CASE DIGEST -SERIES 6

(Case Snippets and Case Studies)

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

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Dear Professional Colleagues,

Subject : Case Digest – Series 6

"Learning is not attained by chance.
It must be sought for with ardour and attended with diligence."
- Abigail Adams

The beauty as well as the strength of the profession of Company Secretaries lies in the diversity and multiplicity of roles played by Governance Professionals both in employment and in practice. This diversity is further marked by the assortment of arenas, areas, subjects and laws wherein one can easily find a Company Secretary portraying their expertise.

However, what unites them is the need and requirement to keep themselves abreast and updated on a continual basis of any and every development, not only in their respective arena of expertise but in various other ancillary subjects and areas as well. Given the fact that the legal, economic and business environment is in a constant state of flux and business challenges faced are of varying magnitudes and different forms, it is imperative that as professionals we are well conversant with the practical insights of laws, regulations, theories, models etc.

Given the dynamism and uniqueness of each business scenario, the adage of "One size fits all", surely does not apply and managerial approaches are required to be calibrated embracing a holistic view while formulating a business plan or policies so that all the stakeholders (external and internal) are benefitted.

While on one hand, the in-depth knowledge of the core aspect coupled with information of the recent developments is what provides substance to the overall intellect of a Company Secretary, for a professional working in close consonance with a variety of laws it is imperative that a tab is kept on the cases that are brought before Regulatory, judicial and quasi-judicial authorities. It would not be an exaggeration that not only the judgements passed on these cases provide better clarity and understanding of the true intent of the laws but shall pave way for future developments and amendments in the laws as well.

In view of all of the above and more, the Institute had commenced the Case Digest Series as an academic endeavour towards inculcating practical insights among the future legion of Governance Professionals and enhancing their armoury of wisdom by imparting knowledge on various facets of corporate laws, capital market laws, insolvency laws, business and commercial laws, tax laws, management theories, etc.

I thoroughly appreciate the efforts placed by the Dte. of Academics in bringing out the sixth edition of the Case Digest Series which is playing a pivotal role in grooming the future Governance Professionals.

I wish all the readers a very happy reading!!!

With warm regards,

(CS Nagendra D. Rao)
President
The Institute of Company Secretaries of India

CASE DIGEST – SERIES 6

(Case Snippets and Case Studies)

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COMPANY LAW

1.	**19.01.2021**	***RHI India Private Limited & Ors. (Appellants)* vs. *Union of India (Respondent)***	**NCLAT**

Section 232(6) of the Companies Act, 2013 enables the companies to choose and state in the scheme of amalgamation an 'appointed date'.

Fact of the case:

Appellants presented a scheme of amalgamation for approval of the Tribunal for merging 1st appellant (RHI India Private Limited) and 2nd appellant (RHI Clasil Private Limited) in 3rd appellant (Orient Refractories Limited). The rationale for the scheme is simplification of the corporate structure. The NCLT Mumbai bench, has rejected the scheme filed by the Appellants stating that the appointed date of the Scheme is January 01, 2019 whereas the Valuation Date is July 31, 2018, putting its reliance on the case of *East West Pipelines (demerged Company) and Pipeline Infrastructure Pvt. Ltd. (the resultant Company),* and ordered that the appointed date can be the date on which the Valuation Report was prepared and the Fairness Opinion was given by the Merchant Banker i.e. July 31, 2018. Since the Transferee Company will be allotting the shares which are listed and being regularly traded on the Stock Exchanges, on consideration, the share exchange ratio would undergo change significantly in view of the market price on which the cut-off date i.e. appointed date is considered.

Judgment:

The NCLAT observed that the Ministry of Corporate Affairs, General Circular dated August 21, 2019 has clarified that section 232(6) of Companies Act, 2013 enables the companies in question to choose and state in the scheme an 'appointed date'. This date may be a specific calendar date or may be tied to the occurrence of an event such as grant of license by a competent authority or fulfilment of any preconditions agreed upon by the parties, or meeting any other requirement as agreed upon between the parties, etc., which are relevant to the scheme. Therefore, NCLT have wrongly relied on the abovementioned judgement. The NCLT while passing the impugned order have overreached its scope of Judicial Intervention in determination of the Scheme of Amalgamation under sections 230-232 of the Companies Act, 2013. Therefore, the present appeal was allowed.

2.	**19.11.2020**	***Registrar of Companies (Appellant)* vs. *Goouksheer Farm Fresh Pvt. Ltd. & Ors. (Respondents)***	**NCLAT**

The Tribunal's order of 'non levy of any fine / penalty' to the defaulting restored Company because the Company is in 'Corporate Insolvency Resolution Process' is legally untenable, especially in the absence of any express provision under the Companies Act, 2013.

Fact of the case:

The Registrar of Companies (Appellant) had struck off the name of the 1st Respondent Company. The 'Financial Creditor' (M/s. P.M. Cold Storage Pvt. Ltd.) filed an application under section 7 of the Insolvency and Bankruptcy (I&B) Code read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the 1st Respondent (Corporate Debtor) to initiate 'Corporate Insolvency Resolution Process'. The 2nd Respondent in his capacity as an 'Interim Resolution Professional' filed Company Petition for restoration of the name of the 1st Respondent Company together with the prayer to allow the 2nd Respondent to comply with the formalities of filing the pending Annual Returns of the said Company (struck off) without the payment of the penal fees levied by the Appellant Authority. The NCLT, Kolkata bench through order dated January 22, 2020 ordered restoration of the Company with the direction to the Appellant Authority not to levy any fee / penalty to the Company because of the fact that the Company is in 'Corporate Insolvency Resolution Process'.

The Appellant submitted that there is no enabling provision for 'Waiver of Fees/Penalty' under the Companies Act, 2013. A primordial fact is that, there is no express / enabling provision for waiver of fees / penalty under the Companies Act, 2013.

Judgment:

The NCLAT ordered Registrar of Companies (ROC) to restore the name of the 1st Respondent Company for completion of 'Corporate Insolvency Resolution Process' effectively. However, the further direction issued by the Tribunal, to the Appellant 'not to levy any fee / penalty' to the Company because Company is in 'Corporate Insolvency Resolution Process' is legally untenable, especially in the absence of any express provision under the Companies Act, 2013 and the relevant Rules made thereunder. Hence, the said direction of Tribunal is set aside. Accordingly, the Appeal is allowed.

3.	**18.11.2020**	***Positiveedge Technology Pvt. Ltd. & Ors. (Appellants)* vs. *Asmita Katdare & Ors. (Respondents)***	**NCLAT**

The Companies Act, 2013 vide chapter IV specifically regulates the mechanism for Transfer & Transmission of Securities. Hence, as per Section 430 of the Companies Act, 2013 "Civil Court not to have Jurisdiction" on such issues.

Fact of the case:

The Appellants are aggrieved by the impugned order of the NCLT, Bangalore Bench which directed the 1st Appellant Company to give effect to the transmission of shares of the deceased Director and Shareholder of 1st Appellant Company in favour of Respondents by rectifying its

register of members and also to pay all consequential benefits at par with other shareholders. The Tribunal has observed that the Appellant Company is exercising arbitrary powers conferred on the Company and its Directors by Article of Association of this Company and it amounts to oppression.

The Appellants have alleged that the Respondents are putting pressure on the Appellants for transmission of 5000 equity shares without complying with the Indian Laws Intestate Succession. Further, the Appellants have submitted that the Article of Association of the company is conferring discretion upon the Board of Directors in transmission matters. They have also raised the issue that the Tribunal has decided "Civil Right of inheritance of the Respondent qua the shares held by the deceased members". It is a settled principle of law that such an adjudication regarding the rights of inheritance can be made only on a civil suit filed for such adjudication before Civil Court of competent jurisdiction and have cited certain judgments. The Tribunal has entered into the area of discretion granted to the Board of Directors.

Judgment:

The NCLAT observed that the Appellant Company have not assigned a tenable or sound reason as well as taken the correct approach to the issue of transmission. Further, the Companies Act, 2013 vide chapter IV specifically regulates the mechanism for Transfer & Transmission of Securities. Hence, as per Section 430 of the Companies Act, "Civil Court not to have Jurisdiction" on such issues. Hence, NCLAT upheld the order of NCLT, Bengaluru Bench and the Appeal is dismissed.

4.	**19.11.2020**	***M/S Kaledonia Jute and Fibres Pvt. Ltd. (Appellant)* vs. *M/S Axis Nirman and Industries Ltd. & Ors. (Respondents)***	**The Supreme Court of India**

Any Creditor of a company in Liquidation can seek transfer of winding up plea from High Court to the NCLT.

Fact of the case:

A petition was filed before the High Court of Allahabad for the winding up of the 1st Respondent company on the ground that the Company was unable to pay its debts. The Appellant herein, claiming to be a creditor of the 1st Respondent herein, moved an application before the NCLT, Allahabad under Section 7 of the Insolvency and Bankruptcy Code, 2016. The claim of the Appellant before the NCLT was that the 1st Respondent was due and liable to pay a sum of ₹ 32 lakhs and the company failed to pay the said amount. It also moved an application before the High Court seeking a transfer of the winding up petition to the NCLT, Allahabad. This application was rejected by the High Court, on the sole ground that the requirement of Rule 24 of the Companies (Court) Rules, 1959 had already been complied with and that a winding up order had already been passed. Aggrieved by the order of the High court, the financial creditor filed this civil appeal.

The main issues that arise for consideration in this appeal are:

(i) what are the circumstances under which a winding up proceeding pending on the file of a High court could be transferred to the NCLT; and
(ii) At whose instance, such transfer could be ordered.

Judgment:

The Hon'ble Supreme Court observed that the proceedings for winding up of a company are actually proceedings in rem to which the entire body of creditors is a party. The proceeding might have been initiated by one or more creditors, but by a deeming fiction the petition is treated as a joint petition. The official liquidator acts for and on behalf of the entire body of creditors. Therefore, the word "party" appearing in the 5th proviso to Section 434 (1) (c) of the Companies Act, 2013 cannot be construed to mean only the single petitioning creditor or the company or the official liquidator. The words "party or parties" would take within its fold any creditor of the company in liquidation. Further, as observed in Forech India Limited (supra), the object of IBC will be stultified if parallel proceedings are allowed to go on in different fora. Hence, it was held that the Appellant will come within the definition of the expression "party" appearing in the 5th proviso to Section 434(1) (c) of the Companies Act, 2013 and is entitled to seek a transfer of the pending winding up proceedings against the 1st Respondent, to the NCLT.

5.	**12.11.2020**	***M/s Vintage Hotels Private Limited & Ors. (Appellants)* vs. *Mr. Ahamed Nizar Moideen Kunhi Kunhimahin (Respondent)***	**NCLAT**

The Discretionary Power of Directors to refuse 'Transfer of Shares' is not to be resorted to in a deliberate or arbitrary fashion but in good faith. The Directors are to give due weightage to shareholder's right to transfer his share.

Fact of the case:

The Respondent herein is an existing shareholder and also one of the Directors of the First Appellant Company. It transpires from the contents of affidavit of 'T. Shahul Hameed' dated 10.04.2015 that he was holding 20,000 equity shares of ₹100/- each of the First Appellant Company and that he had transferred the aforesaid shares to 'Mr. Ahamed Nizar Moideen Kunhi Kunhimahin' (Respondent) and further that the 'Share Certificates' were lost and were not in his possession. The deponent of 'Affidavit' (T. Shahul Hameed) had averred that he had made a request to the First Appellant Company to issue duplicate share certificates in lieu of the original share certificates in the name of Respondent.

The First Appellant Company through its communication dated 30.10.2015 had rejected the request for transfer of the shares in the name of Respondent. The Appellants submitted that in the 'Share Transfer Form' SH-4 furnished by the Respondent, the distinctive number of the share was not mentioned, corresponding certificate numbers were not mentioned, witness signature and name was not found, and the Transferee's details were not mentioned. Further, the 'Allotment Letter' or the 'Original Share Certificate' was not enclosed with the share transfer form.

Respondent contended that the Board of Directors had not issued the duplicate share certificates even though request was made by the transferor.

Judgment:

The NCLAT observed the discretionary power to refuse 'Transfer of Shares' is not to be resorted to in a deliberate, arbitrary, fraudulent, ingenious or capricious fashion. As a matter of fact, the Directors are to exercise their discretion in good faith and to act in the interest of company. The Directors are to give due weightage to shareholder's right to transfer his share.

When the original share certificates were lost, it is not prudent for the Appellants to insist upon the production of original share certificates in question to give effect to the transfer of shares. Thus, the NCLAT, upheld the order passed by the NCLT, Bengaluru bench and dismissed the present appeal.

6.	**05.11.2020**	**IN THE MATTER OF:** **Scheme of Amalgamation of Arihant Unitech Realty Projects Limited With North Town Estates Private Limited, M/s Arihant Unitech Realty Projects Limited**	**NCLAT**

If the 'explanation' offered does not seemed mala fide, utmost consideration must be given to a Litigant/Suitor to condone the delay.

Fact of the case:

The Appellant/unlisted Public Limited Company has preferred the instant Company Appeal in respect of the order dated February 13, 2020, passed by the NCLT, Chennai bench who had dismissed the petition for condonation of delay of 201 days filed by the Appellant Company.

The Appellant Company submitted that it had duly complied with the directions of the Tribunal, in convening and holding meeting of equity shareholders and unsecured creditors. Further, in the said meetings, the 'Equity Shareholders' and 'Unsecured Creditors' of 'Transferor' and 'Transferee' Company unanimously approved the 'Resolution' approving the Scheme of Amalgamation. The prime plea of the Appellant is that the 'Scheme of Amalgamation' is formulated in the best interest of the Shareholders, Employees, Creditors and other Stakeholders of the 'Transferor' and 'Transferee' Company and as a result thereof, they should not be deprived of the benefits under the scheme, if the delay in filing the petition was not condoned.

Judgment:

The NCLAT observed that in case of 'Condonation of Delay', the Tribunal is to adopt lenient/liberal view of course, based on the facts and circumstances of given case. Further, the very approach of the Tribunal should be pragmatic and justice oriented. It is well settled principle in Law that if the 'explanation' offered does not seemed mala fide, utmost consideration must be given to a Litigant/Suitor to condone the delay. Hence, the NCLAT held that in the present case Appellant had come out with reasons that the delay in filing the

Company Petition was not an act wantonly and that the delay was due to their pre-occupation with internal compliance and closure of audit/accounts, and that the said reasons ascribed by the Appellant Company is not mala fide. Therefore, to prevent an 'Aberration of Justice' and to 'Secure the Ends of Justice' the impugned order passed by the NCLT, Chennai bench is set aside and the instant Appeal is allowed.

7.	**20.10.2020**	***Ashish O. Lalpuria (Appellant)* vs. *Kumaka Industries Ltd. & Ors. (Respondents)***	**NCLAT**

The non-compliances and irregularities or any illegal act already committed by the company cannot be ratified under the umbrella of "Scheme of Arrangements" as envisaged under Section 230-232 of the Companies Act, 2013

Fact of the Case:

The Appellant is a shareholder of Respondent No. 1 Company and he pointed out certain irregularities and non-compliances and raised the objections that the Scheme of Arrangements presented by Respondent No. 1 company before NCLT, Mumbai bench is a mere rectification of action already taken by the Respondent company without obtaining approval of Tribunal and other Regulatory Authorities as required under the provisions of the Companies Act. Since, NCLT, Mumbai in its order dated July 6, 2020 held that the Scheme of Arrangement appeared to be fair and reasonable and does not violate any provision of law and is not contrary to public policy or public interest, the Appellant being aggrieved with the same filed the present appeal.

Judgment:

The NCLAT observed from the records that there were irregularities and non-compliances which were present at the time of sanctioning of scheme by the NCLT which was objected by the Stock Exchanges & Regional Director. These non-compliances and irregularities or any illegal act already committed cannot be ratified under the umbrella of "Scheme of Arrangements" as envisaged under Section 230-232 of the Companies Act, 2013.

Even if the objections are procedural but it is the jurisdiction of the Tribunal that such procedural aspects need to be duly complied with before sanctioning of the scheme. The NCLAT held that before the scheme gets approved, there must be no actions pending against the company by the public authorities before sanctioning of a scheme under Section 230 of the Companies Act, 2013. Hence, the appeal is allowed and the impugned order passed by NCLT, Mumbai bench is set aside and the Respondent No. 1 Company is directed to undo all the actions taken in line with the sanctioned "Scheme of Arrangement".

8.	**19.10.2020**	***Volkswagen Finance Private Limited (Appellant)* vs. *Shree Balaji Printopack Pvt. Ltd & Ors. (Respondents)***	**NCLAT**

'Charge' was not registered as per the provisions of Section 77 (1) of the Companies Act, 2013 and as envisaged under the Insolvency and Bankruptcy Code, 2016, hence the Creditor cannot be treated as a 'Secured Creditor'

Fact of the Case:

The Respondent Company (under Liquidation) namely Shree Balaji Printopack Pvt. Ltd. executed a Loan and Hypothecation Agreement on November 25, 2013, for an amount of ₹ 36,00,000/- payable in 84 monthly instalments of ₹ 61,964/- each from December 15, 2013 to November 15, 2020, for the purchase of an AUDI Q3 TDI 2.0 vehicle. The Appellant claimed that they have security of the vehicle in terms of Sections 52 and 53 of the Insolvency and Bankruptcy Code, 2016 and a demand of ₹21,83,819.18/- was made which was not paid by Respondent and hence there was a 'default' giving rise to a legitimate claim. The Appellant filed its claim on 22.07.2019 with the Liquidator and had informed the Liquidator that the 'Charge' was duly registered by way of hypothecation registration with the Regional Transport Office (RTO) in terms of Section 51 of the Motor Vehicles Act, 1988 and there was no requirement of registration of 'Charge' with the ROC. The Liquidator, dismissed the Claim made by the Appellant. Being aggrieved with the decision the Appellant approached the NCLT, New Delhi Bench, but the appeal was further rejected by NCLT and they upheld the order of Liquidator.

The main issue which falls for consideration in this Appeal was:

- whether the Liquidator was justified in rejecting the Application filed by the Appellant on the ground that the Appellant was not a 'Secured Financial Creditor' in the absence of the 'Charge' being registered with the ROC under Section 77 (1) of the Companies Act 2013.
- that the Registration of Hypothecation by way of 'Charge' under Section 51 of Motor Vehicles Act, 1988 would stand nullified, if the 'Charge' was not registered under the Companies Act, 1956/2013.

Judgment:

NCLAT observed from the documentary evidence on record that no 'Charge' has been registered under Section 77(1) of the Companies Act, 2013 and Appellant 'Claim' was not supported by the provisions under Regulation 21 of Insolvency and Bankruptcy Board of India (IBBI) (Liquidation Process) Regulation, 2016. Further, the contentions of the Appellant that Registration with Motor Vehicle Authority under Section 51 of the Motor Vehicles Act, 1988 would suffice, cannot be sustained.

Hence, it is held that when 'Charge' was not registered as per the provisions of Section 77 (1) of the Companies Act, 2013 and as envisaged under the Insolvency and Bankruptcy Code, 2016, the Creditor cannot be treated as a 'Secured Creditor'. Thus, this Appeal is accordingly dismissed.

9.	10.10.2020	*Omega Icehill Pvt. Ltd. & Ors. (Appellants)* vs. *Anil Agarwal (Respondent)*	NCLAT

The exceptional and compelling circumstances, have warranted for grant of waiver under Section 242 of the Companies Act, 2013.

Fact of the Case:

The Appellant Company was formed as a joint venture company. The Respondent herein, filed Company Petition before the NCLT, New Delhi Bench under Section 241 read with Section 242 of the Companies Act, 2013 against the acts of oppression and mismanagement committed by 2nd to 4th Appellant to oust the Respondent from the position of Managing Director of the 1st appellant company. The Respondent submitted that he is the First Director and Promoter of the Appellant company and it is trite law that removal of the First Director form the management of the company is an act of oppression. Further, it was stated that the Appellants also violated the terms of agreement which states that each group will have two members. After hearing, the NCLT allowed the waiver application and allowed the applicant to file company petitioner under Section 241 read with Section 242 of the Companies Act, 2013 as it requires a detailed enquiry into the matter complained of.

Being aggrieved the Appellants have filed this present appeal. The Appellants stated that the Respondent was acting against the interest of 1st Appellant for quite some time which was adversely affecting the performance of the company.

Judgement:

The NCLAT observed that, it is not disputed that the Respondent is member of Appellant No.1 company and holding 0.04% shareholding. It is also not disputed that the consent affidavit of his family were filed with the Rejoinder before the NCLT. Thus, the Respondent's wife and his daughters has given affidavits to the Respondent in order to protect their rights and interest in the company in which they own shares. It is on this basis the affidavits given by the wife of Respondent and his daughters who holds shares in the company is a valid consent within the meaning of Section 244(2) of the Companies Act, 2013. In these circumstances, it is held that this is one of the exceptional and compelling circumstances, which merit the application for waiver. Thus the NCLAT upheld the order of NCLT and dismissed the present appeal.

10.	09.10.2020	*Meethelaveetil Kaitheri Muralidharan (Appellant)* vs. *Union of India & Ors. (Respondents)*	Madras High Court

Madras High Court quashes ROC action of Deactivation of DINs of all disqualified Directors.

Fact of the case:

This writ appeal against the common order has been filed to quash the respective disqualification by the ROC and for consequential reactivation of the DIN or permission for appointment or reappointment as director were dismissed.

The Madras High Court observed that Rules 9 and 10 of the Companies (Appointment & Qualification of Directors) Rules, 2014 which deals with the application for allotment of DIN.

Rule 10 (6) specifies that the DIN is valid for the life time of the applicant and shall not be allotted to any other person. Rule 11 of the Companies (Appointment & Qualification of Directors) Rules, 2014 provides for the cancellation or surrender or deactivation of the DIN. It is very clear upon examining Rule 11 that neither cancellation nor deactivation is provided for upon disqualification under Section 164(2) of the Companies Act, 2013.

In this connection, it is also pertinent to refer to Section 167(1) of the Companies Act, 2013 which provides for vacating the office of director by a director of a Defaulting Company. In this connection, it is also pertinent to point out that it is not possible to file either the financial statements or the annual returns without a DIN. Consequently, the director of defaulting company would be required to retain the DIN so as to make good the deficiency by filing the respective documents. Thus, apart from the fact that the Companies (Appointment & Qualification of Directors) Rules, 2014 do not empower the ROC to deactivate the DIN, such deactivation would also be contrary to Section 164(2) read with 167(1) of Companies Act, 2013 in as much as the person concerned would continue to be a director of the Defaulting Company.

Judgment

Hence, these appeals are allowed by setting aside the impugned order dated January 27, 2020. Consequently, the publication of the list of disqualified directors by the ROC and the deactivation of the DIN of the Appellants is hereby quashed.

SECURITIES LAW

1.	**07.01.2021**	***State Bank of India, Life Insurance Corporation of India Limited, Bank of Baroda (Appellants)* vs. *Securities and Exchange Board of India (SEBI)***	**Securities Appellant Tribunal (SAT)**

It is necessary that governmental entities, including public sector undertakings, need to develop protocols for coming out from being prisoners of protracted procedures for complying with applicable laws and regulations timely, because as legal entities accountability falls on them.

Facts of the Case:

These three appeals have been challenged similar orders in respect of each of the three entities/ appellants passed by the Adjudicating Officer ('AO') of SEBI dated August 14, 2020. By the 3 said orders of SEBI, a penalty of ₹10 lakh each have been imposed on the appellants for violation of Regulation 7B of the SEBI (Mutual Funds) Regulations, 1996 ('Mutual Fund Regulations'). As per Regulation 7B, a sponsor of a mutual fund, its associates or group company etc. cannot have 10% or more shareholding or voting rights in the Asset Management Company (AMC) or Trustee Company of any other mutual fund or entities holding 10% or more of such shareholding or voting rights. One year time was also given to entities which exceed such shareholding limit to comply with Regulation 7B.

All appellants are public sector banks/financial institutions who have sponsored their own Mutual Funds, in addition to holding stake in UTI Mutual Fund. Since the issue is the same, not complying with Regulation 7B of Mutual Funds Regulations, all appeals are heard and decided by this common decision.

Order:

All 3 appeals are partly allowed by substituting the monetary penalty of ₹10 lacs each imposed on the appellants with that of a warning as it found no "justifiable" reasons to impose a monetary penalty on the violators.

For details: http://sat.gov.in/english/pdf/E2021_JO2020304.PDF

2.	**04.1.2021**	***Mr. Prannoy Roy and Mrs. Radhika Roy (Appellants)* vs. *Securities and Exchange Board of India (SEBI)***	***The Supreme Court of India***

The appeals will be heard by the SAT without insisting on deposit of half the amount of fines as a pre-condition for hearing appeals.

Facts of the Case:

SEBI conducted an investigation into the suspected insider trading in the scrip of NDTV ("the Company") and the investigation detected that-

Mr. Prannoy Roy and Mrs. Radhika Roy were insiders in terms of regulation 2(e) of the PIT Regulations, 1992.

Mr. Prannoy Roy and Mrs. Radhika Roy indulged in the act of insider trading by trading in the scrip of New Delhi Television Ltd (NDTV) while in possession of unpublished price sensitive information ("UPSI") relating to the proposed reorganization of the Company and therefore, have violated the provision of sections 12A (d) and (e) of the SEBI Act, 1992 read with regulations 3(i) and 4 of the PIT Regulations, 1992.

Mr. Prannoy Roy and Mrs. Radhika Roy sold their shares of NDTV on April 17, 2008, during trading window closure period, i.e., within 24 hours of the public announcement of Price Sensitive Information relating to the proposed reorganization of the Company on April 16, 2008 and as such have violated NDTV's Code of Conduct and the provisions of regulation 12(2) read with regulation 12(1) of the PIT Regulations, 1992.

Mr. Prannoy Roy and Mrs. Radhika Roy together have made a wrongful gain of ₹16.97 crores by trading in the shares NDTV while in possession of UPSI relating to the reorganization of the Company.

SEBI vide order dated 27.11.2020 issued the following directions:

(a) Mr. Prannoy Roy and Mrs. Radhika Roy shall, jointly or severally, disgorge the amount of wrongful gain of ₹16,97,38,335/- , alongwith interest at the rate of 6% per annum from April 17, 2008, till the date of actual payment of disgorgement amount alongwith interest, within 45 days from the date of coming into force of this order; and

(b) Mr. Prannoy Roy and Mrs. Radhika Roy shall be restrained from accessing the securities market and further prohibited them from buying, selling or otherwise dealing in securities, directly or indirectly, or being associated with the securities market in any manner, whatsoever, for a period of 2 years.

Further, Mr. Prannoy Roy and Mrs. Radhika Roy filed an appeal against the SEBI's order dated November 27, 2020 whereby SEBI had barred them from the securities market for two years and also directed them to disgorge illegal gains of ₹16.97 crore for indulging in insider trading more than 12 years ago.

SAT Order:

SAT has directed NDTV's promoters Prannoy Roy and Radhika Roy to deposit 50 per cent of the disgorged amount before SEBI within four weeks. If NDTV deposits the amount, the balance amount will not be recovered during the pendency of the appeal before SAT.

Supreme Court Order:

The Hon'ble Supreme Court vide its order dated February 15, 2021 exempted Prannoy Roy and Radhika Roy from making deposit before the SAT for hearing their appeals. The Hon'ble Supreme Court directed that "no amount shall be coercively recovered from the appellants (Prannoy Roy and Radhika Roy) for hearing the case.

For details:
http://sat.gov.in/english/pdf/E2021_JO2020558_1.PDF
https://main.sci.gov.in/supremecourt/2021/829/829_2021_31_6_26161_Order_15-Feb-2021.pdf

3.	05.01.2021	*SEBI (Appellant)* **vs.** *Bharti Goyal Etc. (Respondent)*	**The Supreme Court of India**

The direction for substituting the penalty which has been imposed under Section 15HA with a warning is contrary to the statutory provisions.

Facts of the case:

In February 28, 2020, SEBI imposed a penalty of Rs 5 lakh each against Bharti Goyal and 15 other entities for indulging in fraudulent trading in the shares of Mapro Industries Ltd. The penalty was imposed for violating provisions of the PFUTP (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ("PFUTP Regulations").

Pursuant to this, Bharti Goyal and one other individual filed an appeal against SEBI's order dated February 28, 2020, to the Securities Appellate Tribunal (SAT).

SAT vide its Order dated August 25, 2020 held that the nature and pattern of trading of the individuals are violative of the provisions of the PFUTP Regulations and substituted the penalty of ₹5 lakh levied by SEBI with a warning.

Pursuant to this, SEBI filed an appeal against the SAT order dated August 25, 2020, to the Supreme Court.

Order:

The Supreme Court has stayed SAT order dated August 25, 2020.

It was held that "Prima facie, the direction for substituting the penalty which has been imposed under Section 15HA with a warning is contrary to the statutory provisions". The SAT is not exercising the jurisdiction under Article 226 of the Constitution and is a creature of the statute. Even the jurisdiction under Article 226 has to be exercised in a manner consistent with law. Hence, there shall be a stay of the operation of the impugned judgment and order of the SAT.

For details:
https://main.sci.gov.in/supremecourt/2020/23317/23317_2020_35_20_25234_Order_05-Jan-2021.pdf

4.	06.01.2021	*SEBI (Appellant)* **vs.** *National Highway Authority of India (Respondent)*	**The Supreme Court of India**

Even though the violations of the SEBI LODR Regulations have been made in the given case but imposition of penalty was harsh and excessive which is substituted with a warning.

Facts of the case:

SEBI vide its order dated May 26, 2020 imposed a penalty of ₹7 lakh on National Highway Authority of India (NHAI) for failure to make timely disclosures of the financial results for half year ending on September 30, 2018 and March 31, 2019 and thereby violated Regulation 52(1) of the SEBI (LODR) Regulations, 2015.

Pursuant to this, NHAI filed an appeal against SEBI's order dated May 26, 2020, to the Securities Appellate Tribunal (SAT).

SAT vide its Order dated August 27, 2020 had set aside SEBI's order, which imposed a penalty of ₹7 lakh on National Highways Authority of India for the delay in filing financial results. SAT held that "Even though there has been a violation of Regulation 52 of the LODR Regulations but in the peculiar facts and circumstances of the present case which should not be treated as a precedent for other matters, we are of the opinion that the imposition of penalty of ₹7 lakh in the given circumstances was harsh and excessive". Thus, the imposition of ₹7 lakhs upon NHAI cannot be sustained and is substituted with a warning with a further condition that in the event the NHAI violates Regulation 52 of the LODR Regulations in future it will be open to the SEBI to initiate proceedings under the Act/LODR Regulations and proceed in accordance with law.

In view of the aforesaid, the penalty of ₹7 lakhs was substituted by SAT with a warning.

Pursuant to this, SEBI filed an appeal against the SAT order dated August 27, 2020, to the Supreme Court.

Supreme Court Order:

The Supreme Court dismissed SEBI's appeal against the Securities Appellate Tribunal's order.

For details:

1. https://main.sci.gov.in/supremecourt/2020/22583/22583_2020_37_12_25255_Order_06-Jan-2021.pdf
2. http://sat.gov.in/english/pdf/E2020_JO2020232_2.PDF

5.	**09.11.2020**	***Prabhat Dairy Limited (Appellant no. 1), Sarangdhar Ramchandra Nirmal (Appellant no. 2), Vivek Sarangdhar Nirmal (Appellant no. 3)* vs. *Securities and Exchange Board of India (SEBI)***	**Securities Appellant Tribunal (SAT)**

The direction of the SEBI to deposit a sum of ₹1,292.46 crore in the given case is wholly arbitrary which is neither in the interest of the company nor in the interest of its shareholders.

Facts of the case:

The present appeal has been filed against an ex-parte ad interim order dated October 20, 2020 passed by SEBI. The facts leading to the filing of the present appeal is, that on January 21, 2019 the Board of Directors of the appellant no. 1 Company approved the sale of its shareholding in its subsidiary called Sunfresh Agro Industries Private Limited ('Sunfresh') to Tirumala Milk Products Private Limited ('Tirumala') on terms and conditions contained in the share purchase agreement and business transfer agreement. This fact was disclosed by the Company to the National Stock Exchange of India Limited ('NSE') and BSE Limited ('BSE') under Regulation 30 of the LODR Regulations. The Company also informed the stock exchange on the same date that a substantial portion of the sale consideration would be distributed to the shareholders after meeting the tax liability, indemnity, transaction cost, payments to advisors, etc.

The resolution of the board of directors was subsequently approved by the 92% of the shareholders of the company present and voting in its extraordinary general meeting held on March 26, 2019, based on which, the sale was concluded on April 10, 2019 for total consideration of ₹1880.85 crore, the breakup of which is ₹1700 crore towards sale consideration and ₹180.85 towards debit repayment. This fact was also disclosed to the stock exchange on April 11, 2019.

Various options for distribution of the sale proceeds to the shareholders were alleged to be evaluated by the appellant no. 1 Company such as dividend and buy-back of equity shares. It is alleged that these options were not tax efficient and consequently the promoter and the promoter group, namely, appellant nos. 2 and 3 showed their intention to buy the 49% shares of the minority shareholders in order to provide an exit opportunity to the minority shareholders of appellant no. 1 Company. It may be stated here that the promoter and promoter group of the appellant no. 1 Company hold 51% of the total shareholding of the Company and 49% of the shares are held by the public shareholders.

This intention of the promoters to buyout the shares of the minority shareholders was also indicated to the stock exchange on September 4, 2019 and subsequently the board of directors passed a resolution on September 10, 2019 indicating that the Company would be delisted and that 49% of the shares of the public would be bought by the promoters, namely, appellant nos. 2 and 3. The floor price of ₹ 63.77 paise was also determined in accordance with Regulation 15(2) of the SEBI (Delisting of Equity Shares) Regulations, 2009 ('Delisting Regulations').

Subsequently, a resolution of the board of directors was approved by 99.13% of the shareholders on October 16, 2019. In the explanatory statement published and distributed to the shareholders under Section 102 of the Companies Act, 2013 it was made known to the shareholders that the dairy business of the Company had been sold off to Tirumala and that the Company was no longer operating its core business, namely, the dairy business. It was also indicated that the acquirers understood and recognized that a majority of the public shareholders would have invested in a Company with the intention of investing in a Company engaged in a dairy business and therefore keeping that in mind the acquirers have provided an exit opportunity to the shareholders through this delisting process.

Based on the approval granted by the majority shareholders of the Company for delisting, a formal application dated December 23, 2019 was filed for approval of the delisting of the Company under Regulation 8(1) of the Delisting Regulations.

In the meanwhile, based on certain news items, the respondent asked for certain information from the Company regarding the sale consideration of its subsidiary and the distribution of the sale consideration to its shareholders. It is submitted that the appellants provided all the requisite information but SEBI not being satisfied directed the stock exchanges to independently conduct a critical analysis of the disclosures made by the appellant no. 1 Company. On this basis, BSE submitted a report on December 12, 2019 indicating that no serious effort was being made by the appellant no. 1 Company to distribute the proceeds to its shareholders and that the delisting offer of ₹310.81 crore calculated on the basis of floor price of ₹63.77 per share is far lower than ₹872 crore parked by the appellant no. 1 Company in the escrow account. NSE in its report dated January 3, 2020 advised SEBI to conduct a forensic audit of the Company and further stated that the delisting application should be considered after the audit report. The appellant contended that as and when the information was sought by the stock exchange necessary information was provided. However, SEBI prima-facie came

to a conclusion that there was lack of proper trail utilization of funds received from the transaction and non-distribution of the consideration to the shareholders appears to be suspicious and that the floor price offered under the Delisting Regulations does not commensurate with the funds available with the Company. Accordingly, SEBI by an order dated July 17, 2020 appointed Grant Thornton Bharat LLP (erstwhile Grant Thornton India LLP) as the forensic auditor for financial years ending March 31, 2019 and March 31, 2020. The appellants were accordingly directed to cooperate with the forensic auditor and supply the necessary information.

It transpires that the forensic auditor requested the appellant company to supply various documents some of which were supplied but majority of the documents were not supplied. It was contended that the business transfer agreement, share purchase agreement and other documents relating to the sale consideration were not readily available and the same was sought from the purchaser. Further, on account of Covid pandemic, the appellant was unable to provide the requisite documents to the forensic auditor. It was further contended that the appellant had not refused to cooperate with the forensic auditor but only sought time to locate and procure the documents so that the same could be provided to the forensic auditor.

It seems that on the basis of some report submitted by the forensic auditor for not supplying the requisite documents and on the basis of certain complaints given by the investors had led to the passing of the impugned ex-parte ad-interim order on October 20, 2020 wherein **Prabhat Dairy Limited were directed** to deposit within seven working days from the date of receipt of this Order, the amount of ₹1292.46 Crore to an interest bearing Special Escrow Account. The Audit Committee of **Prabhat Dairy Limited** shall directly monitor the process of creation of this Special Escrow Account and its funding as directed by this Order and furnish a Compliance Report to SEBI.

SAT Order:

The appeal is allowed with the following directions:-

(i) The appellant no. 1 Company shall deposit a sum of ₹500 crore in a separate escrow account within 10 days from today, the details of which would be supplied to SEBI and to the stock exchanges.

(ii) The amount so deposited shall not be utilized by the appellants till the submission of the forensic report and the decision taken by the respondent on the distribution of the amount to the shareholders and/or the delisting application.

(iii) The appellants shall provide all the necessary information and documents relating to the sale, etc. and as asked by the forensic auditor in this regard which is depicted in the impugned order within ten days from today. SEBI will direct the forensic auditor to furnish the forensic report within four weeks from the date of the submission of the documents supplied by the appellants ascertaining the amount received from the sale and the amount distributable to the shareholders after meeting tax liability, indemnity, transaction cost, payment to advisors, etc.

(iv) Simultaneously, the respondent shall process the delisting application under the Delisting Regulations and SEBI (Substantial Acquisition of Shares and Takeover) Regulations 2011and pass appropriate orders within six weeks from the date of this order.

(v) Upon deposit of ₹500 crore, the demat accounts and bank accounts of appellant nos. 2 and 3 shall be defreezed.

(vi) In the circumstances, there shall be no order as to costs. The urgency and other misc. applications are accordingly disposed of.

For details: http://sat.gov.in/english/pdf/E2020_JO2020413_1.PDF

DIRECT TAX

1.	**15.01.2021**	***PCIT (Appellant)* vs. *Smt. Krishna Devi, (Respondent)***	**Delhi High Court**

Section 10(38) of the Income Tax Act, 1961- *Jump in the share price within two years, which is not supported by the financials, does not justify the AO's conclusion that the assessee converted unaccounted money into fictitious exempt LTCG to evade taxes.*

Fact of the Case:

The Respondent-Assessee is an individual who has derived income from interest on loan, FDR, NSC and bank interest under the head of 'income from other sources' in respect of A.Y. 2015-16. She filed her return of income, declaring total income of ₹13,96,116 after claiming deduction of ₹1,60,000 under Chapter VI-A, the total taxable income of Respondent was declared to be ₹12,36,120. The return was processed under Section 143(1) of the Act and thereafter the case was selected for scrutiny. During the scrutiny proceedings, the Assessing Officer noticed that for the relevant year under consideration, the Respondent had claimed exempted income of ₹ 96,75,939 as receipts from Long Term Capital Gain under Section 10(38) of the Act. He inter alia concluded that the assessee had adopted a colorable device of LTCG to avoid tax and accordingly framed the assessment order under Section 143(3) of the Act at the total income of ₹1,09,12,060 making an addition of ₹96,75,939 under Section 68 read with 115BBE of the Income tax Act, 1961, on account of bogus LTCG on sale of penny stocks of a company named M/s Gold Line International Finvest Limited.

The appeal before the Commissioner of Income Tax (Appeals) was dismissed and additions were confirmed with the observation that the Respondent had introduced unaccounted money into the books without paying taxes. Further appeal filed by the Respondent before the learned ITAT was allowed in her favour, and the additions were deleted vide the Impugned Order.

The learned senior standing counsel for the revenue (Appellant herein), contends that the learned Income Tax Appellate Tribunal (ITAT) has completely erred in law in deleting the addition, and thus the Impugned Order suffers from perversity. He argues that in cases relating to LTCG in penny stocks, there may not be any direct evidence in the hands of the Revenue to establish that the investment made in such companies was an accommodation entry. Thus the Court should take the aspect of human probabilities into consideration that no prudent investor would invest in penny scrips. Considering the fact that the financials of these companies do not support the gains made by these companies in the stock exchange, as well as the fact that despite the notices issued by the AO, there was no evidence forthcoming to sustain the credibility of these companies, he argues that it can be safely concluded that the investments made by the present Respondents were not genuine.

Order/ Judgement:

The fact that there was an astounding 4849.2% jump in the share price within two years, which is not supported by the financials, does not justify the AO's conclusion that the assessee converted unaccounted money into fictitious exempt LTCG to evade taxes. The finding is

unsupported by material on record & is purely an assumption based on conjecture. The theory of human behavior and preponderance of probabilities, based on *Sumati Dayal* v. *CIT* 214 ITR 801 (SC), cannot be cited as a basis to turn a blind eye to the evidence.

2.	**19.01.2021**	***Sanjay Duggal (Appellant)* vs. *Assistant Commissioner of Income Tax, (Respondent)***	**ITAT Delhi**

Search Assessment: Section 153C, 153D of Income Tax Act, 1961 - The approving authority has to give approval for "each" assessment year after applying independent mind to the material on record to see whether the cases are un-abated or abated assessments and their effect.

Fact of the Case:

A search and seizure operation was conducted on 29.12.2015 against Shri Rajnish Talwar [who was Ex- General Manager (Sales)] of M/s. Jagatjit Industries Ltd., [M/s. JIL]. Shri Sanjay Duggal [who was Ex.DGM (Sales) of JIL], their family Members and MAPSKO Group. The basic issue of search and seizure was deposit of huge money in the bank accounts of M/s. Alfa India which is proprietary concern of Shri Arun Duggal brother of Shri Sanjay Duggal and transfer of huge amounts from bank accounts of M/s. Alfa India to various bank accounts maintained by Shri Sanjay Duggal, Faridabad Rajnish Talwar and his family Members and Shri Sanjay Duggal and his family Members.

These accounts were maintained in various branches of South India Bank. As per the submissions made by the Assessee before the Ld. CIT(A) in the case of Shri Sanjay Duggal for the A.Y. 2010-2011, bank accounts in the name of M/s. Alfa India proprietary concern of Shri Arun Duggal, real brother of Shri Sanjay Duggal were used as conduit just to route the unaccounted money generated through the game of “rebates and discounts”. The Assessees claimed that M/s. Alfa India was never a beneficiary, and all the funds in the accounts either transferred by Shri Sanjay Duggal’s Family or Shri Rajnish Talwar’s Family.

The Search and Seizure operation was conducted because the Income Tax Department came to know that Shri Rajnish Talwar was maintaining the Savings Bank with South India Bank Ltd. Similarly, Shri Sanjay Duggal was maintaining a saving account with South India Bank Ltd. On going through the transactions in the abovementioned Bank Accounts of Shri Rajnish Talwar and Shri Sanjay Duggal, it was noticed that large value fund transfers were coming in these bank accounts from a Current Account which was in the name of M/s. Alfa India maintained with same bank. Credits in the bank account of M/s. Alfa India were received by way of proceeds of large value cheques tendered for collection in the account and this money was found transferred (from the bank account of M/s. Alfa India) to the bank accounts of Sh. Rajnish Talwar (and his family members) and Shri Sanjay Duggal (and his family members). Sh. Rajnish Talwar and Sh. Sanjay Duggal used to withdraw the funds from their (and family members) bank accounts, in cash, generally. Further, it was found that the above mentioned process was followed in various other connected bank accounts as well.

In view of the large value transactions in these accounts, the South Indian Bank branch authorities had requested the account holders to submit copies of their respective PAN Cards. But every time the customers either pretended that they have no PAN card or refused to provide the PAN details. It was found by the bank authorities that the above mentioned

individuals were having PAN cards. Subsequent to the request of the bank officials for the information regarding source of the funds in the account, the proprietor of the current account, i.e., M/s. Alfa India closed the account.

In the post search and survey enquiries period, three more bank accounts of M/s Alfa India, maintained with South Indian Bank were identified and similar pattern was observed that cheques deposit from liquor distributors and ultimately transferred to the bank accounts of members of Duggal & Talwar families, from where cash was withdrawn.

The AO observed that during the course of search, the replies of Shri Sanjay Duggal were very inconsistent regarding questions posed to him in respect of M/s Alfa India.

The above facts suggest the possibility of Duggal and Talwar family, being the beneficiaries of cash, arising out of machinery of M/s Alfa India. The family members of Duggal and Talwar family have not disclosed in their ITR's, the particulars of funds received, in their bank accounts, after transfer of funds from the bank account of M/s Alfa India. The A.O. given opportunities of being heard to the Assessees and assessment orders have been passed under section 153A of the I.T. Act, 1961.

The assessees have challenged all the additions before the Ld. Commissioner of Income Tax (Appeals). The appeals of the Assessees have been dismissed. The Assessees have preferred the above appeals before the Tribunal.

Order/ Judgement:

The approving authority (Joint Commissioner of Income Tax) has to give approval for "each" assessment year after applying independent mind to the material on record to see whether the cases are un-abated or abated assessments and their effect. However, the JCIT has granted common approval for all AYs. Further, he did not have the seized material nor the appraisal report or other material at the time of granting approval. Therefore, the approval granted is merely technical approval just to complete the formality and without application of mind. The approval has been granted without application of mind and is invalid, bad in Law and is liable to be quashed.

3.	**15.01.2021**	***CVO Chartered & Cost Accountants' Association (Appellant)* vs. *UOI (Respondent)***	**Writ Petition**

Extension of Due Date for filing Return of Income and Tax Audit Report.

Facts of the Case:

This petition has been filed under Article 226 of the Constitution of India seeking the following reliefs:

To issue the forms and utilities for filing of the Return of Income under section 139 of the Act and the Tax Audit Report under section 44AB the Act immediately after the end of the previous year and at the beginning of the Assessment Year and, henceforth, not make any alterations in Forms and Utilities or changes in tax compliance requirements in that regard.

To provide the tax payers and the tax practitioners a clear period of 183 and 214 days to prepare and submit the prescribed Reports and Forms, respectively and that in the matter of extension of due dates, consult the stakeholders well in advance and not to keep the matter pending till last moment.

To extend the due date for filing the Income Tax Returns (ITR) for A.Y. 2020-2021 till 31st March, 2021 and to extend the due date for filing the Tax Audit Reports (TAR) for A.Y. 2020-2021 to 28th February, 2021;

For ad-interim reliefs in terms of prayers in clauses above; (e) for costs of the petition; and (f) for such other and further other reliefs as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case.

In the wake of the global pandemic due to COVID-19 the due dates for filing of income tax returns for A.Y. 2020-21 was extended vide the Taxation and Other laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (which was enacted on 29th September,2020) to 30th November, 2020. Subsequently, vide notification dated 29th October, 2020 the due dates for filing of returns were further extended to 31st January, 2021 for cases in which tax audit report under section 44AB of the Income tax Act ("the Act") is required to be filed and 31st December, 2020 for all other cases. Further vide notification S.O.4805 (E) dated 31st December, 2020 the above due dates were further extended to 15th February, 2021 and 10th January, 2021 respectively.
As per the provisions of the Income tax Act, 1961, the due date for filing of the audit report under section 44AB is one month prior to the due date of filing of income tax return. Therefore, the said due date was extended to 31st October, 2020 vide the Taxation and Other laws (Relaxation and Amendment of Certain Provisions) Act, 2020, 31st December, 2020 vide notification dated 29th October, 2020 and further to 15th January, 2020 vide notification dated 31st December, 2020. The due dates for payment of self-assessment tax, for taxpayers whose amount due does not exceed rupees one lakh, also coincide with the due dates for filing of income tax returns.

Thus, it is apparent that the Government has not only considered representations of various stakeholders but also has been proactive in providing relaxation to the taxpayers by extending due dates regularly.

From the above it may be seen that Government has been proactive in analyzing the situation and providing relief to assessee. However, it should also be appreciated that filing of tax returns/audit reports are essential part of the obligations of assessee and cannot be delayed indefinitely. Many functions of the Income-tax Department start only after the filing of the returns by the assessee. Filing of tax returns by assessee also results in collections of taxes either through payment of self-assessment tax by the assessee or by the subsequent collection by the department post processing or assessment of the tax returns. The tax collections assume increased significance in these difficult times and Government of India needs revenue to carry out relief work for poor and other responsibilities. Any delay in filing returns affects collection of taxes and other welfare functions of the state for the vulnerable and weaker sections of society which is funded through the revenue collected. Sufficient time has already been given to taxpayers to file their tax returns and a large number of taxpayers have already filed their returns of income.

We find from the order dated 11th January, 2020 passed by the CBDT under section 119 of the Act that across the board three extensions of the due dates have been granted. Thus, we find that CBDT had considered the evolving situation in the country and thereafter, had extended the due dates on three occasions. Now CBDT says that filing of audit reports and income tax reports cannot be delayed indefinitely. Therefore, a line has been drawn that no further extension of the due dates would be granted.

Order/ Judgement:

Power exercised by the CBDT u/s 119 is discretionary. On careful consideration of the order passed by the CBDT on 11.01.2021, we are of the considered view that it cannot be said that CBDT had failed to exercise its discretion or that it acted in an arbitrary or unreasonable manner in refusing to grant further extension of the due dates. We therefore do not find any good ground to invoke our writ jurisdiction under Article 226 of the Constitution of India to direct CBDT for further extension of the due dates.

4.	**01.12.2020**	***Interactive Avenues Private Limited (Appellant)* vs. *DCIT (Respondent)***	**ITAT Mumbai**

Section 40(a)(i) of the Income tax Act, 1961 is a restriction on deductibility of expenses u/s 30 to 38 of the Act.

Fact of the Case:

During the relevant previous year, the assessee appellant has made certain payments to Facebook Ireland Limited towards the cost of advertisements, carried by facebook, for its clients. In the course of the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has not deducted tax at source from these payments to Facebook Ireland Limited, whereas, for the detailed reasons set out by the Assessing Officer, the tax was deductible from the same under section 195 of the Income Tax Act, 1961. It is for this reason that the Assessing Officer disallowed these payments to Facebook Ireland Limited, in computation of business income, under section 40(a)(i) of the Act. Aggrieved, assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals) but without any success. The assessee is not satisfied and is in further appeal before ITAT.

The Income Tax Appellate Tribunal 'ITAT' heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

The ITAT have taken note of the fact that the assessee is an advertisement agency, and, as such, advertisements are placed by the assessee on behalf of its clients. There is thus ordinarily no occasion to claim the costs of advertisements as deduction in computation of its business income, and, so far as the advertisement agencies are concerned, their revenues consist of only the commission received in respect of the advertisements so placed.

A plain reading of the above statutory provision shows that section 40(a)(i) acts as a restriction on deductibility of expenses under section 30 to 38, but then, as a corollary to this legal position, when the related expenditure is not claimed as deduction under section 30 to 38, this disallowance cannot be pressed into service at all. In other words, a disallowance under section

40(a)(i) can come into play only when the deduction for the related expenditure is claimed under sections 30 to 38 of the Act.

Order/ Judgement:

If the related expenditure is not claimed as a deduction u/s 30 to 38 of the Act, this disallowance cannot be pressed into service at all. As the assessee is an advertisement agency and advertisements are placed by the assessee on behalf of its clients, there is ordinarily no occasion to claim the costs of advertisements as deduction in computation of its business income. The revenues, in the case of advertisement agencies, consist of only the commission received in respect of the advertisements so placed.

5.	**14.09.2020**	***Kamal Galani (Appellant)* vs. *ACIT (Respondent)***	**ITAT Mumbai**

Section 68/69 of the Income Tax Act, 1961: Black Money - The Assessing Officer 'AO' has to prove that the money belongs to the assessee. Unless the AO proves that unexplained money is belongs to the person, he cannot make any addition in the hands of the assessee.

Fact of the Case:

On the facts and circumstances of the case, the learned Assessing Officer as well as the Commissioner of Income Tax (Appeals) has erred in confirming the following factual assumptions:

1. The AO has incorrectly assumed that the Appellant is the owner of the bank account;
2. The AO has erred in assuming that an investment of USD 3 million was made in order to open the account;
3. The alleged investment of USD 3 million was made out of income which originated from income chargeable to tax, but not disclosed in India; and
4. That the bank had paid interest of 17% per annum.

The Appellant submits that additions of ₹2,34,35,316 made based on such incorrect factual assumptions must be deleted. The AO as well as CIT(A) has erred in relying on the base notes, without bring any cogent material on record to establish the authenticity or the veracity of the base notes. The AO has further erred in placing reliance on incomplete information extracted from the HSBC Private Bank website to justify the authenticity of the base note.

Order/ Judgement:

The Assessing Officer 'AO' has to prove that the money belongs to the assessee. If the assessee files necessary evidences to prove that the unexplained money does not belongs to him, the onus shift to the revenue to prove that the unexplained money in fact belongs to the assessee. Unless the AO proves that unexplained money is belongs to the person, he cannot make any addition in the hands of the assessee. The fact that the assessee is a joint holder of the bank account does not mean that the money belongs to him if the evidence suggests that the money belongs to the other holder.

Source:

1. https://itatonline.org/archives/
2. https://indiankanoon.org/doc/987467/
3. https://itatonline.org/digest/ito-v-techspan-india-private-ltd-sc-www-itatonline-org/
4. manupatra.com

INDIRECT TAX

1.	**17.12.2020**	***Union of India (Appellant)* vs. *Bharti Airtel Ltd. & Ors. (Respondent)***	**The Supreme Court of India**

Supreme Court stays Delhi High Court judgment in the case of Bharti Airtel wherein Court had allowed rectification in Form GSTR-3B

Facts of the case:

The Delhi High Court while reading para 4 of Circular No. 26/26/2017-GST dated December 29, 2017, held that the rectification of the return for that very month to which it relates is imperative and any restriction on this rectification is ultra vires the provisions of CGST Act, 2017 and contrary to Articles 14, 19 and 265 of the Constitution of India. High Court said that failure of the Government to operationalise the statutory returns, GSTR 2, 2A and 3, cannot prejudice the assessee. The GSTR 3B which was merely a summary return as an alternative did not have the statutory features of the returns prescribed under CGST Act, 2017. Therefore, if there were errors in capturing Input Tax Credit (ITC) on account of which cash was paid for discharging GST liability instead of utilising ITC which could not be captured correctly at that time, the return should be allowed to be rectified in the very month in which the ITC was not recorded and the cash paid should be available as refund.

Judgment:

The Supreme Court stayed the judgment of Delhi High Court, allowing Bharti Airtel Ltd. to claim ₹ 923 crore in tax refunds by rectifying its Goods and Services Tax (GST) returns for July to September 2017.

2.	**09.12.2020**	***Ravi Charaya (Appellant)* vs. *Hardcastle Restaurants (P) Ltd. (Respondent)***	**National Anti-Profiteering Authority (NAA)**

NAA finds McDonald's franchisee Hardcastle Restaurants guilty of profiteering

Facts of the case:

Hardcastle Restaurants was operating quick service restaurants under the brand name McDonald's in the Western and Southern regions of India. Complaints were filed against the restaurant accusing it of keeping the prices of the products same despite a reduction in the GST rate from 18 per cent to 5 per cent with effect from November 15, 2017.

Judgment:

NAA has found Respondent guilty of not passing on GST rate cut benefits of over ₹7.49 crore to consumers. It has held that Respondent had resorted to profiteering by charging more price for some of its products even though GST on it reduced from 18 per cent of 5 per cent without Input Tax Credit (ITC) with effect from November 15, 2017.

It has also directed the restaurant to reduce prices of all impacted products commensurately in respect of which profiteering had been computed, keeping in view the reduced rate of tax

and the benefit of ITC which has been availed. It also directed Hardcastle to deposit 50 per cent of the profiteered amount of ₹7.49 crore in the Central Consumer Welfare Fund and balance 50 per cent on consumer welfare funds of 10 states where supplies by Hardcastle resulted in profiteering. The deposits will also attract 18 per cent interest rate applicable from the date from which higher amount was realised by the respondent despite tax cuts and will have to be deposited within a period of three months.

3.	**04.12.2020**	***Mayajaal Entertainment Ltd. (Appellant)* vs. *Commercial Tax Officer (Respondent)***	**Madras High Court**

Entertainment Tax not applicable on Online booking charges for Cinema Tickets in Tamil Nadu

Facts of the case:

The issue raised in this case was whether the Online booking charges charged by a Cinema Hall Owner besides the cost of ticket for entry into the cinema hall and relish the entertainment in the form of a movie, was a part of taxable receipt by the Cinema Owner for the purposes of the Tamil Nadu Entertainment Tax Act, 1939.

Judgment:

The Madras High Court affirmed that the entertainment tax is not applicable on online booking charges for cinema tickets. The court concluded that online booking charges or internet handling charges was not a mandatory payment for gaining entry into the cinema hall, it was an additional payment for extra or other facility provided by the Cinema hall owner thus, the same could not be subjected to entertainment tax.

4.	**03.12.2020**	***Skill Lotto Solutions (P) Ltd. (Appellant)* vs. *Union of India and Ors. (Respondent)***	**The Supreme Court of India**

Lottery, betting, gambling taxable under GST Act

Facts of the case:

The Appellant argued that the CGST Act, 2017 and notifications wrongfully viewed lotteries as goods when lotteries are actionable claims. The appellant also said that under the GST Act, 2017, rates prescribed on the sale of lottery tickets are 12% if the lotteries are sold within the same State, and 28% if a State sells the lottery tickets in other States, which is arbitrary, discriminatory, unreasonable and clearly violative of Articles 14 of the Constitution.

According to the petition, Section 2(52) of the Central Goods and Services Tax Act, 2017 and notifications levying tax on lottery is violative of the fundamental rights and contrary to a judgment of Supreme Court in Sunrise Associates vs. Government of NCT of Delhi of 2006, where it was held that lotteries could not be defined as goods and were merely actionable claims.

Judgment:

The Supreme Court upheld the constitutional validity of imposing Goods and Services Tax (GST) on sale of lotteries across India. The Court has held that keeping lottery and gambling under GST's ambit is legally valid, upholding validity of tax imposition on lottery tickets and the prize money. The Court said that lottery, betting and gambling are "actionable claims" and come within the definition of 'goods' under Section 2(52) of the Central Goods and Services Tax Act, 2017.

5.	**03.12.2020**	**In re HP Tourism Development Board**	**GST AAR Himachal Pradesh**

No GST on grant received for promotion of Tourism

Facts of the case:

The Appellant submitted that the Government of Himachal Pradesh, Department of Tourism agreed to credit the amounts to Tourism Development Board (in lieu of Grant) for smooth functioning of the board. The amount was credited on account of receipts of amount from the sale of Publicity material/ Literature books; Fee from parking lots and public places of convenience built by the Tourism Department, Adventure sports fee including heli skiing and paragliding fee, etc. 25% to be contributed by the Tourism Development Council from their resources; donation/grants received especially for tourism promotion/development and annual license fee and success fee received to the department from BOOT/BOT basic project.

The Appellant sought the advance ruling on the issue of Whether the amount credited in favour of H.P Tourism Development Board by Department of Tourism, Govt. of H.P, as grant in aid or financial assistance is taxable or not.

Judgment:

The Himachal Pradesh Authority of Advance Ruling (AAR) held that no GST applicable on the amount credited to H.P. Tourism Development Board by Govt. of H.P., as grants in aid or financial assistance. The amount credited in favour of H.P Tourism Development Board by Department of Tourism, Govt. of H.P, as grant in aid or financial assistance is exempt under GST as per Serial No 9C of Notification No 32/2017-Central Tax (Rate) dated October 13, 2017.

6.	**01.12.2020**	***Singh Traders (Appellant)* vs. *Additional Commissioner (Respondent)***	**Allahabad High Court**

GST proceedings cannot be initiated against a goods carrying company by serving notice to its truck driver

Facts of the case:

The Appellant, M/S Singh Traders is a registered dealer having a valid registration. The appellant alleges that the respondent authority passed an order under Section 129 (3) of the UPGST Act, 2017 against the appellant on the grounds that the goods were not accompanied by the requisite E-way Bill-01 and proceeded to determine tax and penalty of ₹3,03,660. The Appellant alleged that the order was served on the driver of the truck in question and was never served upon the appellant, which is against the mandate of Section 169 of the Act. The

Respondent authority vide its order dismissed the appeal on the ground of limitation as prescribed under Section 107(1) and 107(4) of the Act.

Judgment:

The Allahabad High Court held that the service of the order on truck drivers can not be a valid service as by no stretch of the imagination the truck driver can be termed as representative of the appellant.

7.	**06.11.2020**	***Agarwal Foundries Private Limited Rama Towers (Appellant)* vs. *Union of India (Respondent)***	**Telangana High Court**

No physical violence or torture allowed against persons suspected of tax-evasion

Facts of the case:

The Appellant were a Private Limited Company incorporated under the Companies Act involved in the business of steel registered under the CGST Act, 2017. It was submitted by the appellant that without any prior intimation or show-cause notice, the officials attached to the Directorate General of GST Intelligence, New Delhi conducted simultaneous raids on business units of the petitioner company and the residential house of the director. The respondent authorities physically assaulted the appellant and his relative without any regard to their old age, although the employees of the appellant company and also the director of the company co-operated with the search operations conducted, contended by the appellant. The respondent denied the allegations of the appellant and submitted that it was the appellant and their employees who had obstructed the search operations and assaulted them.

The question which arises for consideration by the Court was whether officials belonging to the GST Intelligence Department of the Union of India can resort to physical violence while conducting interrogation of the petitioners and their employees in connection with proceedings initiated against the appellant by the respondents under the CGST Act, 2017 and IGST Act, 2017.

Judgment:

The Telangana High Court held that the Directorate General of GST (DGGST) shall not use any acts of violence or torture against the appellant or their employees in furtherance of inquiry proceedings the High Court directed that the investigation be transferred to the other officer and the officer alleged of using violence shall not participate in the investigation - that the interrogation of the petitioner be held between 10:30 a.m. and 05:00 p.m. on weekdays in the visible range of an advocate appointed by them and the interrogation be held at Zonal unit of DGGST except in case of few persons who may be asked to attend at DGGST Head Quarters at New Delhi for 2-3 days.

8.	**05.10.2020**	***GSP Power System (P) Ltd. (Appellant)* vs. *Commissioner of GST Department of Trade and Taxes & Anr. (Respondent)***	**Delhi High Court**

High Court allowed to file revised returns for the financial year 2017-18 under DVAT

Facts of the case:

This writ petition had been filed challenging the rejection by respondent authorities of Appellant's request for correction of the return filed for first quarter of Year 2017-18 and refusal to give statutory forms under Central Sales Tax (Delhi) Rules. Appellant further seeks a direction to the respondent authorities to allow the Appellant's revision of returns for the year 2017-18 as per the provisions of DVAT Act and Rules.

Judgment:

Delhi High Court said that, no useful purpose would be served by keeping the petition pending. Consequently, the Court directs the respondent to allow the amendment sought by the Appellant in its return of first Quarter for the Financial Year 2017-18.

9.	**23.09.2020**	***Nitin Singh Bhati (Appellant)* vs. *Union of India (Respondent)***	**Madhya Pradesh High Court**

Public Interest Litigation (PIL)cannot be filed for non-completion of GST crime investigation by Investigating Agency within time

Facts of the case:

The Appellant filed a Public Interest Litigation (PIL) stating that a criminal case was registered against certain persons in the township of Indore for offences under Section 132(1) of CGST Act, 2017 read with 409, 467, 471 and 120-B of IPC. The Appellant's contention was that grant of bail to one of the co-accused as investigation was not completed is against public interest and the Investigating Agency should have completed the investigation, within time.

Judgment:

The Hon'ble Madhya Pradesh High Court held that the petition was certainly not at all the PIL. If the investigating agency was not able to conclude the investigation within time there can be a number of reasons for the same. No element of Public Interest is involved in the matter. The court did not find any reason to interfere in the matter especially in a PIL in respect of non-filing of charge sheet, within time.

10.	**12.05.2020**	**In re Tamil Nadu Textbook and Educational Services Corporation**	**GST AAR Tamilnadu**

GST is exempted on supply of Dress, School Bag, Boots etc. to students without consideration to Government and Government Aided schools.

Facts of the case:

Tamil Nadu Textbook and Educational Services Corporation have sought advance ruling whether the supply of educational aids to students such as school bags, footwear, geometry box, wooden colour pencils, crayons, a woollen sweater to government and government-aided schools based on the State Government educational policy for which the consideration is paid to Tami Nadu Text Book and Educational Services Corporation by the State Government utilizing a budgetary allocation constitutes a supply. If the answer to the above is in the affirmative then the Tamil Nadu Text Book and Educational Services Corporation is entitled to avail of the corresponding input tax credit on the procurement made.

Judgment:

GST AAR Tamilnadu ruled that GST is exempted on the supply of Dress, School Bag, Boots etc. to students without consideration to Government and Government Aided schools. The applicant, Tamil Nadu Textbook and Educational Services Corporation is controlled by the Government of Tamil Nadu and therefore they are a government entity.

BANKING LAWS

1.	**02.02.2021**	***Samir Sardana (Complainant)* vs. *Reserve Bank of India (Respondents)***	**Central Information Commission**

Facts of the case:

The complainant filed an application dated 27.11.2018 under the Right to Information Act, 2005 (RTI Act) before the Central Public Information Officer (CPIO), Reserve Bank of India, Mumbai, seeking informations related to Demonetization. In his RTI, he asked for different details like Proceeds collected by each State, by Scheduled Bank, by each Cooperative Bank, how much Fake Currency collected etc. The complainant later submitted that the reply given by the respondent was not satisfactory and that the information which must be voluntarily disclosed to the appellant was deliberately not disclosed by the respondent.

Judgment:

The Commission after adverting to the facts and circumstances of the case, hearing both the parties and perusal of records, observes that due reply was given by the CPIO's letter dated 15.01.2021. The CPIO had replied to the complainant and therefore it may not be considered to be a case of non-response. Besides, the delay caused in the case appears to be inadvertent and point-wise information/reply being made available it may not be appropriate to initiate action under section 20 (1) of RTI Act. That being so there appears to be no infirmity with the reply given by the CPIO and there appears to be no merit in the complaint. Accordingly, the complaint is rejected.

2.	**29.01.2021**	***Sri U M Ramesh Rao (Petitioners)* vs. *Union Bank of India (Respondent)***	**Karnataka High Court**

Facts of the case:

The company had applied for a short term loan of ₹20 crores on the security of all the movable assets. An agreement styled as "Term Loan Agreement" was entered into between borrower and the respondent/Bank on 21.11.2008. The immovable assets included two flats (S 402 and S 703) situated at "ACS - Vasundhara" Phase-II, Site Nos.2 and 3, near Kodihalli, Bengaluru. The Director on behalf of company had signed a Letter of Undertaking regarding creation of mortgage of the schedule property on 21.11.2008. In addition, the charge had been created on immovable property, i.e., coffee estate situated at Kolagave village of Chickamagalur District in favour of the Bank. The schedule property were mortgaged for creating credit facilities aggregating to ₹210 crores under bank guarantee/letter of credit account/short term loan. Thus, equitable mortgage agreements were entered into in respect of the immovable properties. The Schedule property were auctioned under the SARFAESI Act, but later it was contended by the appellants that the land being coffee plantation and agricultural land, could not be proceeded against, under the provisions of the SARFAESI Act having regard to Section 31(i) of the said Act.

Judgment:

The writ petition raised a question about applicability of SARFAESI Act to coffee plantation/estate on the ground that the same is an agricultural land, having regard to Section 31(i) of the SARFAESI Act. Whether the said provision is not applicable to agricultural land and therefore, the action initiated is illegal and contrary to the object and purpose of the provision had to be considered. The coffee plantation/estate is an agricultural land within the meaning of Section 31(c) of the SARFAESI Act, is in the affirmative, then the provisions of the Act would not apply and the action initiated by the respondent/bank would be without jurisdiction. Any action of an authority without jurisdiction goes to the root of the matter and in such a case, a writ petition would lie under Article 226 of the Constitution. In such circumstances, it would not be sound exercise of discretion to relegate the parties to the remedy by way of an appeal. This is particularly so, when a constitutional right, such as Article 300A of the Constitution is involved and the applicability of the SARFAESI Act to coffee estate in the context of whether it is an agricultural land or not would be an important question which has to be decided in the first instance before deciding on the legality of the action otherwise.

The final conclusion was that the expression 'agricultural land' in Section 31(i) of the SARFAESI Act, does not include land on which plantation crops are grown namely, cardamom, coffee, pepper, rubber and tea as defined in Section 2(A)(25) of the Land Reforms Act. Therefore, the measures initiated by the respondent banks in relation to the coffee estates in these appeals are not hit by Section 31(i) of the SARFAESI Act, as the said Act is applicable to land on which plantation crops are grown, including coffee plantation, in the instant cases. In the result, the writ appeals were disposed off.

3.	**25.01.2021**	***M/S BBR Enterprises (Petitioners) vs. Central Bank of India (Respondent)***	**Telangana High Court**

Facts of the case:

The petitioner in the present writ petition is claiming tenancy and possessory rights over the secured asset under an unregistered lease deed. The petitioner has filed a copy of lease deed dated 19.12.2017, wherein the term of lease is for a period of five (05) years. By virtue of the said unregistered lease deed, the petitioner is claiming that it is in possession of the secured asset - subject property. There is no dispute with regard to possession of the petitioner over the secured asset. In fact, it is supported by the impugned notice dated 07.01.2020 issued by the Advocate Commissioner to the petitioner to vacate the subject property and to hand over the same within fifteen (15) days. Therefore, respondent No.1 bank is having knowledge of the tenancy of the petitioner over ARR,J & KL,J W.P. No.1315/2020 the secured asset, the bank got issued the impugned notice to the petitioner for eviction of the petitioner after obtaining orders from the Magistrate Court under Section - 14 of the SARFAESI Act without impleading the petitioner.

Judgment:

As per section 17 (1) of the Registration Act, 1908, all the leases of immovable property for any period has to be compulsorily registered. In view of the same, the petitioner, which is claiming

lease hold and possessory rights under an unregistered lease deed not properly stamped, cannot question the notice to vacate dated 07.01.2020 issued by the Advocate Commissioner pursuant to the order passed by the Chief Metropolitan Magistrate, Cyberabad at L.B. Nagar on the ground that it is not impleaded as it cannot continue in possession of the secured asset beyond one year from the date of lease or date of possession as held by the Apex Court.

After discussion, it has been decided that the petitioner in the present case is not having valid lease and, therefore, it cannot question the notice to vacate dated 07.01.2020 issued by the Advocate Commissioner pursuant to the order passed by the Chief Metropolitan Magistrate, Cyberabad at L.B. Nagar, asking the petitioner to vacate and hand over the secured asset within fifteen (15) days. The writ petition fails and accordingly dismissed.

4.	**25.01.2021**	***M/S. Sai Durga Agrotech (Petitioner)* vs. *Bank of Baroda Erstwhile Vijaya Bank (Respondent)***	**Telangana High Court**

Facts of the case:

In view of the said settled principle of law, coming to the facts of the case on hand, the petitioner in the present writ petition is claiming tenancy and possessory rights over the secured asset under an unregistered rental deed. The petitioner has filed copy of rental deed dated 13.06.2019, wherein it is mentioned that the term of lease is for a period of three (03) years. By virtue of the said unregistered rental deed, the petitioner is claiming that it is in possession of the secured asset - subject property. There is no dispute with regard to possession of the petitioner over the secured asset. In fact, it is supported by the impugned notice dated 16.06.2020 issued by respondent No.1 - secured creditor advising the petitioner to vacate the premises within fifteen (15) days. Therefore, respondent No.1 bank is having knowledge of the tenancy of the petitioner over the secured asset by 16.06.2020, it issued the impugned notice to the petitioner for vacating the subject property after obtaining orders ARR,J & KL,J W.P. No.8945/2020 from the Court under Section 14 of the SARFAESI Act without impleading the petitioner herein.

Judgment:

Pursuant to the amendment w.e.f. 01.04.1999 to Section 17 (1) (d) of the Registration Act, 1908, all the leases of immovable property for any period has to be compulsorily registered. In the present case, the rental deed through which the petitioner is claiming lease-hold and possessory rights for three years is an unregistered rental deed. The latest rental deed is dated 13.06.2019 for a period of three (03) years from 13.06.2019. Admittedly, one year period is over. Property is immovable. Though the lessee and lessor agreed to register the lease deed, they have not adhered to the said condition. Therefore, the petitioner which is claiming lease-hold and possessory rights under an unregistered rental deed not properly stamped, cannot question the notice to vacate dated 16.06.2020 issued by respondent No.1 pursuant to the order passed by the District Magistrate, Sangareddy on the ground that it is not impleaded as it cannot continue in possession of the secured asset beyond one year from the date of lease or date of possession as one year elapsed as held by the Apex Court. It is also contended by the learned counsel for respondent No.1 that the present writ petition is not maintainable in view of availability of an alternative and efficacious remedy under the provisions of the SARFAESI

Act. But, Telangana High Court does not agree with the said contention since the petitioner's contention is that it was denied an opportunity of being heard in an application under Section 14 of the SARFAESI Act before the District Magistrate, Sangareddy, and it amounts to violation of principles of natural justice. Therefore, the writ petition is maintainable to examine the said aspect since the said alternative remedy is not a bar for maintaining the present writ petition when violation of principles of natural justice is alleged.

After discussion it has been decided that the petitioner in the present case is not having valid lease and, therefore, it cannot question the notice to vacate dated 16.06.2020 issued by respondent No.1 pursuant to the order passed by the District Magistrate, Sangareddy, asking the petitioner to vacate the secured asset within fifteen (15) days. The writ petition fails and accordingly the same has been dismissed.

ARBITRATION

1.	**27.11. 2019**	***M/s. Uttarakhand Purv Sainik Kalyan Nigam Limited (Petitioner) vs. Northern Coal Field Limited (Respondent)***	**The Supreme Court of India**

Hon'ble Supreme Court set aside the judgment and order passed by the High Court, and directed that the issue of limitation be decided by the arbitral tribunal. The Court is now required only to examine the existence of the arbitration agreement.

Facts of the case:

An agreement was entered into between the petitioner and respondent, under which the Petitioner – Contractor was to provide security to the Respondent. The Petitioner – Contractor issued a Notice of Arbitration calling upon the Respondent to nominate a Sole Arbitrator in terms of the arbitration clause. The Respondent did not respond to the Notice. The Petitioner sent a further notice to the Respondent proposing the name of a retired Additional District Judge for appointment as the Sole Arbitrator. The Respondent did not respond to this Notice as well. The Petitioner filed an Application under Section 11 invoking the default power of the High Court to make the appointment of a sole arbitrator. The High Court held that the claims of the Petitioner were barred by limitation. Aggrieved by the Order, the Petitioner has filed this Special Leave Petition before the Supreme Court.

Judgement:

Section 21 of the Arbitration Act, 1996 provides that arbitral proceedings commence on the date on which a request for disputes to be referred to arbitration is received by the respondent. In the present case, the Notice of Arbitration was issued by the Petitioner to the Respondent on 09.03.2016. The invocation took place after Section 11 was amended by the Arbitration (Amendment) Act, 2015, which came into force on 23.10.2015, therefore the amended provision would be applicable to the present case. In view of the legislative mandate contained in Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16 of Arbitration Act, 1996, which enshrines the Kompetenz-Kompetenz principle. The doctrine of "Kompetenz-Kompetenz", also referred to as "Compétence-Compétence", or "Compétence de la recognized", implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction. Reliance was *inter-alia* placed on the judgment of the Supreme Court in *NTPC* v. *Siemens Atkein Gesell Schaft*, wherein it was held that the arbitral tribunal would deal with limitation under Section 16 of Arbitration Act, 1996. In *M/s. Indian Farmers Fertilizers Cooperative Ltd.* v. *Bhadra Products* the Supreme Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the UNCITRAL Model Law which enshrines the Kompetenze principle. In this case, the Supreme Court set aside the judgment and order passed by the High Court, and directed that the issue of limitation be decided by the arbitral tribunal.

For details :
https://main.sci.gov.in/supremecourt/2018/12434/12434_2018_6_1501_18564_Judgement_27-Nov-2019.pdf

2.	**27.11.2019**	***Hindustan Construction Company Limited (Petitioners)* vs. *Union of India & Ors. (Respondents)***	**The Supreme Court of India**

The Hon'ble Supreme Court held Section 87 and the deletion of Section 26 of the 2015 Amendment Act manifestly arbitrary. The section enacted unreasonably, without adequate determining principle, and contrary to the public interest sought to be subserved by the Arbitration Act, 1996 and the 2015 Amendment Act.

Facts of the case:

A set of Writ Petitions sought to challenge the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 (**'Arbitration Act'**) as inserted by the Arbitration and Conciliation (Amendment) Act, 2019. It was contended that section 87 is violative of Articles 14, 19(1)(g), 21 and 300-A of the Constitution of India, as it is contrary to the object of the principal Arbitration Act, 1996 itself. Arbitration awards that were in favour of the Petitioner company were invariably challenged under Sections 34 and 37 of the Arbitration Act, 1996, and on average, more than 6 years are spent in defending these challenges. The major problem in the way of the Petitioners was that the moment a challenge is made under Section 34, there is an 'automatic-stay' of such awards under the **'Arbitration Act'**. The Petitioners were then subjected to a double-whammy as the Government bodies other than Government companies are exempt from the Insolvency Code because they are statutory authorities or government departments.

Judgement:

The Hon'ble Supreme Court noticed that after the advent of the Insolvency Code, the consequence of applying Section 87 of Arbitration Act, 1996 is that due to the automatic-stay doctrine laid down by judgments of the Supreme Court - which have only been reversed today by the present judgment - the award-holder may become insolvent by defaulting on its payment to its suppliers, when such payments would be forthcoming from arbitral awards in cases where there is no stay, or even in cases where conditional stays are granted. The court stated that an award when challenged under Section 34 becomes unexecutable merely by virtue of such challenge being made because of the language of Section 36 is plainly incorrect. The court referred to the Srikrishna Committee Report dated 30.07.2017 and held that the report render Section 87 and the deletion of Section 26 of the 2015 Amendment Act manifestly arbitrary, having been enacted unreasonably, without adequate determining principle, and contrary to the public interest sought to be subserved by the Arbitration Act, 1996 and the 2015 Amendment Act. It held that the retrospective resurrection of an automatic-stay not only turns the clock backwards contrary to the object of the Arbitration Act, 1996 and the 2015 Amendment Act, but also results in payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed. Further, the

court held that the challenge to the provisions of Insolvency Code, insofar as this Writ Petitions are concerned, to be wholly devoid of merit.

For details :
https://main.sci.gov.in/supremecourt/2019/29540/29540_2019_4_1501_18556_Judgement_27-Nov-2019.pdf

3.	**13.11.2019**	***The Oriental Insurance Company Limited (Appellants)* vs. *Dicitex Furnishing Limited (Respondents)***	**The Supreme Court of India**

For deciding the application under Section 11(6) of Arbitration Act, 1996, the court is required to ensure that an arbitrable dispute exists and has to be prima facie convinced about the genuineness or credibility of the plea and not be too particular about the nature of the plea, which necessarily has to be made and established in the substantive proceeding.

Facts of the Case:

Dicitex (Respondent) obtained a Standard Fire and Special Peril Policy from the Oriental Insurance Company Limited (Appellants). A fire broke out which spread to the first floor of the building and completely engulfed all of the appellant's three godowns. Respondent informed the appellant about the fire and the consequential loss. The appellant appointed M/s. C.P. Mehta & Co. as Surveyors and Assessors to survey the loss suffered. The Surveyor appointed by the insurer filed a FinalSurvey Report recommending that the clai m be settled for a net amount of ₹12,28,60,369/ be paid over to Respondent. Respondent addressed various letters to the appellant's chairman, informing him of the financial distress that it was facing, requesting for settlement of the claim on priority basis. Apparently, the appellant appointed a Chartered Accountant (M/s Naveen Jhand & Associates) to carry out a resurvey of the claim made by Respondent. Respondent received an email from the appellant stating that a discharge voucher for the balance amount of the claim payable as described was being enclosed. Respondent placed on record that its total claim was approximately ₹15 crores and the surveyor had assessed the same at approximately ₹12.93 crores. Respondent stated that the basis for arriving at the figure of ₹7.16 crores was not explained by the appellant. Respondent submitted along with the discharge voucher for a full and final settlement of their claim due to urgent need of funds to meet its mounting liabilities. Respondent placed on record their objection that the same was signed due to pressure of the respondents and applied to Bombay High Court under Section 11(6) of Arbitration Act, 1996. Bombay High Court has allowed the application under Section 11(6) of said act. The appellant filled the appeal to the Supreme Court in present case.

Judgement:

The Hon'ble Supreme Court held that an overall reading of respondent's application under Section 11(6) of Arbitration Act, 1996 clearly shows that its grievance with respect to the involuntary nature of the discharge voucher was articulated. The court is conscious of the fact that an application under Section 11(6) is in the form of a pleading which merely seeks an order of the court, for appointment of an arbitrator. The high court- which is required to ensure that an arbitrable dispute exists, has to be prima facie convinced about the genuineness or credibility of the plea of coercion; it cannot be too particular about the nature of the plea, which

necessarily has to be made and established in the substantive proceeding. The Supreme Court opinioned that the reasoning in the impugned judgment cannot be faulted. The appeal was held to be dismissed without order as to costs.

For details :
https://main.sci.gov.in/supremecourt/2015/39792/39792_2015_4_1501_18110_Judgement_13-Nov-2019.pdf

4.	**04.09.2019**	***Rashid Raza (Appellants)* vs. *Sadaf Akhtar (Respondents)***	**The Supreme Court of India**

Mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement

Facts of the case:

An FIR was lodged by one of the partners alleging siphoning of funds and various other business improprieties that were committed. The High Court, by the impugned order has cited the judgment of Supreme Court in '*A. Ayyasamy* vs. *A. Paramasivam and Others*' and has dismissed application under Section 11 of Arbitration Act, 1996. The appellant filled the appeal from the decision of the High Court.

Judgement:

The Hon'ble Supreme Court referred to the Two working tests laid down in paragraph 25 of the Judgement '*A. Ayyasamy* v. *A. Paramasivam and Others*' i.e. (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain. The Supreme Court held that the disputes raised between the parties are arbitrable and, hence, a Section 11 application under the Arbitration Act would be maintainable.

For details :
https://main.sci.gov.in/supremecourt/2019/4489/4489_2019_5_2_16554_Judgement_04-Sep-2019.pdf

5.	**30.08.2019**	***Tulsi Narayan Garg (Appellants)* vs. *M.P. Road Development Authority (Respondents)***	**The Supreme Court of India**

It is the settled principles of law that a party to an agreement cannot be an arbiter in his own cause.

Facts of the case:

The Tulsi Narayan Garg (Appellants) is a proprietorship firm registered as Class 'A' contractor. In response to the notice inviting tender for construction and maintenance of rural road under the Pradhan Mantri Gram Sadak Yojna, tender was awarded to the appellant and in furtherance, the work order was issued and pursuant thereto, an agreement was

executed between the appellant and the first respondent. The respondent invoking clause 52 of the work agreement terminated the agreement for slow progress of work. Further, the respondent invoking clause 44.1 and 53.1 of the agreement served a notice to the appellant for determining the liquidated damages that came to be challenged by the appellant by filing of a Writ Petition before the High Court of Madhya Pradesh. Writ petition disposed of with liberty to the appellant to challenge order of termination before the Arbitral Tribunal under the provisions of the Adhiniyam, 1983. The appellant filed a reference petition against the termination of agreement and damages claimed by the first respondent before the Madhya Pradesh Arbitral Tribunal under Section 7 of the Adhiniyam, 1983 the same was still pending adjudication before the Arbitral Tribunal. Pending adjudication, the first respondent issued notice to the appellant to recover alleged damages for packages. Petitions were dismissed by the High Court on the premise that General Manager of the respondent has initiated the proceedings under clause 53.1 of the agreement and once the liquidated damages have been quantified by the authority, the action cannot be faulted with for initiating the recovery proceedings distinguishing the judgment of Madhya Pradesh High Court on which the reliance was placed by the appellant in B.B. Verma and another Vs. State of M.P. and another. This becomes the subject matter of challenge in this appeal.

Judgement :

In this case, for both the two agreement , the general manager of the respondent quantified the liquidated damages as alleged and that has been the subject matter of challenge raised by the appellant in the reference petitions filed before the Arbitral Tribunal, which is still pending adjudication and once the remedial mechanism provided has been availed by the appellant which is pending adjudication, the respondents were not justified in initiating the recovery proceedings without awaiting the outcome of the arbitral proceedings. The Hon'ble Supreme Court held that it is the settled principles of law that a party to an agreement cannot be an arbiter in his own cause. The appeals succeeded and were accordingly allowed.

For details :
https://main.sci.gov.in/supremecourt/2018/47525/47525_2018_3_49_16383_Judgement_30-Aug-2019.pdf

6	**27.08.2019**	***National Highway Authority of India (Appellants)* vs. *Sayedabad Tea Company Limited (Respondents)***	**The Supreme Court of India**

NHA, 1956 being a special enactment and an inbuilt mechanism for appointment of an Arbitrator by the Central Government is provided. Hence, Section 11 of the Arbitration Act, 1996 has no application.

Facts of the Case:

The subject land comprised in "Sayedabad Tea Estate" measuring 5.08 acres was acquired by the appellant in exercise of its powers under Section 3(D) of the National Highway Act, 1956(**NHA, 1956**). The **NHA, 1956** is a comprehensive code in itself and a special legislation enacted by the Parliament for acquisition and for determining compensation. If the amount so determined by the competent authority is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by

the Arbitrator to be appointed by the Central Government. The respondent-applicant being dissatisfied with the award of compensation determined by the competent authority filed application for appointment of an Arbitrator in terms of Section 3G (5) of **NHA, 1956** to the Central Government. As alleged, since the Central Government has not responded to his request for appointment of an Arbitrator within a period of 30 days from receipt of the request, application was filed to the Chief Justice/his designate of Calcutta High Court for appointment of an Arbitrator invoking Section 11(6) of the Arbitration Act, 1996. The High Court held that right of appointment of the Arbitrator by the Central Government stands forfeited as it failed to appoint the Arbitrator until filing of the application under Section 11(6) of the Arbitration Act, 1996. The moot question which arisen before the Supreme Court by this appeal was whether the application under Section 11 of the Arbitration and Conciliation Act, 1996 is maintainable in view of Section 3G(5) of the NHA, 1956 which provides for appointment of an Arbitrator by the Central Government.

Judgement :

The Hon'ble Supreme Court noticed that the two Judge Bench in the recent judgment in General Manager (Project), National Highways and Infrastructure Development Corporation Ltd. case(supra), while dealing with the scope of sub-sections (5) and (6) of Section 3G of the NHA, 1956 with reference to Section 11 of the Arbitration Act, 1996 has held that the NHA, 1956 being a special enactment and Section 3G in particular provides an inbuilt mechanism for appointment of an Arbitrator by the Central Government. Hence Section 11 of the Arbitration Act, 1996 has no application and the power is exclusively vested with the Central Government for appointment of an Arbitrator and if the Central Government does not appoint an Arbitrator within a reasonable time, it is open for the party to avail the remedy either by filing a writ petition under Article 226 of the Constitution of India or a suit for the purpose but the remedy of Section 11 of Arbitration Act, 1996 is not available for appointment of an Arbitrator. It is settled principles of law that when the special law sets out a self-contained code, the application of general law would impliedly be excluded. The Supreme Court held that the appeals accordingly succeed and are allowed. The orders passed by the High Court were set aside.

For details :
https://main.sci.gov.in/supremecourt/2007/32180/32180_2007_3_1501_16353_Judgement_27-Aug-2019.pdf

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Part B
Case Studies

LOXON AND MKB BANK - A CASE STUDY ON CREDIT RISK MANAGEMENT*

(Mapped with Governance, Risk Management, Compliances and Ethics)

Prelude

Credit risk management has become an integral element of financial institutions, especially post Global Economic Crisis. Further, with the implementation of global accounting standards, like IFRS (International Financial Reporting Standards) 9, financial institutions have increasingly embraced a more 'risk aware' approach.

Credit risk plays a pivotal role in undertaking prognosis of credit defaults, a development that has manifested itself in functions like expected credit loss (ECL) computations. As a result, the risk and finance functions are continuing to merge, creating a need for more diversified skill-sets and increased collaboration on technology systems and the reporting and analysis of credit risk.

Credit risk ratings and evaluation tools are now critical to the technology infrastructure in retail and commercial banks. What's more, the implementation and integration of a new system into an existing architecture is a multi- faceted project which does not end when the implementation project finishes – full integration can take a long time.

In view of the significance of credit risk management, this case study focuses on a Hungarian bank, MKB which followed a change of ownership and direction, replaced its legacy risk rating and risk management systems (which consisted of three separate modules) with a solution from Loxon that included a risk ratings engine, a financial data analysis module and a risk data mart.

MKB Bank and Loxon – A Brief Background

MKB Bank, a universal financial institution, is one of the oldest and most determinant members of the Hungarian banking system. MKB Bank was established in 1950. After the change of regime (in 1994), it was taken over by a became bank, in 2014 it was purchased by the Hungarian State. After a successful reorganization MKB became privately owned again in 2016.

Its main business activities include corporate and institutional banking services, international banking relationships, retail, private banking and small business as well as money and capital market services. Through its interests, MKB Bank provides complex vehicle and machinery financing, fund management and advisory services, sets up credit structures if necessary, furthermore meets specific banking needs, and offers pension and health fund services to its clients. Emphasis is placed on corporate relationships, exploiting synergies with MKB Pension Fund, MKB-Pannónia Health and Mutual Fund and MKB Euroleasing Group.

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Following the preparations, MKB Bank executed a comprehensive digital changeover which resulted that MKB Bank has become a digital bank. At the beginning of 2019, MKB Bank opened among the first its Application Programming Interface (API), creating an opportunity to develop new secure fintech solutions which could make the customers life easier. As a result of the successful reorganization, the shares of MKB were introduced to the Budapest stock Exchange on 30 May 2019.

MKB has the sixth largest balance sheet among the Hungarian banks. Its branch network coverage is nationwide which are complemented by modern, constantly evolving digital channels.

Vision

"The MKB Financial Group considers its customers and employees partners. We believe in the strength of cooperation, we build bridges.The Group builds on traditional banking values, advisory activity and it extends the most up-to-date service to its customers via innovations. Its internal model is based on continuously optimized business processes".

Mission

"The mission of MKB Financial Group is to extend high quality service based on mutual advantages to our customers".

Loxon

Loxon was founded in 2000 by young banking experts. The core value of the company is the strong capability of business and technology innovation keeping the company continuously a step ahead of competitors

Loxon has achieved considerable growth in client base and has become the leading provider of the risk management and lending software market in the CEE (Central and Eastern Europe) and CIS (Commonwealth of Independent States) regions. Loxon is actively building its customer base in the MEA (Middle East and Africa) region since 2007.

Loxon products and services are applied in 25+ countries, its customer base in these countries (60+ tier 1 and tier 2 financial institutions) includes the member entities of large international banking groups such as Erste, GE Money, Home Credit International (HCI), Intesa Sanpaolo, KBC, OTP, Raiffeisen and UniCredit groups as well as regional and local banks.

The Approach Embraced

A research based firm, Chartis conducted interviews with representatives from both Loxon and MKB bank to comprehend the following-

i) Their perspectives of the problem that needed to be solved.

ii) The parameters of the implementation project.

iii) How the requirements were fulfilled.

As a part of the research study, Chartis also assessed the vendor landscape, to provide context around the suitability of Loxon's capabilities for the bank's needs

Outcomes of implementing Loxon's Credit Risk Management Solution

i) A single integrated platform supporting MKB Bank and its subsidiaries (such as leasing companies) was developed. The platform combined a risk ratings engine, a financial data analysis module and a data mart for risk.

ii) Tools and interfaces that can be tailored to the specific needs of the bank's staff and users (with test models delivered throughout the process).

iii) A rapid implementation – the project was completed within 12 months. Given its scope and scale, this was a significant result.

iv) Considerable cost savings, i.e., according to MKB, the consolidated Loxon system is five to 10 times cheaper to run than the systems it displaced.

Reference

1. https://www.chartis-research.com/financial-risk-and-evaluation/credit-risk/case-study-loxon-and-mkb-bank-10746
2. https://mkb.hu/investor/investor-relations/mkb-introduction
3. https://www.loxon.eu/en/page/show/company

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SETTLED THE UNSETTLED : WHO CAN APPROACH THE CCI?*

The Supreme Court of India Dismissed the Allegation of Cartelisation and Anti-Competitive Practices by Cab Aggregator Ola & Uber & analysed the provisions of the Competition Act as well as the 2009 Regulations and settled the unsettled: Who can approach the CCI? In the Case of Samir Agrawal (Appellant) Vs. Competition Commission of India & Ors (Respondents), Civil Appeal No. 3100 of 2020, and Judgement dated December 15, 2020.

Brief Facts

Informant who describes himself as an independent practitioner of the law. The Appellant/Informant, by an Information filed on 13.08.2018 ["the Information"], sought that the Competition Commission of India ["CCI"] initiate an inquiry, under section 26(2) of the Competition Act, 2002 ["the Act"], into the alleged anti-competitive conduct of ANI Technologies Pvt. Ltd. ["Ola"], and Uber India Systems Pvt. Ltd., Uber B.V. and Uber Technologies Inc. [together referred to as "Uber"], alleging that they entered into price-fixing agreements in contravention of section 3(1) read with section 3(3)(a) of the Act, and engaged in resale price maintenance in contravention of section 3(1) read with section 3(4)(e) of the Act. According to the Informant, Uber and Ola provide radio taxi services and essentially operate as platforms through mobile applications ["apps"] which allow riders and drivers, that is, two sides of the platform, to interact. A trip's fare is calculated by an algorithm based on many factors. The apps that are downloaded facilitate payment of the fare by various modes.

The Informant alleged that due to algorithmic pricing, neither are riders able to negotiate fares with individual drivers for rides that are booked through the apps, nor are the drivers able to offer any discounts. Thus, the pricing algorithm takes away the freedom of riders and drivers to choose the best price on the basis of competition, as both have to accept the price set by the pricing algorithm. As per the terms and conditions agreed upon between Ola and Uber with their respective drivers, despite the fact that the drivers are independent entities who are not employees or agents of Ola or Uber, the driver is bound to accept the trip fare reflected in the app at the end of the trip, without having any discretion insofar as the same is concerned. The drivers receive their share of the fare only after the deduction of a commission by Ola and Uber for the services offered to the rider. Therefore, the Informant alleged that the pricing algorithm used by Ola and Uber artificially manipulates supply and demand, guaranteeing higher fares to drivers who would otherwise compete against one and another. Cooperation between drivers, through the Ola and Uber apps, results in concerted action under section 3(3)(a) read with section 3(1) of the Act. Thus, the Informant submitted that the Ola and Uber apps function akin to a trade association, facilitating the operation of a cartel. Further, since Ola and Uber have greater bargaining power than riders in the determination of price, they are able to implement price discrimination, whereby riders are charged on the basis of their willingness to pay and as a result, artificially inflated fares are paid. Various other averments *qua* resale price maintenance were also made, alleging a contravention of section 3(4)(e) of the Act.

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Competition Commission of India (CCI) Order

The CCI by its Order dated 06.11.2018, under section 26(2) of the Act, discussed the Information provided by the Appellant/Informant and held:

"13. At the outset, it is highlighted that though the Commission has dealt with few cases in this sector, the allegations in the present case are different from those earlier cases. The present case alleges that Cab Aggregators have used their respective algorithms to facilitate price-fixing between drivers. The Informant has not alleged collusion between the Cab Aggregators i.e. Ola and Uber through their algorithms; rather collusion has been alleged on the part of drivers through the platform of these Cab Aggregators, who purportedly use algorithms to fix prices which the drivers are bound to accept....."

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15. In the conventional sense, hub and spoke arrangement refers to exchange of sensitive information between competitors through a third party that facilitates the cartelistic behaviour of such competitors. The same does not seem to apply to the facts of the present case. In case of Cab Aggregators model, the estimation of fare through App is done by the algorithm on the basis of large data sets, popularly referred to as 'big data'. Such algorithm seemingly takes into account personalised information of riders along with other factors e.g. time of the day, traffic situation, special conditions/events, festival, weekday/weekend which all determine the demand-supply situation etc. Resultantly, the algorithmically determined pricing for each rider and each trip tends to be different owing to the interplay of large data sets. Such pricing does not appear to be similar to the 'hub and spoke' arrangement as understood in the traditional competition parlance. A hub and spoke arrangement generally requires the spokes to use a third party platform (hub) for exchange of sensitive information, including information on prices which can facilitate price fixing. For a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers. In the case of ride-sourcing and ride-sharing services, a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. There does not appear to be any such agreement between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators. Thus, the Commission finds no substance in the first allegation raised by the Informant.

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"23. Based on the foregoing, the Commission is of the view that no case of contravention of the provisions of Section 3 has been made out and the matter is accordingly closed herewith under Section 26(2) of the Act."

National Company Law Appellate Tribunal ["NCLAT"] Order

The Appellant/Informant, being aggrieved by the Order of the CCI, filed an appeal before the National Company Law Appellate Tribunal ["NCLAT"] which resulted in the impugned judgment dated 29.05.2020. After setting out section 19 of the Act, the NCLAT held:

"16. It is true that the concept of *locus standi* has been diluted to some extent by allowing public interest litigation, class action and actions initiated at the hands of consumer and trade associations. Even the whistle blowers have been clothed with the right to seek redressal of grievances affecting public interest by enacting a proper legal framework. However, the fact remains that when a statute like the Competition Act specifically provides for the mode of taking cognizance of allegations regarding contravention of provisions relating to certain anti-competitive agreement and abuse of dominant position by an enterprise in a particular manner and at the instance of a person apart from other modes viz. *suo motu* or upon a reference from the competitive government or authority, reference to receipt of any information from any person in section 19(1) (a) of the Act has necessarily to be construed as a reference to a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices. Any other interpretation would make room for unscrupulous people to rake issues of anticompetitive agreements or abuse of dominant position targeting some enterprises with oblique motives. In the instant case, the Informant claims to be an Independent Law-Practitioner. There is nothing on the record to show that he has suffered a legal injury at the hands of Ola and Uber as a consumer or as a member of any consumer or trade association. Not even a solitary event of the Informant of being a victim of unfair price fixation mechanism at the hands of Ola and Uber or having suffered on account of abuse of dominant position of either of the two enterprises have been brought to the notice of this Appellate Tribunal. We are, therefore, constrained to hold that the Informant has no *locus standi* to maintain an action qua the alleged contravention of Act."

Despite having held that the Informant had no *locus standi* to move the CCI, the NCLAT went into the merits of the case and held:

"17. Assuming though not accepting the proposition that the Informant has locus to lodge information qua alleged contravention of the Act and appeal at his instance is maintainable, on merits also we are of the considered opinion that business model of Ola and Uber does not support the allegation of Informant as regards price discrimination. According to Informant, the Cab Aggregators used their respective algorithms to facilitate price fixing between drivers. It is significant to notice that there is no allegation of collusion between the Cab Aggregators through their algorithms which necessarily implies an admission on the part of Informant that the two taxi service providers are operating independent of each other. It is also not disputed that besides Ola and Uber there are other players also in the field who offer their services to commuters/ riders in lieu of consideration. It emerges from the record that both Ola and Uber provide radio taxi services on demand. A consumer is required to download the app before he is able to avail the services of the Cab Aggregators. A cab is booked by a rider using the respective App of the Cab Aggregators which connects the rider with the driver and provides an estimate of fare using an algorithm. The allegation of Informant that the drivers attached to Cab Aggregators are independent third party service provider and not in their employment, thereby price determination by Cab Aggregators amounts to price fixing on behalf of drivers, has to be outrightly rejected as no collusion inter se the Cab Aggregators has been forthcoming from the Informant. The concept of hub and spoke cartel stated to be applicable to the business model of Ola and Uber as a hub with their platforms acting as a hub for collusion inter se the spokes i.e. drivers resting upon US Class Action Suit titled "*Spencer Meyer* v. *Travis Kalanick*" has no application as the business model of Ola and Uber (as it operates in India) does not manifest in restricting price competition among drivers to the detriment of its riders. The matter relates to foreign antitrust jurisdiction with different connotation and cannot be

imported to operate within the ambit and scope of the mechanism dealing with redressal of competition concerns under the Act. It is significant to note that the Informant in the instant case has alleged collusion on the part of drivers through the platform of the Cab Aggregators who are stated to be using their algorithms to fix prices which are imposed on the drivers. In view of allegation of collusion *inter se* the drivers through the platform of Ola and Uber, it is ridiculous on the part of Informant to harp on the tune of hub and spoke raised on the basis of law operating in a foreign jurisdiction which cannot be countenanced. The argument in this core is repelled.

Admittedly, under the business model of Ola, there is no exchange of information amongst the drivers and Ola. The taxi drivers connected with Ola platform have no *inter se* connectivity and lack the possibility of sharing information with regard to the commuters and the earnings they make out of the rides provided. This excludes the probability of collusion inter se the drivers through the platform of Ola. In so far as Uber is concerned, it provides a technology service to its driver partners and riders through the Uber App and assist them in finding a potential ride and also recommends a fare for the same. However, the driver partners as also the riders are free to accept such ride or choose the App of competing service, including choosing alternative modes of transport. Even with regard to fare though Uber App would recommend a fare, the driver partners have liberty to negotiate a lower fare. It is, therefore, evident that the Cab Aggregators do not function as an association of its driver partners. Thus, the allegation of their facilitating a cartel defies the logic and has to be repelled.

18. Now coming to the issue of abuse of dominant position, be it seen that the Commission, having been equipped with the necessary wherewithal and having dealt with allegations of similar nature in a number of cases as also based on information in public domain found that there are other players offering taxi service/ transportation service/ service providers in transport sector and the Cab Aggregators in the instant case distinctly do not hold dominant position in the relevant market. Admittedly, these two Cab Aggregators are not operating as a joint venture or a group, thus both enterprises taken together cannot be deemed to be holding a dominant position within the ambit of Section 4 of the Act. Even otherwise, none of the two enterprises is independently alleged to be holding a dominant position in the relevant market of providing services. This proposition of fact being an admitted position in the case, question of abuse of dominant position has to be outrightly rejected."

Based on these findings, the appeal was accordingly dismissed.

Supreme Court of India Observations:

Hon'ble Supreme Court analysed the provisions of the Competition Act as well as the 2009 Regulations and settled the unsettled: Who can approach the CCI? In this case Supreme Court in para 13, 14, 15, 16 and 17 observed that;

"A reading of the provisions of the Act and the 2009 Regulations would show that "any person" may provide information to the CCI, which may then act upon it in accordance with the provisions of the Act. In this regard, the definition of "person" in section 2(l) of the Act, set out hereinabove, is an inclusive one and is extremely wide, including individuals of all kinds and every artificial juridical person. This may be contrasted with the definition of "consumer" in

section 2(f) of the Act, which makes it clear that only persons who buy goods for consideration, or hire or avail of services for a consideration, are recognised as consumers.

A look at section 19(1) of the Act would show that the Act originally provided for the "receipt of a complaint" from any person, consumer or their association, or trade association. This expression was then substituted with the expression "receipt of any information in such manner and" by the 2007 Amendment. This substitution is not without significance. Whereas, a *complaint* could be filed only from a person who was aggrieved by a particular action, *information* may be received from any person, obviously whether such person is or is not personally affected. This is for the reason that the proceedings under the Act are proceedings *in rem* which affect the public interest. That the CCI may inquire into any alleged contravention of the provisions of the Act on its own motion, is also laid down in section 19(1) of the Act. Further, even while exercising *suo motu* powers, the CCI may receive information from any person and not merely from a person who is aggrieved by the conduct that is alleged to have occurred. This also follows from a reading of section 35 of the Act, in which the earlier expression "complainant or defendant" has been substituted by the expression, "person or an enterprise," setting out that the informant may appear either in person, or through one or more agents, before the CCI to present the information that he has gathered.

Section 45 of the Act is a deterrent against persons who provide information to the CCI, *mala fide* or recklessly, inasmuch as false statements and omissions of material facts are punishable with a penalty which may extend to the hefty amount of rupees one crore, with the CCI being empowered to pass other such orders as it deems fit. This, and the judicious use of heavy costs being imposed when the information supplied is either frivolous or *mala fide*, can keep in check what is described as the growing tendency of persons being "set up" by rivals in the trade.

The 2009 Regulations also point in the same direction inasmuch as regulation 10, which has been set out hereinabove, does not require the informant to state how he is personally aggrieved by the contravention of the Act, but only requires a statement of facts and details of the alleged contravention to be set out in the information filed. Also, regulation 25 shows that public interest must be foremost in the consideration of the CCI when an application is made to it in writing that a person or enterprise has substantial interest in the outcome of the proceedings, and such person may therefore be allowed to take part in the proceedings. What is also extremely important is regulation 35, by which the CCI must maintain confidentiality of the identity of an informant on a request made to it in writing, so that such informant be free from harassment by persons involved in contravening the Act.

This being the case, it is difficult to agree with the impugned judgment of the NCLAT in its narrow construction of section 19 of the Act, which therefore stands set aside."

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Further, Hon'ble Supreme Court of India observed in para 22 and 23 that ***" obviously, when the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of the Act.***

Coming now to the merits, we have already set out the concurrent findings of fact of the CCI and the NCLAT, wherein it has been found that Ola and Uber do not facilitate

cartelization or anti-competitive practices between drivers, who are independent individuals, who act independently of each other, so as to attract the application of section 3 of the Act, as has been held by both the CCI and the NCLAT. We, therefore, see no reason to interfere with these findings. Resultantly, the appeal is disposed of in terms of this judgment."

For details:
https://main.sci.gov.in/supremecourt/2020/16963/16963_2020_33_1502_25089_Judgement_15-Dec-2020.pdf

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CAIRN ENERGY CASE VERDICT PRONOUNCED BY INTERNATIONAL ARBITRATION TRIBUNAL ON DECEMBER 24, 2020*

Before going into the brief analysis of the Cairn Energy case verdict pronounced by International arbitration tribunal on December 24, 2020, let's have a brief look on Supreme Court decision in Vodafone Case in 2012 and the Indian retrospective tax legislation.

Issue in Vodafone Case:

In February 2007, the Dutch group Vodafone International Holding (VIH) purchased 100 % of the shares in CGP Investments (Holding) Ltd (CGP), a Cayman Islands group, from Hutchison Telecommunications International Limited for USD 11.1 billion. 67% of Hutchison Essar Limited (hereinafter HEL), an Indian Company, was governed by CGP through various transitional organisations / authoritative courses of action. The acquisition resulted in Vodafone acquiring control over CGP and its subsidiaries downstream, including eventually Hutchison Essar Limited. In September 2007, Vodafone Company received a show-cause notice from the Indian Tax Department to explain why tax was not withheld on payments made to HTIL in connection with the transaction in question above. The tax department argued that the aforementioned transaction involving the sale of CGP shares had an effect on the aberrant or indirect sale of India-based properties.

Should the indirect transfer of India - based capital assets be subject to taxation?

With regard to Section 9 of the Income tax Act, 1961, which states that income is considered to accrue or arise in India if it accrues to or arises from a transfer of capital assets in India or to a non-resident, the Court observed that there is an omission under Section 9(1)(i) of the word 'indirect transfer.' If the word 'indirect' used is read with the phrase' Capital asset located in India 'on the off chance, then it would be made worthless. And there is no 'look through' clause in Section 9(1)(i) and can therefore not be expanded to include indirect transfers of capital assets located in India. Therefore, the transfer of shares to CGP did not result in the transfer of capital assets located in India and was not subject to taxation.

Pursuant to a challenge by Vodafone International Holdings B.V in the Supreme Court of India against imposition of tax by Income Tax Department, the Supreme Court of India on January 20, 2012 discharged VIHBV of the tax liability and held that sale of share in question to Vodafone did not amount to transfer of a capital asset within the meaning of Section 2(14) of the Income Tax Act, 1961. Further, the Apex Court not only quashed the demand of INR 120 billion by way of capital gains tax but also directed the Income tax department to refund of INR 25 billion which was deposited by the Vodafone in terms of the interim order along with interest at 4% p.a. within two months.

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Immediately, after the Supreme Court's verdict in Vodafone Case, the Central Board of Direct Taxes came out with an amendment vide Finance Act 2012, which provided for the insertion of two explanations in Section 9(1)(i) of the Income Tax Act, 1961.

The **first explanation** clarified the meaning of the term "through", stating that: "For the removal of doubts, it is hereby clarified that the expression 'through' shall mean and include and shall be deemed to have always meant and included 'by means of', 'in accordance of' or 'by reason of'."

The **second explanation** clarified that "an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India".

The above amendments also clarified that the term "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights had been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

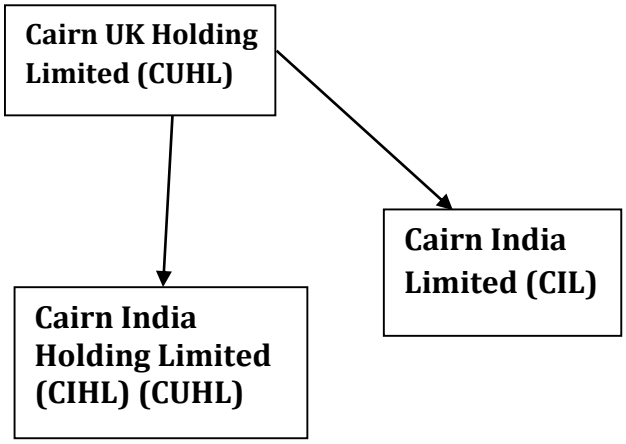
Facts of the Case [Cairn Energy]:

August 2006: Cairn India Holdings Limited (CIHL) was incorporated in Jersey in as a wholly owned subsidiary of Cairn UK Holdings Limited (CUHL). Under a share exchange agreement between CUHL and CIHL, the former transferred shares constituting the entire issued share capital of nine subsidiaries of the Cairn group, held directly and indirectly by CUHL, that were engaged in the oil and gas sector in India. Cairn India Limited (CIL) was also incorporated in India in August 2006 as a wholly owned subsidiary of CUHL.

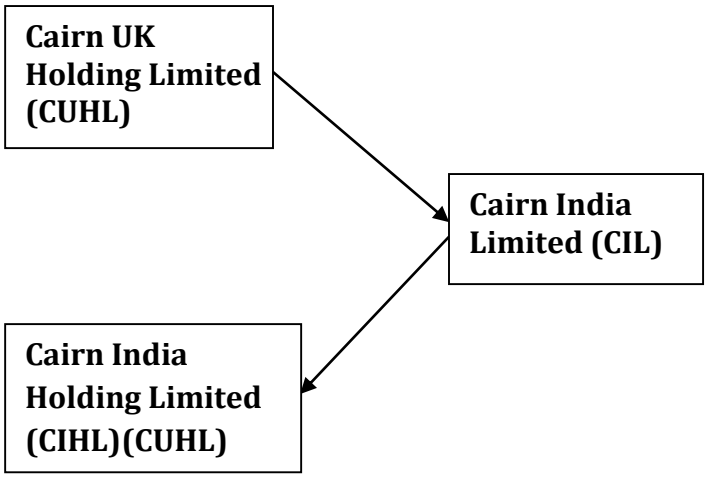
October 2006: CUHL sold shares of CIHL to CIL in an internal group restructuring. This was done by way of a subscription and share purchase agreement, and a share purchase deed, through which shares constituting the entire issued share capital of CIHL were transferred to CIL. The consideration was partly in cash and partly in the form of shares of CIL.

December 2006 : CIL then divested 30.5% of its shareholding by way of an Initial Public Offering in India. As a result of divesting Approx. 30% of its stake in the Subsidiaries and part of IPO proceeds, CUHL received Approx. INR 6101 Crore (Approx. USD 931 Million).

Structure Prior to the Transaction



Structure subsequent to the Transaction



December 2011: UK-based Vedanta Resources Plc (Vedanta UK) acquired 59.9% stake in CIL.

April 2017: CIL merged with Vedanta Ltd. (VL), a subsidiary of Vedanta UK. Under the terms of the merger, Cairn Energy, a subsidiary of Vedanta Resources Plc, received ordinary shares and preference shares in VL in exchange for the residual shareholding of approximately 10% in CIL. As a result, Cairn Energy had a shareholding of approximately 5% in VL along-with an interest in preference shares. As on December 31, 2017, this investment was valued at approximately US$ 1.1 billion.

Proceeding:

January 2014: The Indian Income tax department initiated reassessment proceedings against CUHL under Sections 147 and 148 of the Income-tax Act, 1961 which provide for reassessment proceedings in cases where income has escaped assessment. The Income tax department issued a notice to Cairn Energy, requesting information related to the Transaction. The

assessing officer claimed to have identified unassessed taxable income resulting from the Transaction, such transactions having been allegedly undertaken in order to facilitate the IPO of CIL in 2007. The Income tax department sought to apply the 2012 tax Amendments retrospectively (as stated above) to the transaction. CUHL was also restricted from selling its shareholding of approximately 10% in CIL, which at that time had a market value of approximately US$ 1bn.

March 2015: The Income tax department passed a draft assessment order against CUHL on March 9, 2015, assessing a principal tax due on the 2006 Transaction to INR 102 billion (US$1.6bn), plus applicable interest and penalties. Thereafter, CUHL preferred an appeal against the order before the Income Tax Appellate Tribunal in which the ITAT upheld the capital gains tax demand on CUHL, but rejected the Income Tax Department's demand for interest.

Cairn Energy initiated international arbitration proceedings under the India-UK BIT against the aforesaid measures adopted by the Indian government. It reportedly sought restitution of the value effectively seized by the Income Tax Department in and since January 2014. Cairn's principal claims were that the assurance of fair and equitable treatment and protections against expropriation afforded by the Treaty have been breached by the actions of the Income Tax Department, which had sought to apply punitive retrospective taxes to historical transactions already closely scrutinised and approved by the Government of India.

On March 13, 2015, a draft assessment order was passed by the Assessing Officer against CIL for failure to deduct withholding tax on alleged capital gains arising during 2006 Transaction in the hands of CUHL. The tax demand comprised INR 10247 Crores of tax, and the same amount as interest (approximately USD3.293 billion).

On March 27, 2015, Vedanta UK served a notice of claim against the Government of India under the India-United Kingdom BIT, challenging the tax demand (Vedanta case).

2016-2017: The Treaty proceedings in the Cairn case formally commenced in January 2016. Cairn's submitted its statement of claim in June 2016. In June 2016, India sought a stay on proceedings in Cairn Energy's arbitration, stating that it is "unfair" that India has to defend two cases at once. On October 6, 2016, India filed an application for bifurcation of the proceedings to decide issues of jurisdiction and admissibility of claims. India submitted its statement of defence in February 2017. On March 31, 2017, the International arbitration tribunal rejected the application for 'stay'. On April 19, 2017, the International arbitration tribunal rejected the bifurcation application.

In August 2017, CUHL filed an appeal against the ITAT order before the High Court of Delhi, challenging ITAT's imposition of capital gains tax demand. In October 2017, a cross-appeal was filed by department, challenging ITAT's rejection of the interest demand.

Between 2016 and 2018, during the pendency of the international arbitration proceedings, the Income Tax Department seized and held CUHL's shares in VL for a value of approximately USD 1 billion as a result of which CUHL could not freely exercise its ownership rights over those shares and could not sell them. Further aggravating matters, the Income Tax Department sold part of CUHL's shares in VL to recover part of the tax demand, realising and seizing proceeds of

USD 216 million. It continued to pursue enforcement of the tax demand against CUHL's assets in India. These enforcement actions seizure of dividends due to CUHL worth USD 155 million, and offset of a tax refund of USD 234 million due to CUHL as a result of overpayment of capital gains tax on a separate matter.

Since the Income Tax Department attached and seized assets of CUHL to enforce the tax demand, CUHL pleaded before the International Arbitration Tribunal that the effects of the tax assessment should be nullified, and Cairn should receive recompense from India for the loss of value resulting from the attachment of CUHL's shares in CIL and the withholding of the tax refund, which together total approximately USD 1.3 billion. The reparation sought by CUHL in the arbitration was the monetary value required to restore Cairn to the position it would have enjoyed in 2014 but for the Government of India's actions in breach of the Treaty.

Judgment:

The Indian government has lost an international arbitration case to energy giant Cairn Plc over the retrospective levy of taxes, and has been asked to pay damages worth $1.2 billion (Rs 8,842 crore) to the UK firm. The Permanent Court of Arbitration at the Hague has maintained that the Cairn tax issue is not a tax dispute but a tax-related investment dispute and, hence, it falls under its jurisdiction. It stated that the India's demand in past taxes, was in breach of fair treatment under the UK-India Bilateral Investment Treaty. The verdict has also noted the argument, that the tax demand came up after the Vodafone tax case, which was quashed by Indian courts.

Thereafter, Cairn Energy has filed a case in a US District court to enforce a $1.2 billion (Rs 8,842 crore) arbitration award, ratcheting up pressure on the government to pay its dues.

Source:

1. *https://www.nishithdesai.com/information/news-storage/news-details/article/cairn-v-india-investment-treaty-arbitration.html*
2. *https://www.livemint.com/*

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