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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 latest by 25th 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 latest by 25th 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

M/s. Muneraka Electricals India Private Limited (hereinafter referred to as “the applicant”) are engaged in business of supply of various electronic items. Applicant is having GST Registration Number 25AACCV2163K1MG. The company purchases various electronic items from M/s. Sumedha Electricals Private Limited (hereinafter referred as “the supplier”) having GST Registration Number 25AACCV2093K1SG.

The supplier issued Tax Invoice in terms of Rule 46 of CGST Rules, 2017 and charged GST on such taxable value, calculated in terms of section 15 of CGST Act, 2017. The applicant submits that, supplier paid GST and filed GSTR3B for the relevant tax period and reported details of supplies of GSTR1. Applicant has received the goods and made the payment for consideration as per tax invoice for the goods received from the supplier.

Various incentives are received by the applicant, in the nature of “discounts” from its supplier viz. Turnover Discount, Quantity Discount, Cash Discounts, Additional Scheme Discounts, 3 months regular scheme discounts, etc. year wise from effective date of registration till date. All these discounts are in the form of after sale discounts. For these discounts, the supplier has raised financial commercial credit note without GST for accounting purposes only. The financial Credit Notes were accounted for by the Applicant and also disclosed by distributors in their Income Tax returns. Further, supplier does not reduce its output tax liability in respect to said Financial/commercial Credit Notes, as section 15 does not permit to exclude “Post Supply Discount” from transaction value. Supplier also filed affidavit stating that they don’t reduce GST liability on account of financial/commercial credit note.

The applicant submits that section 16 of CGST Act, 2017 deals with eligibility to avail credit of Input Tax paid by the recipient of goods or services on inward supplies subject to fulfillment of certain conditions. He is satisfying all the conditions mentioned in section 16 e.g. he is in possession of tax invoice issued by a supplier registered under this Act, he has received the goods, the goods received by him are intended to be used for his business further and most importantly, GST charged in respect of such supply has actually been paid to the Government along with timely filing of return


under section 39. Therefore, he is eligible to avail credit of input tax charged on payment made by him of the amount towards the value of supply of goods along with tax payable thereon.

The applicant further submits that “amount towards the value of supply” to be the commercial price, which is mutually agreed upon between the supplier and the buyer and claims that the said proviso of section 16 of CGST Act does not have any application to this case. Further, legislative intention is to merely ensure that suppliers essentially those in MSME sector are paid the commercially agreed price on time.

The applicant further submits that a conjoint reading of section 15 and 16 of the CGST Act, 2017 leads to the conclusion that a registered person is entitled to take full credit of the input tax charged on the supply of goods or services or both.

Q. Whether the applicant is duly eligible to take full credit of GST charge in Tax Invoice issued by supplier and GST was paid by such supplier to government even though later commercial/financial credit note is issued for part amount of invoice corresponding to “after sales discount”?

Q. Whether the applicant is required to reverse the ITC (input tax credit) proportionately to the extent of financial/commercial credit note issued by supplier?

Q. What would have been the situation in above two cases if after sales discount is established as per the terms of the agreement before or at the time of such supply and a link established with relevant invoices of the discounts given and supplier has reduced output GST liability on account of financial/commercial credit note? 

Winner of Case Study – June 2023

CS Himanshu Bhardwaj

ACS-67805

BEST ANSWER CASE STUDY JUNE 2023

Q1- Whether the Naib Tehsildar was at all justified in not taking possession of the secured assets / properties as per order passed by the District Magistrate under Section 14 of the SARFAESI Act?

Answer – Section 14 of the SARFAESI Act, enables secured creditors to seek assistance from the Chief Metropolitan Magistrate or District Magistrate for the possession of secured assets. The Magistrate is required to facilitate the transfer of possession and has the authority to take appropriate measures to ensure compliance. The actions taken by the Magistrate under this section are immune from challenge in any court or authority.

The contention that Naib Tehsildar was at all justified in not taking possession of secured assets / properties as per order passed by the District Magistrate under section 14 of the SARFAESI Act is not maintainable and out of the jurisdiction designated authorities under section 14.

Case Brief:

The secured creditor, initiated recovery proceedings under Section 13(2) of the SARFAESI Act. The bank filed an application under Section 14 of the SARFAESI Act before the District Magistrate for seeking assistance in taking possession of the secured assets. The District Magistrate (“DM”) granted the application and directed the SDM to take vacant possession of the assets. However, no action was taken which led secure creditor to complaints of non-compliance of order to both the District Magistrate and the SDM. Finally, The SDM instructed the Naib Tehsildar to comply with the District Magistrate's order and obtain possession with police assistance. However, the Naib Tehsildar refused to comply, citing pending recovery proceedings initiated by an MSME and recovery certificates issued under the MSMED Act. The Naib Tehsildar argued that the MSMED Act, being a subsequent special enactment, would prevail over the SARFAESI Act.

Rationals:

1. The power exercisable by the DM under sec 14 of SARFAESI Act are considered ministerial in nature and does not required to adjudicate the dispute between the borrower and the secured creditor and between any other third party with respect to secured assets.
2. It is the duty cast upon the DM to assist the secured creditor in obtaining the possession as well as the documents related to the secured assets even with help of any officer subordinate to him after being satisfied by the secured creditor that he complied with the requirements of SARFAESI Act.
3. Any objections and disputes should be raised in proceedings under section 17 SARFAESI Act before debt recovery tribunal.

Supporting Case:

In the Balkrishna Rama Tarle Dead Thr LRS & Anr. versus Phoenix ARC Private Limited & Ors, the supreme court had examined Section 14 of the SARFAESI Act grants ministerial powers to the

Chief Metropolitan Magistrate or District Magistrate, without involving an adjudicatory process. Once the secured creditor fulfils the requirements of Section 14, it is the duty of the CMM/DM to assist the creditor in obtaining possession of the secured assets and related documents. The CMM/DM is not required to settle disputes between the borrower and the creditor at this stage. Any objections can be raised during proceedings under Section 17 before the Debts Recovery Tribunal.

Conclusion:

The Naib Tehsildar was not at all justified in not taking possession of the secured assets / properties as per order passed by the District Magistrate under Section 14 of the SARFAESI Act for the reason the recovery certificate under MSMED Act is pending and also without jurisdiction. Even the District Magistrate is not having jurisdiction in this regard to decide the dispute. The District Magistrate is only to give assistance the secured creditor to take over the assets. If any person is aggrieved by the steps, then the aggrieved person has to approach the Debts Recovery Tribunal by way of appeal / application under Section 17 of the SARFAESI Act.

Q2 - Whether recovery proceedings / recoveries under the MSMED Act would prevail over the recoveries made / recovery proceedings under provisions of the SARFAESI Act in view of the non-obstante clause of section 24 of the MSMED Act?

Answer – Section 24 of the MSMED Act, containing the non-obstante clause, provides that provisions mentioned in Section 15-23 of the MSMED Act pertaining to special mechanism for adjudication of the dispute between the supplier and buyer along with enforcing certain other contractual and business terms on the parties such as time limit for payments and interest in case of delayed, shall have effect notwithstanding anything inconsistent therewith under any other law in effect.

Case Brief:

The submission on behalf of MSME argues that Section 24 of the MSMED Act, which contains a non-obstante clause, gives it overriding effect over other laws, including the SARFAESI Act. They contend that since the MSMED Act is a later enactment, it should prevail over the SARFAESI Act. The principle is that when two enactments have competing non-obstante provisions, the later statute takes precedence. The MSME Act's non-obstante clause, Section 24, should prevail over the recovery mechanism

of the SARFAESI Act. Additionally, the IBC, 2016 is said to override the SARFAESI Act, and the MSMED Act may also have precedence in this context.

It is a settled law that where two enactments have competing non-obstante Clause then non-obstante clause of the subsequent would prevail over the earlier. The Hon'ble Supreme court laid down principle in Bank of India vs. Ketan Parekh & Ors, 2008 that wherein if two enactments have competing non-obstante clauses then the non-obstante clause of the subsequent statute would prevail over the earlier.

In above context, SARFAESI Act enacted before MSMED Act in case of any conflict between the same on non-obstante clause, the non-obstante clause of MSMED Act shall have prevailing and overriding effect. However, through Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, section 26-E of SARFAESI Act was inserted which states that after the registration of a security interest, the debts owed to a secured creditor take priority over all other debts, revenues, taxes, and rates payable to the Central Government, State Government, or local authority, regardless of any other laws in force.

Since 26E of the SARFAESI Act, being subsequently inserted vide amendment in 2016, the non-obstante clause in section 26-E shall prevail over the provisions of MSMED Act,

Rationals:

1. Section 15 to 23 of MSMED Act only provide for special mechanism for adjudication of the dispute along with enforcing certain other contractual and business terms on the parties such as time limit for payments and interest in case of delayed payments.
2. There is no express priority envisaged for payments over the dues of secured creditors or over any taxes or cesses payable to Government or local authority.
3. The provisions of SARFAESI Act provide expressly and unambiguously for a legal framework exclusively on the issue of priority of payment of dues.
4. In the absence of such express provisions, specific scheme of priority of payments provided by SARFAESI Act as compare to MSMED Act have prevailing effect.

Supporting Case:

In Kotak Mahindra Bank Limited Vs. Girnar Corrugators Pvt. Ltd. & Ors, facts of the case are similar, supreme court observe the question of non-obstante nature of section 24 of MSMED Act and Section 26-E of SARFAESI Act. Where court held that section 15 to 23 of MSMED Act provide special mechanism for adjudication of the disputes and to adjudicate and resolve the same. It does not provide any priority over the debt dues of secured creditors akin to section 26-E of SARFAESI Act. Since section 26-E was subsequently inserted, it has overriding effect over the section 24 of MSMED Act.

Conclusion:

Even though there is non-obstante clause in both SARFAESI Act and MSMED Act. The MSMED Act is silent on the payment of dues under this Act on priority basis whereas in the SARFAESI Act Section 26E it is provided that the secured creditors are having the priority over the other dues. On that basis SARFAESI Act overrides the provisions of MSMED Act.

Q3 - Whether there is conflict between scheme of SARFAESI Act and the MSMED Act?

Answer - There is no inherent conflict between the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act and the Micro, Small and Medium Enterprises Development (MSMED) Act.

The SARFAESI Act, enacted in 2002, provides a framework for banks and financial institutions to recover their non-performing assets (NPAs) by enforcing the security interests created in their favor. It enables secured creditors to take possession of and sell the assets of defaulting borrowers without requiring court intervention.

On the other hand, the MSMED Act, enacted in 2006, aims to promote and facilitate the development of micro, small, and medium enterprises (MSMEs). It provides certain benefits and protections to MSMEs, including the provision of timely credit and settlement of their dues.

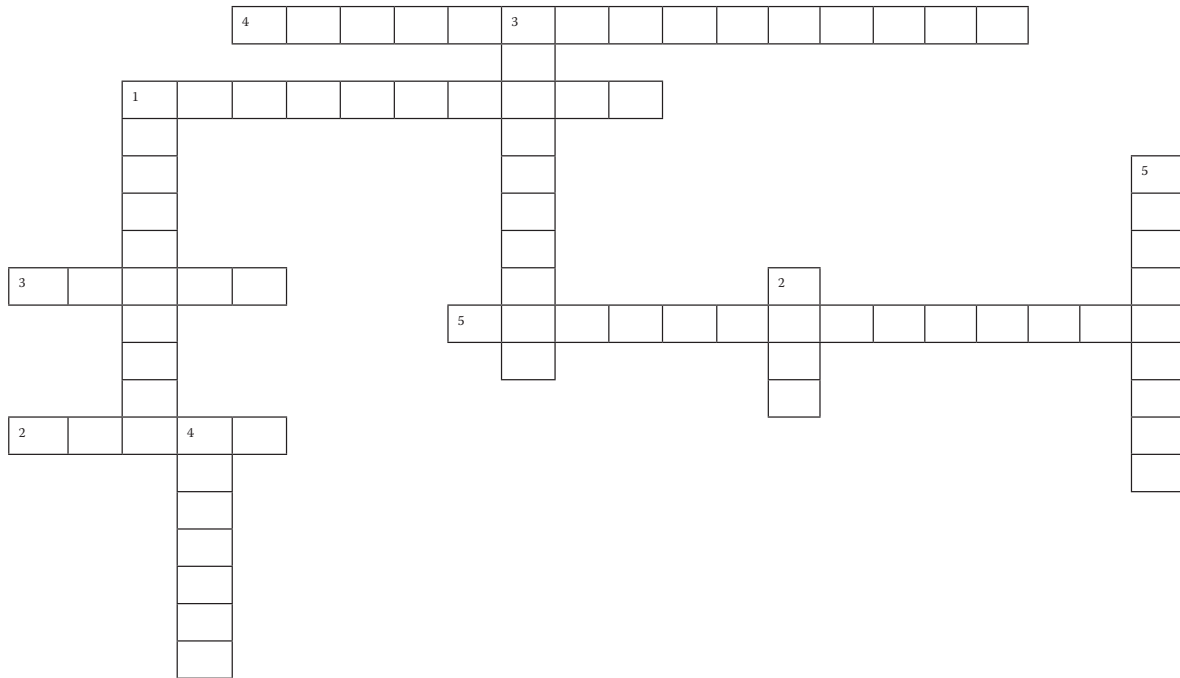
Conflicts between two enactments can arise when the provisions of one law contradict or are incompatible with the provisions of another law. In such cases, it becomes necessary to determine which law takes precedence or whether they can be interpreted and applied together in a harmonious manner. Therefore, courts play a crucial role in interpreting laws and resolving conflicts. If a conflict arises, the court may carefully examine the provisions, legislative intent, and context of both laws to determine their compatibility and the appropriate course of action.

Supporting Case and conclusion:

In context of given facts of the case, supreme court in Kotak Mahindra Bank Limited Vs. Girnar Corrugators Pvt. Ltd. & Ors, held that there is no conflict or repugnancy between the SARFAESI Act and the MSMED Act. The SARFAESI Act provides a specific mechanism for handling financial assets and security interests, while the MSMED Act has provisions for adjudicating and resolving disputes between suppliers and micro or small enterprises. The MSMED Act does not provide priority to the debt dues of secured creditors like the SARFAESI Act does. However, the award passed by the Facilitation Council shall be entitled to execute the same like other debts / creditors. The court concluded that the two acts can be applied harmoniously as they serve different purposes, and there is no conflict between their schemes.

CROSSWORD PUZZLE – COMPANY LAW

JULY 2023



ACROSS

1. One Person Companies and other companies having members upto _____are not required to transact any business through postal ballot.
2. A copy of report on Annual General Meeting shall be filed by Listed Company with the Registrar in such form.
3. The insolvency professional, interim resolution professional or resolution professional on an electronic platform of the Board, shall file such form within 7 days of filing of application in respect of preferential transaction, undervalued transaction, fraudulent transaction, and extortionate transaction.
4. As per Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, The Liquidator shall submit a Preliminary Report to the Adjudicating Authority within _____ days from the liquidation commencement.
5. The provisions of Section 190 related to Contract of employment with managing or whole-time director are not applicable to such company:

DOWN

1. A person can act as proxy on behalf of members not exceeding fifty and holding in the aggregate not more than _____of the total share capital of the company carrying voting rights:
2. Register of Significant Beneficial Owners maintained in such form by the Company:
3. The interim resolution professional or the resolution professional shall preserve a physical copy of records for a minimum period of _____; from the date of completion of the corporate insolvency resolution process or the conclusion of any proceeding relating to the corporate insolvency resolution process, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.
4. As per SEBI LODR Regulations, 2015 The meetings of the risk management committee shall be conducted in such a manner that on a continuous basis not more than _____days shall elapse between any two consecutive meetings.
5. As per Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, The liquidator shall constitute a consultation committee, comprising of all creditors of the corporate debtor, within _____days from the liquidation commencement date.