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## BEYOND GOVERNANCE

### Case Study

In order to make the Chartered Secretary Journal (CSJ) more interactive for the members and students, the Case Study section has been introduced from April issue. Each Case Study is followed by question(s) which are to be solved by member(s)/student(s). The answer(s) are to be sent to [cs.journal@icsi.edu](mailto:cs.journal@icsi.edu) latest by 25<sup>th</sup> of each month.

The answer(s) will be reviewed by a Panel of reviewer(s). The winner will be given:

- (i) Certificate of Appreciation.
- (ii) His/Her name will be published in the next issue of the Journal.
- (iii) He/She will be awarded cash award of ₹ 2,500.

### Crossword

A new section 'Crossword' containing terminologies/concepts from Companies Act, IBC, NCLT and such related areas of profession is introduced. Members/ students are to send the answers of Crossword to [cs.journal@icsi.edu](mailto:cs.journal@icsi.edu) latest by 25<sup>th</sup> of each month.

- The answer(s) will be published in the next issue of CSJ.
- The winners will be selected randomly.
- The name of three winners will be published in the next issue of CSJ.



CASE STUDY

**Chronology of the facts in case of Resolution Professional (of a company “XBRL”) ..... Petitioner  
vs.  
DIRECTORATE OF ENFORCEMENT..... Respondent**

<ul style="list-style-type: none"> <li>This writ petition raises the important question of the impact that a moratorium that comes into effect in terms of Section 14 of the Insolvency and Bankruptcy Code, 2006 would have on the powers of the Enforcement Directorate to enforce an attachment under the provisions of the Prevention of Money Laundering Act, 2002 i.e. once the moratorium had come into effect, is it outside the jurisdiction of the ED to exercise powers under the PMLA?</li> </ul>	
19 <sup>th</sup> April 2018	<ul style="list-style-type: none"> <li>Company’s (“XBRL”) bank accounts were frozen by the Enforcement Directorate (“ED”) in purported exercise of powers conferred by Section 102 of the Code of Criminal Procedure, 1973.</li> <li>Meanwhile an application for commencement of Corporate Insolvency Resolution Process (“CIRP”) was initiated against the “XBRL”, the corporate debtor (“CD”), under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“IBC”).</li> </ul>
8 <sup>th</sup> May,2018	<ul style="list-style-type: none"> <li>Application for initiating CIRP of “XBRL” (the CD) was admitted giving effect to commencement of CIRP of “XBRL”, the CD.</li> </ul>
4 <sup>th</sup> October 2018	<ul style="list-style-type: none"> <li>The Adjudicating Authority (under PMLA) passed an order upholding the freezing of the bank accounts detailed hereinabove and thereafter.</li> </ul>
7 <sup>th</sup> October 2019	<ul style="list-style-type: none"> <li>The respondent(ED) proceeded to attach 49 bank accounts of “XBRL”, in exercise of powers conferred by Section 5 of the Prevention of Money Laundering Act, 2002 (“PMLA”). An order was passed under Section 5 of the PMLA for provisional attachment of certain properties.</li> <li>A writ petition was filed by the Resolution Professional (RP) of “XBRL”, the “CD” in 2019 wherein the orders of freezing bank accounts dt 19<sup>th</sup> April,2018 and 4<sup>th</sup> October, 2018,were quashed but the learned Judge, however, refrained from interfering with the order of 07<sup>th</sup> October 2019 which had been passed under Section 5 of the PMLA and had provisionally attached certain properties.</li> <li>The order dated 7<sup>th</sup> Oct,2019 is subject to question in the current petition.</li> <li>Aggrieved by the provisional attachment order (“PAO”) pertaining to the 49 bank accounts of “XBRL”, the petitioner filed an application to set aside the same before the National Company Law Tribunal .</li> </ul>
17 <sup>th</sup> March 2020	<ul style="list-style-type: none"> <li>During the pendency of that challenge before NCLT, the Adjudicating Authority, by its order, confirmed the order of attachment.</li> </ul>

21 <sup>st</sup> May 2020	<ul style="list-style-type: none"> <li>The corporate debtor is said to have received an income tax refund pertaining to the assessment year 2015-2016.</li> </ul>
07 <sup>th</sup> July 2020	<ul style="list-style-type: none"> <li>The RP (petitioner) received an e-mail from Axis Bank, with which its bank accounts aforementioned were maintained, to ascertain whether the debit freeze as imposed by ED stood lifted. The petitioner was also called upon to ascertain whether any other attachment orders had come to be passed effecting the assets of “XBRL”, the corporate debtor.</li> </ul>
08 <sup>th</sup> July 2020	<ul style="list-style-type: none"> <li>The ED attached two tunnel boring machines again in exercise of powers conferred under the PMLA.</li> <li>Aggrieved by the aforesaid action as initiated by the ED, the RP filed an Interlocutory Application before the NCLT seeking directions for the ED being restrained from proceeding further in terms of the order of 08<sup>th</sup> July 2020 of the Adjudicating Authority and for them being further restrained from taking any further action against the assets of XBRL during the pendency of the proceedings before the NCLT under the IBC.</li> </ul>
06 <sup>th</sup> August 2020	<ul style="list-style-type: none"> <li>A contempt petition was filed before the Court by the petitioner to resolve the issue of whether income tax refund credited to the Axis Bank Account of CD has been attached or not.</li> <li>The same was being confirmed by the ED and subsequently, the RP received, vide e-mail, a copy of yet another PAO dated 05<sup>th</sup> August 2020 in terms of which the income tax refund also stood attached in proceedings under the PMLA.</li> <li>Thereafter, contempt petition filed by RP came to be dismissed on 13<sup>th</sup> August 2020 with the RP being accorded the liberty to initiate appropriate steps in challenge to the PAO of 05<sup>th</sup> August 2020.</li> </ul>
11 <sup>th</sup> August 2020	<ul style="list-style-type: none"> <li>The Supreme Court while dealing with a civil appeal preferred by another creditor of XBRL, aggrieved by its non-inclusion in the list of operational creditors, stayed further proceedings in the CIRP. That interim order was ultimately vacated on 16<sup>th</sup> November 2020.</li> </ul>
It is thereafter that the instant writ petition came to be preferred before the Hon’ble High Court.	
08 <sup>th</sup> April 2021	<ul style="list-style-type: none"> <li>An interim order was passed where the Hon’ble Court directed the ED to create a separate fixed deposit for the amount which had been attached by ED.</li> <li>The aforesaid fixed deposit was to abide by the final result of the writ petition.</li> </ul>
01 <sup>st</sup> January 2022	<ul style="list-style-type: none"> <li>The Adjudicating Authority confirmed the PAO dated 08<sup>th</sup> July 2020.</li> </ul>
29 <sup>th</sup> January 2022	<ul style="list-style-type: none"> <li>The Adjudicating Authority proceeded to confirm the PAO dated 05<sup>th</sup> August 2020.</li> <li>In the meanwhile, and upon the restraint on the CIRP being lifted by the Supreme Court, the NCLT extended the resolution period by 120 days.</li> <li>The petitioner is stated to have received offers from fourteen Prospective Resolution Applicants. The Court is informed that the aforesaid PRAs are in the process of conducting due diligence of the corporate debtor.</li> </ul>

#### **Arguments of ED**

- The writ petition only lays a challenge to provisional attachment orders when in fact both of which have subsequently come to be confirmed by the Adjudicating Authority in terms of its orders of 01 January 2022 and 29 January 2022.
- RP has raised objections to the proceedings initiated by ED before the Adjudicating Authority under the PMLA who had proceeded to reject the same on merits. The validity of the PAO No.07/2020 dated 08 July 2020 had also been questioned before the NCLT. In view of the aforesaid, it was submitted that the petitioner could not pursue parallel remedies.
- The NCLT, while discharging its functions under the IBC, would have no jurisdiction to rule on the validity of the orders passed under the PMLA.

#### **Arguments on behalf of RP**

- The Enforcement Directorate would have no jurisdiction to interfere or interdict proceedings under the IBC, once a moratorium came into effect. Similarly, NCLT (under

the IBC) cannot adjudicate for the matters falling under PMLA. In view of prevailing conundrum between the two statutes and jurisdiction of authorities under them respectively, the Court should render an authoritative pronouncement on the questions which arise for determination.

- Since the subject of resolution of a corporate debtor is governed exclusively by the IBC which has been duly recognised to be a special statute, it must consequently be held that its provisions would have primacy over any other general statute including the PMLA.
- Though both the IBC as well as the PMLA adopt and incorporate non obstante clauses in terms of Sections 238 and 71 respectively, IBC being a later statute, would prevail and override the provisions of the PMLA. The attachment orders as made are thus liable to be tested on the aforesaid lines.
- Since the attachment of properties under Sections 5 or 8 contained in Chapter III of the PMLA are civil proceedings, they would clearly fall within the ambit of the expression “proceedings” as contained in Section 14

(1)(a) of the IBC and thereby, are subject to moratorium under Section 14 of the IBC i.e. the PAOs impugned herein cannot be sustained.

- Section 32A is merely an extension of the protection conferred by Section 14(1)(a) and, therefore, the impugned orders of attachment are rendered wholly unsustainable.

### Question

- Q1. (i) In view of prevailing conundrum between the jurisdiction of Adjudicating Authority under PMLA and NCLT under IBC, whether it falls in the jurisdiction of Hon'ble High Court to decide upon the issue “once the moratorium, pursuant to Section 14 of the IBC, had come into effect, is it outside the jurisdiction of the ED to exercise powers under the PMLA”?
- (ii) Whether “proceeds of crime” as defined under Section 2(1)(u) of PMLA is an operational debt as per the provisions of Section 5(21) of the IBC? Whether ED would fall within the definition of an operational creditor as defined by Section 5(20) of the IBC?
- (iii) What would be “trigger events” under the IBC which would constitute an embargo on attachment under the PMLA?

- Q2. Whether property attached under PMLA by ED can be claimed by bonafide secured creditors of XBRL, the CD, on ground of having legitimate interest owing to creation of mortgage on such property falling under the “proceeds of crime” under PMLA after the attachment order has been confirmed by the Adjudicating Authority? Will the answer remain same even after such property is confiscated to the Central Government under Section 9 of the PMLA?

*Disclaimer: The case study has been framed from the facts and figures available in the public domain with some modifications/assumptions so as to enable members to apply their professional skills to answer the same and hide the identity of the case. Author is not to be held liable for any resemblance of the facts and figures with any case.*

## Winner of Case Study – November 2023

Part - I

**CS Shivam Singhal**

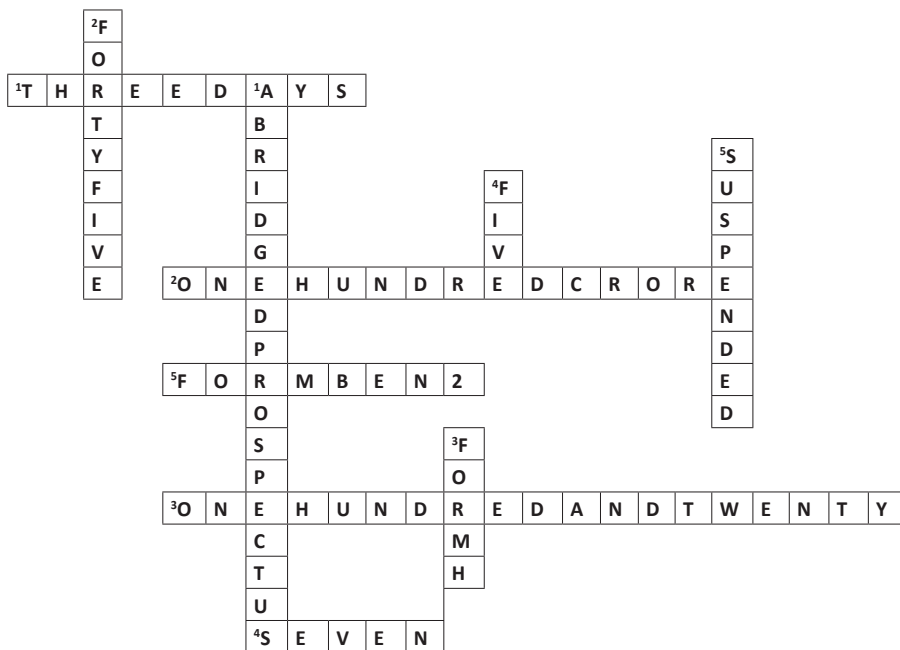
ACS-41948

Part - II

**CS Isha Goel**

ACS-49304

## CROSSWORD PUZZLE – NOVEMBER 2023 ANSWERS



## Winners - Crossword November 2023

1<sup>ST</sup>

**CS Maharajapuram Srinivasan  
Vaidyanathan - ACS-11842**

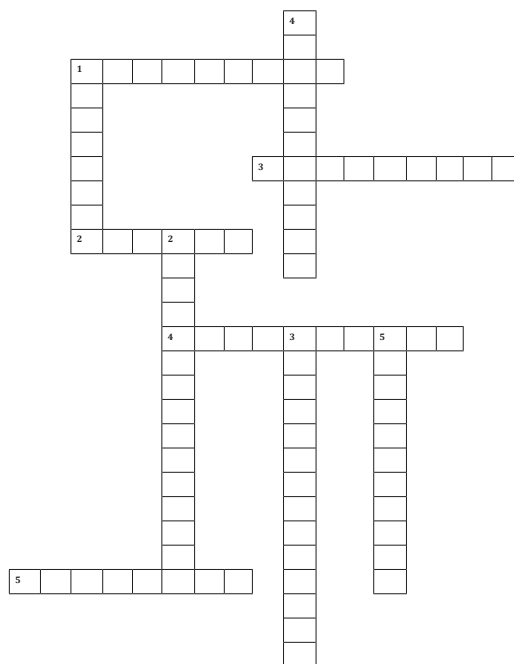
2<sup>ND</sup>

**CS Sunu Thomas - ACS-62295**

3<sup>RD</sup>

**CS Ronisha Duggad - ACS-42755**

# CROSSWORD PUZZLE – COMPANY LAW - DECEMBER 2023

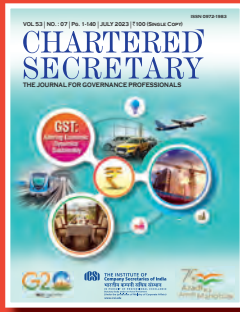


## ACROSS

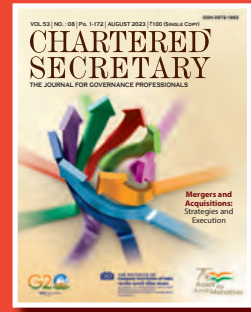
1. Under SEBI (Portfolio Managers) Regulations 2020, The portfolio manager shall preserve the books of account and other records and documents for a minimum period of \_\_\_\_\_.
2. Under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Where a corporate debtor has changed its name or registered office address during the period of \_\_\_\_\_ preceding the insolvency commencement date, the interim resolution professional or resolution professional, as the case may be, shall disclose all the former name(s) and registered office address(es) so changed along with the current name and registered office address in every communication, record, proceeding or any other document.
3. One Person Company and Small Company shall file annual return in \_\_\_\_\_.
4. Under SEBI LODR 2015, The listed entity shall submit a compliance certificate to the exchange, duly signed by both the compliance officer of the listed entity and the authorised representative of the share transfer agent, wherever applicable, within \_\_\_\_\_ from the end of the financial year, certifying that all activities in relation to share transfer facility are maintained either in house or by Registrar to an issue and share transfer agent registered with the Board.
5. Under Companies Act, 2013 An application to the Tribunal to confirm a reduction of share capital of a company shall be in \_\_\_\_\_.

## DOWNWARDS

1. Under Companies Act, 2013, The Report of the Board shall contain the particulars of contracts or arrangements with related parties referred to in sub-section (1) of section 188 in the \_\_\_\_\_.
2. Under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 The Progress Report for the fourth quarter of the financial year shall enclose \_\_\_\_\_ of the liquidator's receipts and payments for the financial year.
3. Under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in case no/ of creditors in class are between 10-100 is Rs. \_\_\_\_\_.
4. Under SEBI LODR 2015, Any vacancy in the office of the Compliance Officer shall be filled by the listed entity at the earliest and in any case not later than \_\_\_\_\_ from the date of such vacancy.
5. Under LLP Rules 2009, The limited liability partnership may change its name by following the procedure as laid down in the limited liability partnership agreement. Where the limited liability partnership agreement does not provide such procedure, consent of \_\_\_\_\_ shall be required for changing the name of the limited liability partnership.



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