

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 23.09.2011

+ WP(C) No. 7592/2009

GOVT. OF INDIA (DEPTT. OF REVENUE) & ANR.

...PETITIONERS

Through: Mr.Sanjeev Sabharwal, Senior
Standing Counsel along with
Mr.D.R.Jain, Advocate.

Versus

APPELLATE AUTHORITY FOR INDUSTRIAL AND FIANCIAL
RECONSTRUCTION & ORS.

..RESPONDENTS

Through: Ms.Maneesha Dhir, Ms.Jayashree
Shukla, Ms.Preeti Dalal,
Ms.Mithu Jain and Mr.Abhirup
Das Gupta, Advocates for R-3 &
R-4.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers
may be allowed to see the judgment? YES

2. To be referred to Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

RAJIV SHAKDHER, J. (ORAL)

1. This writ petition has been filed impugning the orders of the Board of Industrial and Financial Reconstruction ('BIFR' for short) dated 01.03.2007 and that of the Appellate Authority for Industrial & Financial Reconstruction ('AAIFR' for short) dated 23.06.2008.
2. The grievance of the petitioners very briefly is that a provision has been made in the sanctioned scheme whereby the reliefs and concessions have been sought without the Draft Rehabilitation Scheme (in short DRS) being served upon it. The relevant provision which troubles the petitioner is as under:

" 14.3 From Central Govt.

a).....

b) Department of Income Tax

To exempt from provisions of Sections 41(1), 45, 72(3), 43-B, 80 read with Sections 139, 115JB and provisions of Chapter XVII of the Income Tax Act."

3. The brief facts required to decide as to whether the petitioners have a case or not are as follows:
4. Respondent no.3 i.e., Tedco Granites Ltd. (in short TEDCO) which is the sick industrial company, is in the business of manufacturing single super phosphate (fertilizer). The plant for this purpose was set up in 1995. It appears that net worth of TEDCO got eroded, and consequently, a reference was filed with the Board for Industrial & Financial Reconstruction (in short BIFR). TEDCO was declared a sick industrial company on 21.12.2005.
5. Pursuant to the said order of the BIFR, with the help of the operating agency, a DRS was formulated. The DRS was taken up for consideration by the BIFR on 04.12.2006. The said DRS which contained the impugned paragraph i.e. para 14.3 (b), to which we have made a reference hereinabove, was circulated to the concerned authorities on 08.12.2006. The short particulars of the DRS, in accordance with the provisions of Section 18(3)(a) of the Sick Industrial

Companies (Special Provisions) Act, 1985 (in short, SICA) were also published in local newspapers, both in English and in Hindi, on 29.12.2006. The public notice called upon the concerned authorities to submit their views and/or objections to the DRS on or before 19.02.2007.

6. There is no dispute before us that the exercise as mandated under the provisions of SICA was undertaken by the BIFR with the help of concerned authorities which included secured and unsecured creditors including various other authorities. The result of this exercise was that a scheme was sanctioned by the BIFR, on 01.03.2007.
7. Aggrieved by the provision contained in the sanctioned scheme i.e. para 14.3(b), an appeal was preferred by the petitioners with the Appellate Authority for Industrial and Financial Reconstruction (in short AAIFR). The AAIFR vide the impugned judgment dismissed the appeal. In the impugned judgment, the AAIFR has referred to the issue concerning the service of the DRS

and consequent effect it resulted in having vis-à-vis the provision contained in the DRS involving the petitioners. AAIFR briefly concluded that service on the Assessing Officer, Bilwara of the Income Tax Department having not been disputed, the petitioners consent to the provisions contained in the DRS concerning the Income Tax Department would logically follow, since objections if any, to the DRS as mandated under section 19(2) of SICA were not filed within the stipulated 60 days; being a case of deemed consent. Before the AAIFR, TEDCO's stand was precisely this, which is, once a party indicated under section 19(1) of SICA is served with the DRS and objections are not filed within the stipulated period of 60 days, the Scheme is binding against such a party under section 19(2) of SICA. Since the Income Tax Department was served through the Assessing Officer and no objections were filed within the stipulated period, the provisions of the impugned paragraph were binding on the Income Tax Department. The AAIFR vide the impugned judgment accepted the stand of TEDCO and consequently

dismissed the appeal of the petitioners. We may, for the sake of convenience, extract the relevant paragraphs of the order of the AAIFR in that regard.

“...3. We have considered the submissions carefully and have perused the material on record. We find that the BIFR circulated the DRS by its order dated 04.12.2006. It appears from the list of parties attached to the order that originally there were 14 parties including the Assessing Officer, Ward No.3, Income Tax Office, Sastri Nagar, Bhilwara, Rajasthan (S.No.14) to whom the DRS was circulated. Three additions to this list have been made by hand which are as follows:

S.No.15 – Assistant Director, ESIC, Regional Office, New Delhi.

S.No.16 – Dte. Of Income Tax (Recovery), New Delhi.

S.No.17 – Secretary, CBDT, New Delhi

Even if we do not take into account the 3 names added to the list, it cannot be denied that S.No.14 i.e. the Assessing Officer, Ward No.3, Income Tax Office, Sastri Nagar, Bhilwara, Rajasthan was made a party to the proceedings and the DRS was circulated to him by the BIFR vide its order dated 04.12.2006. No averments have been made to the contrary by the Id. counsel for the appellant. However, the argument that has been advanced by the Id. Counsel for the appellant is that as per the CBDT Circular No.683 dated 8.6.1994, the Assessing Officer, Income Tax Office, Bhilwara has no locus standi in the scheme. The Income Tax Office, Bhilwara can only grant income tax

concessions which are permissible under the Income Tax Act, 1961 and cannot grant exemptions from the provisions of Income Tax Act which can only be granted by the CBDT. Therefore, making the Assessing Officer, Bhilwara a party or even serving a copy of the DRS on him cannot be considered to be legal service of the DRS under provisions of Section 19(2) of SICA. Therefore, he argued that BIFR could not have sanctioned the scheme without the consent of the appellant.

4. We are unable to accept the above argument of the Id. counsel for the appellant. The Assessing Officer, Ward No.3, Income Tax Office, Sastri Nagar, Bhilwara, Rajasthan is a part of the Income Tax Department of the Government of India. Therefore, he was aware of the internal circular No.683 dated 8.6.1994 of the IT Department, about the nodality of the appellant's status for coordinating cases before AAIFR and BIFR. The Assessing Officer, Income Tax Office, Bhilwara, therefore, should have promptly sent a copy of the DRS to the appellant which is the nodal authority in this case, intimating about the date of hearing before the BIFR so that the appellant could have appeared before the BIFR on the date of hearing and could have filed its objections and suggestions. Alternatively, Assessing Officer, Income Tax Office, Bhilwara could have appeared before the BIFR and requested the BIFR to issue notice to the appellant as per Circular No.683 dated 8.6.1994 and sought more time for filing of objections by the appellant. The Assessing Officer, Income Tax Office, Bhilwara despite notice chose neither to intimate the appellant nor to appear before the BIFR requesting the BIFR to issue notice to

the appellant or even to seek more time for same purpose. In the circumstances, the argument of the Id. counsel for the appellant that circulation of DRS to the Assessing Officer, Ward No.3, Income Tax Office, Sastri Nagar, Bhilwara, Rajasthan cannot be construed as legal or regular under provisions of Section 19(2) of SICA does not carry any force. As already mentioned, the Assessing Officer, Income Tax, Bhilwara, if he did not have the authority to act in this case, should have intimated the concerned authorities i.e. the appellant to act within the stipulated time under Section 19(2) of SICA. In case more time was required, an extension of time for another 60 days could have been sought under 19(2) of SICA. Considering the above facts and circumstances, we are of the opinion that the circulation of DRS to the Assessing Officer, Ward No.3, Income Tax Office, Sastri Nagar, Bhilwara, Rajasthan is proper service of DRS as per 19(2) of SICA and does not vitiate the proceedings before the BIFR. Since no consent was received within the stipulated period from the appellant, it shall be deemed that consent has been given by the appellant under Section 19(2) of SICA."

8. Learned counsel for the petitioners before us have assailed the said observations of the BIFR. Learned counsel for the petitioners have contended that the reasoning of the AAIFR that service on the Assessing Office would suffice is contrary to the circular issued by the Central Board of Direct Taxes (in short 'CBDT')

bearing no.683 dated 8.6.1994 (in short 'the said circular'). It has been contended before us that the said circular requires the service to be effected on the Director General of Income Tax (Admn.), who is mandated the task of co-ordinating issues concerning the reliefs and concessions sought in the scheme formulated for or on behalf of the sick industrial companies. Learned counsel for the petitioners submitted that no service whatsoever was effected on the petitioners, in particular, on petitioner no.2 i.e. Director General of Income Tax (Admn.). To buttress his submissions, learned counsel for the petitioners have shown us three documents which are appended at pages 134, 205 and 226 of the paper book. Relying on the first document appended at page 134, (which contains a list of parties upon whom the sanctioned scheme dated 01.03.2007 was served) it was contended that the list contains names of 16 entities/persons. Petitioner no.2 i.e., Director General of Income Tax (Admn.) appears at serial no.16. This document, as per submission of learned counsel for the

petitioners, was received by petitioner no.2, while the DRS which was supposedly dispatched to these entities/parties whose names find mention in the list appended at page 205 did not reach the petitioners, even though at serial no.16 and 17 there is a reference made to them. It was pointed out that names of persons/entities from serial no.1 to 14 are typed, while remaining three (3) entries have been made by hand. The learned counsel submit that the extract of the dispatch register of the BIFR would show that only the assessing officer has been served, despite the fact that the mailing list of the DRS appended at page 205 would show that there were other names entered therein by hand, which included the names of the petitioners.

9. Learned counsel for the petitioners further submits that the stand of TEDCO that the service was effected on petitioner no.2 is untenable as would be demonstrable from the document appended at page 226 of the paper book. The said document purportedly is a mailing list which TEDCO appended to its reply filed before the

AAIFR. Annexure 'A' being the mailing list of the DRS contains the names of only 14 parties. The said mailing list ends with reference to the Assessing Officer of the Income Tax Deptt. There is no reference to the petitioners. This mailing list produced by TEDCO before AIFR holds up in sharp contrast to the information contained in the mailing list supplied to the petitioners at the point in time, when they applied for a copy of the DRS. The petitioners list (appended at page 205) as noticed above shows names of three (3) additional entities entered by hand. These three additional entities being : (i). The Assistant Director, ESIC Regional Office, Rajendra Bhawan, Rajendra Place, New Delhi; (ii). Directorate of Income Tax (Recovery), Department of Revenue, 6th Floor, Mayur Bhawan, Connaught Circus, New Delhi-110001; and (iii). The Secretary, C.B.D.T., Department of Revenue, North Block, New Delhi-110001.

9.1 It is the contention of learned counsel for the petitioners that there is apparent dissonance in the two

lists, that is, one appended at page 205 and the other which is annexed at page 226.

10. In view of the aforesaid, learned counsel for the petitioners submits that it is quite clear that there was in fact no service effected on the petitioners. It is submitted that if the said circular is taken into account, a valid service in law would be one in which service is effected on petitioner no.2, if not petitioner no.1. Learned counsel for the petitioners submit that these facts were brought to the notice of the AAIFR which has chosen to give a short shrift to the submissions made on behalf of petitioners. As matter of fact, learned counsel for the petitioners drew our attention to another case involving a different sick industrial company, namely, **Director General of Income Tax Vs. M/s. Shimoga Steels Ltd.**, in Appeal no.307/2007 vide judgment dated 19.09.2008, wherein, an order was passed by the same Bench three (3) months hence whereby, the AAIFR accepted similar submissions made on behalf of the Income Tax Department. AAIFR in the said case came to the conclusion that no valid service was effected on the Income Tax Department as the DRS had not been served on the

Director General of Income Tax (Admn.) It was submitted that the AAIFR in that case proceeded to modify the clause in the sanctioned scheme relating to the Income Tax Department by inserting in the said provision in it, the words 'to consider'; diluting thereby the mandatory direction of the BIFR qua reliefs and concessions to be provided by it.

11. It is in these circumstances, learned counsel for the petitioners state that the order of the AAIFR deserves to be set aside and the matter be remanded to the BIFR. Apart from above, there is also a submission made by learned counsel for the petitioners which is that in any event no reliefs and concessions can be given by the Income Tax Department which are beyond or contrary to the provisions of the Income Tax Act, 1961 (in short the I.T. Act). In this regard, a reference has been made to the provisions of Section 115JB clause (vii). Based on the said provision it is urged, by the learned counsel that the reliefs and concessions which may be made over to a sick industrial company cannot be given beyond the date on which the net worth of the sick industrial company turns positive. It is therefore the submission of the learned counsel for the

petitioners that the issue of reliefs and concessions requires reconsideration by the BIFR.

12. As against this, Ms. Dhir, who appears for TEDCO and its Chairman (i.e., Respondent Nos.3 & 4) submits that the scheme which was sanctioned on 01.03.2007 has been in operation for nearly (four) 4 years. It is her contention that as per the provisions of the sanctioned scheme funds to the tune of nearly Rs.4 crores have been inducted into the sick industrial company. Therefore, the submission of learned counsel for Respondent Nos.3 & 4 was that any tinkering with the sanctioned scheme at this stage, would cause great difficulty for the sick industrial company. It was also submission of learned counsel for Respondent Nos.3 & 4 that while it was not disputed that there was no service effected on petitioner no.2; service was most certainly effected on the Assessing Officer.

12.1 This fact, according to learned counsel for Respondent Nos.3 & 4 cannot be disputed by the petitioners. For this purpose, learned counsel for Respondent Nos.3 & 4 referred to the observations made by AAIFR in the impugned judgment where the counsel for the petitioners accepted the

fact that the service had been effected on the assessing officer. Learned counsel for Respondent Nos.3 & 4 also tried to demonstrate that the change of stand by the petitioners on this account has taken place only in this court. In this regard, Ms. Dhir placed reliance on an inter-departmental letter dated 26.11.2008, whereby purportedly explanation was sought from the concerned Assessing Officer as to why the DRS had not been forwarded to the concerned authority, if it had been served upon him. Ms. Dhir submitted that in reply vide letter date 02.12.2008 the assessing officer took a rather curious stand that he never received the DRS, and in that regard, had placed reliance on the Common Receipt Register of the Financial Year 2006-07 maintained in the General Ward of Income Tax Office, Bhilwara. It was Ms. Dhir's endeavour to show that the stand now taken was contrary to the stand taken before the AAIFR. A reference was made also to the provisions of Section 27 of the General Clauses Act, 1897 & Regulation 13 of the BIFR Regulations, 1987, to buttress her submission that the service on the assessing officer would be deemed as having taken place, after a reasonable period had elapsed from the date of

dispatch of the DRS. Besides this, Ms. Dhir also pointed that the present writ petition impugning the judgment of the AAIFR had been filed nearly eight (8) months after its pronouncement; therefore, any reversal at this stage would impact TEDCO quite severely. Finally, the Learned counsel for Respondent Nos.3 & 4 submits that keeping in mind the aforementioned submissions, the impugned orders ought to be sustained.

13. In support of her submissions, learned counsel for Respondent Nos.3 & 4 cited several judgments. These being: i) Vadilal Dairy International Ltd. v. State of Maharashtra ;(2011) 1 Comp L. J. 466 (Bom.); ii) Karnataka State Financial Corporation v. AAIFR; I (2011) BC 203, iii) Mewar Sugar Mills Ltd. v. Chairman, Central Board of Direct Taxes; Manu/DE/02186/1998, iv) Kotak Mahindra Finance Ltd. v. Mafatlal Industries Ltd; (2004) 122 Comp Case 231 (Bom.), v) Damodar Valley Corporation v. AAIFR; (2010) 156 Comp Case 137 (Delhi) and vi) VDCS Enterprises & Anr. v. UOI & Ors.; 2005 (125) DLT 385.

14. We have heard learned counsel for the parties. In our view, the only issue which arises for our consideration is

whether it could be said that that the petitioners are deemed to have given their consent to the DRS, by virtue of Section 19(2) of SICA, in view of the fact they have not preferred objections to the provisions concerning them within the stipulated period of 60 days.

15. For us to decide this issue it would be important to bear in mind both the provisions of Circular No.683 dated 08.06.1994 issued by the CBDT on which reliance has been placed by the petitioners and the relevant provisions of section 19 of SICA. The relevant portions of the Circular and thereafter provision of Section 19 of SICA are extracted hereinbelow :-

“487. Effect of order passed by Board for Industrial and Financial Reconstruction under scheme for rehabilitation of sick units on determination of losses

1. The Board had issued two circulars, Circular No. 523, dated October 5, 1988 (*Annex I*) and Circular No. 576, dated August 31, 1990 (*Annex II*) in connection with the procedure to be followed in respect of grant of consent by the Central Government in cases involving financial assistance to be given under Direct Tax Laws for rehabilitating sick industries under Sick Industrial Companies (Special Provisions) Act, 1985 (SICA).

2. *While issuing the two circulars, the provisions of section 19(2) of SICA were not considered. According to section 19(2), all parties concerned with giving financial assistance for the rehabilitation scheme should give their consent.*

3. *The Board had withdrawn with immediate effect the above Circular Nos. 523 and 576 vide its letter of even numbers dated 30-12-1993. The said letter to AAIFR and BIFR clarified that each case of fiscal concession of financial assistance under Direct Tax Laws will now be considered in each individual case on merits for the purpose of consent as contemplated in section 19(2) of SICA, 1985 and consent or denial of consent will be conveyed to BIFR by the Central Government. The modal agency for coordination between the Board for Industrial and Financial Reconstruction (BIFR) and, Central Board of Direct Taxes and Appellate Authority for Industrial and Financial Reconstruction (AAIFR) and Central Board of Direct Taxes will be the Director General of Income-tax (Admn.), 7th Floor, Mayur Bhawan, New Delhi-110 001. Cases already decided in accordance with the Circular Nos. 523 and 576 were however, not required to be reopened.*

Circular: No.683 dated 8-6-1994

19(1). Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial

institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

19(2). Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation (or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given).

19(3). Where in respect of any scheme the consent referred to in sub-section (2) is given by every person required by the scheme to provide financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned.

(4). Where in respect of any scheme consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit.

16. A perusal of para 3 of the circular would show that CBDT vide its letter 30.12.1993 had withdrawn its earlier circular bearing no.523 dated 05.10.1988 and circular no.576 dated 31.08.1990. Evidently, the letter dated 30.12.1993 issued to the AAIFR and BIFR clarified that for according financial assistance or giving financial concessions, under Direct Tax Laws, each individual case

would be considered on merits and that consent, if any, would be granted under Section 19(2) of SICA only thereafter. The '**consent or denial of consent**' would be communicated to the AAIFR and/or BIFR by the Central Government. The Nodal Agency for coordination between BIFR and CBDT and between AAIFR and CBDT would be the Director General of Income Tax (Admn.).

17. A reading of the circular thus would convey that the decision on the aspect of reliefs or concessions to be granted can only be communicated by the Central Government. On behalf of the Central Government, it would be the CBDT which would engage with, either the BIFR or the AAIFR, depending on where the case of the sick industrial company was pending; and as between the two authorities i.e., CBDT and the BIFR or the AAIFR and the CBDT, the nodal agency deputed to coordinate the aspect of grant of financial concessions or financial assistance to be given to a sick industrial company would be Director General of Income Tax (Admn.). It cannot be disputed that this circular is in public domain. As a matter of fact, learned counsel for the petitioners quite correctly pointed out to us that this circular

is on the website of the Income Tax Department. That the BIFR was perhaps aware of the fact that the CBDT would be a proper and a necessary party for considering the reliefs and concessions (which the DRS called upon the Income Tax Department to consider) is evident from the list appended at page 205 of the paper book (which is the list containing 17 names enclosed with DRS), where the reference to petitioner nos.1 & 2 is at serial nos.16 & 17. Obviously, there was every intention of the BIFR to serve the petitioners. Learned counsel for Respondent Nos.3 & 4 has not disputed before us that the extract from the Register of Dispatch of the BIFR dated 11.12.2006, at serial no. 1307 reads as 'Assistant Officer, Bhilwara'. We take it that the reference to the Assistant Officer is to the Assessing Officer, who appears at serial no.14, in the list of addressees, appended at page 205 of the paper book.

18. The fact remains that there is no proof of dispatch to the petitioner nos.1 or 2, who are referred to at serial nos.16 and 17 in the list appended at page 205. As a matter of fact, at serial no.1313, there is a reference to ESIC (illegible) Delhi. Interestingly the Assistant Director, ESIC is referred

to at serial no.15, in the list appended at page 205 to the paper book. Therefore, while ESIC was served, the fact remains that neither petitioner no.2 i.e., Director General of Income Tax (Admn.) nor the Secretary, CBDT, who are shown at serial nos.16 and 17 respectively in the list appended at page 205 of the paper book, are shown as in the list of addressees in the dispatch register of the BIFR. Therefore, there can be two possibilities, (as been put forth by the petitioners) either the entries against serial nos. 16 and 17 in the list attached at page 205 of the paper book, which is the list enclosed with DRS dated 04.12.2006, were made subsequent to the dispatch or, that the said two addressees i.e., petitioner no.2/Director General Income Tax (Admn.) and Secretary, CBDT were inadvertently not served by the BIFR.

19. In our view, this would be fatal insofar as the sick industrial company is concerned as, party cannot be mulcted with the consequence of a deemed consent unless service of the DRS is effected on the designated authority in terms of the circular dated 683 dated 08.06.1994.

20. As to why service on the designated authority indicated in the circular is crucial before one could say that the sanctioned scheme would be binding on the Income Tax Department, is quite apparent on a bare reading of the provisions of section 19 of SICA.

20.1 A perusal of the provisions of section 19 of SICA would show that where the Central Government is to provide financial assistance in the form of reliefs and concessions its consent, is mandatory. Where Central Government proposes not to give its consent, it is required to file its objection within sixty (60) days of the date of circulation of the DRS or such further period not exceeding sixty (60) days, which the BIFR may allow, failing which it shall be deemed that Central Government has given its consent. The Central Government is not defined in SICA. The Central Government being an amorphous body has by virtue of the said circular appointed a '**nodal agency**', in other words, an agent to act for and on its behalf in matters concerning financial assistance and concessions under the Direct Tax Laws. There is no provision under the Income Tax Act for according such consent. Therefore, the two statutes are required to be read

harmoniously in order to avoid a conflict. Harmonious construction would have us hold that not only is the consent mandatory, but that, it has to be of an authorized person acting within the ambit of his authority. The limits of such an authority vested in an agent would be defined by the mandate of its principal, which in any event, cannot go beyond the statute of which it is a creature where the statute seeks to define the limit. A Division Bench of this court in WP(C) No.6674/2001 titled as Government of India (Department of Revenue) Vs. Appellate Authority For Industrial and Financial Reconstruction and Ors. vide its judgment dated 18.03.2002 has gone further by holding that before consent is sought, the DRS should quantify the extent of reliefs and concessions to be provided to a sick industrial company. We respectfully reiterate the said view.

20.2 It is pertinent to note that the manner in which sub-section (3) of section 19 of SICA is structured, it is quite possible that BIFR may not sanction a scheme even after a consent, deemed or otherwise, is obtained of entities referred to in sub-section (1) of section 19. Where consent is not given, BIFR has various options depending on the facts

and circumstances obtaining in a case including winding up of a sick industrial company. [see *Oman International Bank S.A.O.G. v. AAIFR*, (2010) 157 CompCas 149 (Delhi)].

21. Since we have taken the aforesaid view, we are really not called upon to consider the submission made by the petitioners that the Assessing Officer was not served in the matter. We may only note that this plea was taken, as noted above, after an inter-departmental letter had been issued on 26.11.2008 calling upon the officer concerned to explain his conduct. It is only thereafter that, once again, by way of an inter-departmental communication, the petitioners were told that there was no service effected on the assessing officer of the DRS dated 04.12.2006. These letters dated 26.11.2008 and 02.12.2008 have been filed by the petitioners admittedly for the first time with the writ petition; which is why there is no reference to the said letters in the impugned judgment of the AAIFR.

22. We may also note at this stage that the impugned judgment which was passed nearly three (3) months prior to the judgment of the AAIFR dated 19.09.2008, Shimoga Steels Ltd. (*supra*) by the same Bench would not reflect on the

bench inasmuch as the order passed in ***Shimoga Steels Ltd.*** though by the same Bench is latter in point of time. The Bench in Shimoga Steels Ltd may have, after hearing learned counsel for the parties, taken a view which was supportive of the stand adopted by the Income Tax Department. It is quite possible that the earlier view was not brought to the notice of the bench. However, this aspect of the matter need not detain us any further as we have already indicated that, in our opinion, the only entity which could have engaged with the BIFR was the Director General of Income Tax (Admn.) and therefore service had to be effected accordingly. We may only observe for the future that both the AAIFR and the BIFR should keep this in vital aspect in mind while seeking response to reliefs and concessions proposed to be given to a sick industrial company under the Direct Tax Laws.

23. It is precisely for this reason that the judgments cited by learned counsel for Respondent Nos.3 & 4 do not require to be discussed as none of them deal with point in issue raised before us.

24. We may only note that there is an observation in para 21(4) of the judgment of a Division Bench of this Court in the

case titled Mewar Sugar Mills Ltd. v. Chairman, Central Board of Direct Taxes and Anr. to the effect that the DRS ought to be circulated to the Director General of Income Tax (Admn.) for seeking his consent under the Direct Tax Laws.

25. Before we conclude, we may notice the submission made on behalf of the petitioners that by virtue of provisions of clause (vii) of Section 115 JB (1), the sick industrial company could not have got benefit beyond the assessment year in which its net worth turned positive.

26. We may only observe that Section 115 JB(1) is a special provision whereby under the Income Tax Act, zero tax companies are taxed on the basis the book profits. In arriving at the book profits of such companies, the provisions given in explanation (1) of the aforementioned Sections are required to be adhered to. The expression book profits as defined means net profits as shown in the profit and loss account for the relevant previous year prepared under Sub-Section (2) as increased by the provisions contained in (a) to (i). There is also a provision for reduction of the profits shown in the profit and loss account by virtue of provisions contained in explanation (1) of Section 115JB under clauses (i) to (viii).

Therefore, as to what would be impact of these provisions will have to be considered by the BIFR, while dealing with paragraph 14.3(b) of the sanctioned scheme. We do not propose to comment on the same at this point in time as no ground admittedly has been taken in the writ petition pertaining to this aspect of the matter.

27. We may only note that it is not disputed on behalf of the respondent that as on 31.03.2009, the net worth of the sick industrial company turned positive. In these circumstances, the best course, in our considered view, keeping the interest of both parties in mind; would be to set aside the impugned judgments of the AAIFR and the BIFR, and remand the matter to the BIFR for the limited purpose of re-considering the provisions of the impugned paragraph 14.3 (b) of the sanctioned scheme.

28. We order accordingly. For this purpose, the parties along with their authorized representative shall appear before the BIFR on 10.10.2011. The BIFR shall consider the issue after hearing the submissions of both the sides and pass an order within a period of six (6) weeks from the date

of receipt of a copy of this order. A copy of this order be also sent expeditiously to the BIFR and the AAIFR.

29. With the aforesaid observations, the writ petition stands disposed of.

SANJAY KISHAN KAUL, J.

SEPTEMBER 23, 2011
DM/yg

RAJIV SHAKDHER, J.