator of an estate of a financial creditor;
(iii) a trustee (including a debenture trustee); and
***(iv) a person duly authorised by the Board of Directors of a Company.**"*

The counsel for the CD also cited and relied on **Section 200** of the Indian Contract Act, 1872, which says that;

"***200.Ratification of unauthorized act cannot injure third person.***
An act done by one person on behalf of another, without such other persons authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect."

Analysis by the Adjudicating Authority:

The Adjudicating Authority observed that the 'IB Code' is a complete Code by itself, and the provisions of the Power of Attorney Act, 1882, cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder, and accordingly the Adjudicating Authority held that a '**Power of Attorney Holder**' is not competent to file an application on behalf of a '**Financial Creditor**' or '**Operational Creditor**' or '**Corporate Applicant**'.

The Adjudicating Authority then referred to Section 65 of 'I&B Code' which relates to '**fraudulent and malicious initiation of proceedings**', by a person who initiates the Insolvency Resolution Process or Liquidation proceeding fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, wherein the Adjudicating Authority is empowered under Section 65(2) to impose upon such person a penalty which shall not be less than Rs.1,00,000/- but may extend to Rs.1,00,00,000/-. **Whether a Power of Attorney Holder, can be punished**, for initiating CIRP, fraudulently or with malicious intention for personal act on the part of an

individual, and for this very reason, the Adjudicating Authority is to hold that a 'Power of Attorney holder' cannot file any application under Section 7 or Section 9 or Section 10 of the IB Code.

The Adjudicating Authority placed reliance on the ruling of Hon'ble NCLAT, New Delhi Bench in ***M. Sai Eswara Swamy vs. Siti Vision Digital Media Pvt. Ltd***[13], wherein the requirement of Board Resolution authorising to file the Petition was affirmed and it was held that "*.... So far as the Petition under Section 7 of the IBC is concerned, there is a specific notification by the Central Government under sub-section (1) Section 7 of the IBC that on behalf of the Financial Creditor a guardian, an executor or administrator of an estate of a financial creditor, a trustee and a person duly authorized by the board of directors of a company may file Application for initiation of CIRP against the Corporate Debtor.* ***In such situation, doctrine of derivative action cannot be applied in Petition under Section 7 of the IBC****....."*
".....Ld. Adjudicating Authority has also held that no Board Resolution was filed in regard to advance loan to Corporate Debtor Company as required under Section 186 of the Companies Act, 2013. In this regard, Ld. Sr. Counsel for the Appellant submitted that the Corporate Debtor Company in his balance sheet acknowledged the debt. ***Therefore, such resolution is not required to maintain the petition under Section 7 of the IBC.*** We are not convinced with this argument. We found no flaw in the findings of Ld. Adjudicating Authority".

The Adjudicating Authority further quoted and also relied on the ruling of the Hon'ble Supreme Court of India, *in* **Innoventive Industries Limited v. ICICI Bank and Anr**[14] wherein it was held that:

"On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable ***unless interdicted by some law*** *or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."*

Thus, from the above ruling that the '**debt**' which is due and payable by the corporate debtor when ***interdicted by some law,*** *then* the petition under section 7 of IBC cannot lie.

Before deciding into the maintainability of the present petition, the Adjudicating Authority then proceeded to section 7 (5) (a) and (b) of

[13] Company Appeal (AT) (Ins) No. 706 of 2021, NCLAT, New Delhi; Order Dt: 09.09.2021

[14] 2017 SCC OnLine SC 1025

IBC, which says that, the Adjudicating Authority when *satisfied* that;

"Initiation of corporate insolvency resolution process by financial creditor.

7. (1) to (4) .. ..

(5) Where the Adjudicating Authority is satisfied that -- (a) a default has occurred and the application under sub-section (2) ***is complete****, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order,* ***admit*** *such application; or*

(b) default has not occurred or the application under sub-section (2) ***is incomplete*** *or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order,* ***reject*** *such application:*

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority."

From the above provision, it is very clear that the Adjudicating Authority while adjudicating a petition filed under section 7 IBC, can either ***'admit'*** if the requirement envisaged under *sub section* 2 (a) are satisfied or ***'reject',*** if the ingredients envisaged under *sub section* 2 (b) exist in a petition filed under section 7 IBC, but it cannot ***dismiss*** the said Petition. Needless to say, that unlike in cases of ***dismissal,*** in cases of ***rejection,*** a party has a right to present a fresh petition. In order to appreciate of the rival contentions properly, we usefully refer to *subsection* (2) of section 7 of IBC, which says that:

"7. (1) .. ..

(2) The financial creditor shall make an application under sub-section (1) in such ***form and manner*** *and accompanied with such fee as may be prescribed."*

The form and the manner in which an application under section 7(2) and 7(3) of the IBC, is to be filed by a 'Financial Creditor' has been provided in **Form-1** of the AA Rules.

The Adjudicating Authority noted that the entries 5 & 6 of Part I of Form-1 under sub-rule (1) of Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 mandates the Financial Creditor to submit the name and address of the ***person authorised,*** to submit application on its behalf. The Rule also mandates that the authorization letter is to be enclosed. The signature block of the aforementioned ***Form-1*** also provides for the authorised person's details to be stated and also the status of the ***authorised person*** in relation to the Financial Creditor.

The Adjudicating Authority placed its reference to the MCA Notification Dt:27.02.2019, wherein it notified the specific category persons who may file an application on behalf of a financial creditor.

The Adjudicating Authority noted that it is clear from Form-1, that it refers ***only*** to an '***authorised person'***. It can be seen that '***Power of attorney holder'*** is ***expressly not included*** in the above Rules. Thereby, it is for the Adjudicating Authority to find out:

(a) whether a '**power of attorney holder'** is distinct from an '**authorised person'**, and

(b) if so, whether the agent under a power of attorney is disentitled to maintain an application under section 7 of IBC?.

The Adjudicating Authority relied on the findings in Palogix Infrastructure Private Limited (supra), wherein the Hon'ble NCLAT, has observed that, "*if there was a resolution of the Board of Directors authorising its officers to do the needful in legal proceedings, mere use of the word 'power of attorney' while delegating such power would not take away the authority of such officer, which would be treated as authorization by the financial creditor in favour of its officer"*.

This ruling in re, *Palogix*, was approved by Hon'ble Supreme Court, in ***Rajendra Narottamdas Sheth and Anr. vs. Chandra Prakash Jain and Anr***[15]*,* wherein Hon'ble Supreme Court observed that:

"authorisation given by the Bank by way of a power of attorney pursuant to a resolution passed by the Bank's Board of Directors would not impair an individual's authority to file an application under Section 7 of the IBC".

From the above, it can be seen that an *exception* has been carved out to the above referred Rule under the AA Rules, and the Government of India, Ministry of Corporate Affairs Circular dated 27.02.2019, by Hon'ble Supreme Court of India, in re, *Rajendra Narottamdas Sheth (supra)*. ***Thereby, an agent of a power of attorney can maintain a petition under section 7 of IB Code, "provided such power of attorney is ratified by the Board of Directors of the company".***

The Adjudicating Authority further observed and held that the ruling in *Rajendra Narottamdas Sheth (supra)*, also establishes that whenever a petition under section 7 IB Code, is filed by a Power of Attorney holder, the requirement that such a power of attorney shall be accompanied by a duly passed "**Board Resolution**" is not a mere a "**technicality**" **but mandatory legal requirement**, as the non-compliance of which renders the said agent of such power of attorney incompetent to file an application under section 7 of IB Code.

The Adjudicating Authority noted that the power of attorney filed along with the Company Petition, discloses that the same has been executed on 28.08.2011 in the favor of Mr. Raghuram Moguluru, who by virtue of the said power of attorney signed and verified the

[15] *(2022) 5 SCC 600*

Company Petition. No Board Resolution, authorizing the execution of the said power of attorney in favor of Mr. Raghuram Moguluru, by the Principal, was either pleaded or filed along with the petition.

The Adjudicating Authority on perusing the Board Resolution Dt:23.08.2017, submitted by the FC, wherein Mr. Raghuram Moguluru, who signed the Company Petition, has been authorized to file the Applications under the IB Code, is concerned, noted that the same does not refer to the Power of Attorney D:23.08.2011, given to Mr. Raghuram Moguluru, basis which the present Section 7 proceedings were initiated.

In the absence of any reference to the Power of Attorney Dt:23.08.2011, in the Board Resolution Dt:23.08.2017, the Adjudicating Authority held that the submission on behalf of the FC that, the Power of Attorney Dt:23.08.2011, stands ratified by virtue of the Board Resolution Dt:23.08.2017, is incomprehensible. The Adjudicating Authority further noted that the pleadings of the company petition since remain unamended, the petitioner is not entitled plead the said ratification, and accordingly, held that the present Company Petition signed and verified by Mr. Raghuram Moguluru, the agent/ power of attorney holder, which power was not backed by the Board Resolution, ***as not maintainable***, and accordingly, the Adjudicating Authority, did not enter in to any discussion on the merits of the case, especially on whether or not a financial debt and its default by the respondent exists.

The Adjudicating Authority clarified that as the Company Petition, was rejected solely on the ground of non-maintainability, the FC is not precluded from filing fresh Company Petition under Section 7 of IB Code, against the CD, provided, the FC is otherwise entitled for the same under law.

Inspite of settled precedents by NCLATs and the Hon'ble Supreme Couts, as discussed supra, we have seen these contradicting orders/judgements of two benches of the NCLT.

General Law:

It is well settled law that a suit/petition filed by a person without any authorisation is liable to be rejected under Order VII Rule 11 (a) & (d) of the CPC, and further the said principles have been appreciated by the Hon'ble Apex Courts and various Hon'ble High Courts in the following cases (1). ***State Bank of Travancore Vs. Kingston Computers India Private Limited***[16] *in (2).* ***New Shelter Enterprises and Others Vs. Meenakshi W/o. Sudhir Gupta and another***[17]*;; (3).* ***Schmenger GMBH and Company Leder vs. Saddler Shoes Private Limited***[18]*, (4).* ***Nibro Limited Vs. National Insurance Co. Ltd***[19] *etc.,* wherein it was held

[16] *(2011) 11 SCC 524*
[17] *(2018) 2 Mah LJ 199: 2017 SCC Online Bom 6601*
[18] *(2010) SCC Online Mad 6539*
[19] *AIR (1991) Del 25*

that unless a power to institute an action is specifically conferred on a particular Director/officer, he would have no authority to bring an action on behalf of the Company and ***held that the suit was bad and liable to be dismissed on that ground alone***.

Summary of Case Laws

The Hon'ble Delhi High Court in the case of M Tech Developers Pvt. Ltd[20] - Assessment or reassessment proceedings cannot be initiated once resolution plan was approved by NCLT.

The Delhi High Court has quashed the faceless assessment proceedings initiated on the assessee after the approval of the resolution plan under the Insolvency and Bankruptcy Code, 2016 (IBC). The court emphasized that such proceedings could tend to re-computation of liabilities which are already concluded by virtue of the approved resolution plan.

In the present case, the petition under IBC of the assessee company was admitted by NCLT and a moratorium order has become effective, and the appointed Resolution Professional (RP) has informed the income-tax authorities about the pending NCLT proceedings. The revenue has initiated proceedings under Section 144B after NCLP approving the resolution plan.

The court noted that Section 144B proceedings involve assessments that could result in re-computing liabilities already settled by the approved resolution plan. Such actions are barred by Section 31 of the IBC, which binds all creditors of the corporate debtor, including the Central and State Governments or any other local authority to whom a debt is owed.

The court relied on the Supreme Court judgment in **Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta**[21], which held that the resolution applicant cannot be unjustified with any liabilities other than those which are specified and concluded in the resolution plan. Additionally, the court referenced the coordinate bench judgment in **Ireo Fiverriver Pvt. Ltd.**[22] and the Supreme Court judgment in **Ghanashyam Mishra**[23] which held that the legislative intent behind section 31 is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If initiation of new proceedings is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable.

The court observed that Section 144B action was described by the Supreme Court as the "hydra head" and contrary to the clean slate principle advocated by the IBC. It was noted that upon the commencement of the Corporate Insolvency Resolution Process, the petition is duly advertised for public announcement. The court held that the revenue could not sustain the invocation of Section 144B based on their

[20] TS-268-HC-2024(DEL)]
[21] [(2020) 8 SCC 531]
[22] W.P.(C) 12461/2022
[23] (2021) 9 SCC 657

failure to lodge a claim within the stipulated time. Consequently, the Delhi High Court quashed the revenue's writ petition.

Our Comments:

A resolution plan once approved would bring the curtains down on any claims pertaining to a period prior to the approval of the RP. Any proceedings initiated on the assessee can be concluded and the claims be made before the approval of resolution plan so as to protect the interests of the creditors and the parties to whom the entity is indebted to. Initiating assessment proceedings post the approval of resolution plan would lead to change in expected liabilities of the entity which would be prejudice to the interests of the stake holders.

The Hon'ble Mumbai Tribunal in the case of Schindler China Elevator Company Limited[24] - No income accrual in India from offshore property transfer; Follows Ishikawajma Harima judgment.

The Mumbai ITAT has held that the offshore supply of goods by the assessee under a contract on a CIF basis is not taxable in India, as the income did not accrue in India. The tribunal determined that the terms of the contract stipulated CIF, and the title to the goods was transferred outside India.

The assessee is a non-resident Chinese company, entered into contracts with DMRCL and BMRCL for the design, manufacturing, supply, installation, testing, and commissioning of escalators. The revenue argued that the assessee had regular income from these contracts and a clear business connection in India, asserting that 5% of total receipts should be taxable as income from a composite contract in India.

However, the ITAT followed a coordinate bench ruling in the assessee's own case from an earlier year, which rejected the revenue's contention. The bench had previously held that since the offshore supplies were made on an Indian port, the delivery was not considered to have been made in India, and the profits from CIF transactions were not taxable in India.

The ITAT also relied on a coordinate bench ruling in Siemens Aktiengesellschaft[25], which stated that offshore supply transactions are completed outside India, and thus no income accrues in India from such transactions. Additionally, the tribunal referenced the Supreme Court judgment in Ishikawajma-Harima Heavy Industries[26], stating that because the assessee did not perform any operations in India regarding its scope of work, the income from the offshore supply of escalators and elevators to DMRCL and MMRCL was not

[24] [TS-238-ITAT-2024(Mum)]
[25] [2009] 34 SOT 16 (Mumbai)
[26] [2007] 288 ITR 408 (SC)

taxable in India. Consequently, the ITAT allowed the assessee's appeal.

Further, in another case of J**.M. Voith SE & Co. KG**[27] delivered by the Hon'ble Delhi High Court, the facts were similar as above except the assessee has to supply machinery to Indian customer and was also responsible for setting up an entire paper mill on a turnkey basis, including design, supply, erection, commissioning, and performance run. The ITAT observed that the contract was for a complete paper mill to be installed and commissioned in India and rejected the assessee's argument that the income from offshore supply of plants and equipment was not taxable in India.

The revenue invoked Rule 10 of the Income Tax Rules and estimated the profit at 10%, attributing 25% of it as the profit of the PE in India, whereas the CIT(A) reduced the estimated profit on offshore supply from 10% to 5%, thereby reducing the additions. The Assessee, aggrieved by the decision, appealed to the Tribunal.

The ITAT examined the terms of the contract and concluded that the contract was not restricted to mere supply of the equipment but for a complete paper mill to be installed and commissioned in India. Therefore, the supply related to the equipment is transferred only after completion of contract which is within India but not outside India.

However, the ITAT noted that the terms of the contracts with other Indian entities were not examined by the revenue or CIT(A) while determining the profit rate. Since the contracts may differ, the ITAT deemed it necessary to analyse each contract individually to determine the profit rate. The ITAT found the estimation of profit at 5% by the CIT(A) unacceptable, as it was based on only one contract and remanded the matter back to the revenue for re-evaluation of profit rate.

Our Comments:

The court has held that even the entity has a PE in India, as the title of the property is transferred outside India, such supply is not related to the Indian PE and hence not taxable in India. However, if the assessee engages in any work related to such asset in India as in the above case, then supply of such asset is completed only after the completion of such work in India. Accordingly, income attributable PE in India for providing such services in India is taxable in India.

[27] [TS-275-ITAT-2024(DEL)]

Gowra Fountain Head, Flat No 510, 5th Floor, Behind Hotel Westin, HITEC City, Hyderabad, Telangana - 500 081.

Disclaimer

The articles contained in SBS Wiki, are contributed by the respective resource persons and any opinion mentioned therein is his/their personal opInion. SBS Wiki is intended to be circulated among fellow professional and clients of the Firm, to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). The information provided is not for solicitation of any kind of work and the Firm does not intend to advertise its services or solicit work through SBS Wiki. The information is not intended to be relied upon as the sole basis for any decision. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser. SBS AND COMPANY LLP [Firm] does not endorse any of the content/opinion contained in any of the articles in SBS Wiki, and shall not be responsible for any loss whatsoever sustained by any person who relies on the same.