

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****COMPANY SCHEME PETITION NO. 137 OF 2014**
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 609 OF 2013.

Casby CFS Pvt. Ltd.

...Petitioner/
Transferor**AND****COMPANY SCHEME PETITION NO. 138 OF 2014**
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 610 OF 2013.

Casby Logistics Pvt. Ltd.

...Petitioner/
Transferee

Mr. Virag Tulzapurkar, Senior Advocate, along with Ms. Alpana Ghone and Mr. Amit Naik, instructed by M/s. Naik Naik & Company, for the Petitioners.

Mr. Shyam Mehta, Senior Advocate, along with Ms. S. V. Bharucha, for the Regional Director.

CORAM: S.J. KATHAWALLA, J.
Judgment reserved on: 24th December, 2014
Judgment pronounced on: 19th March, 2015

JUDGMENT:

1. Sanction of this Court is sought under Section 394 of the Companies Act, 1956 ("the Act") in respect of a scheme of amalgamation between Casby CFS Private Limited ("Transferor") and Casby Logistics Private Limited ("Transferee") and their respective shareholders, whereunder the entire business and the whole of the undertaking of the Transferor shall stand transferred to and vest in the Transferee with effect from the appointed date in terms of the scheme proposed by the Petitioners.

2. The Transferor was incorporated on 7th March 2006, and has been carrying on the business of setting up a container freight station. The

Transferee was originally incorporated on 9th December 1998, under the name Cassinath Shipping Private Limited. The Registrar of Companies issued a fresh certificate of incorporation on 17th April 2001, changing the name of the Transferee to its present name. The Transferee has been carrying on the business of logistics and port services across India.

3. According to the Petitioners, the rationale behind the proposed amalgamation is restructuring of the Casby group. The proposed amalgamation will reduce the shareholding tiers and rationalize investments in the Casby group. Further, the proposed amalgamation would result in improved organizational capability and leadership, strong financial structure to all creditors of the Transferor and the Transferee, lower cost of borrowing, increase operational efficiency, economies of scale, standardization and simplification of business processes, productivity improvement, elimination of duplication and streamlining administrative expenses. The interest of the various stakeholders will be secured and unaffected by the proposed amalgamation.

4. The Board of Directors of the Transferor vide their resolution dated 7th October, 2011, approved the scheme of amalgamation. The Board of Directors of the Transferee also vide their resolution dated 7th October, 2011, approved the scheme of amalgamation. The Transferor and the Transferee filed Company Summons for Directions in this Court. The same were dismissed for default by an order dated 3rd February, 2012, for non-removal of office objections/want of prosecution. Thereafter the Transferor and the Transferee filed Company Applications bearing Nos. 247 and 248 of 2013 seeking setting aside of the order dated 3rd February, 2012, and for restoration of Company Summons for Directions. By an order dated 20th June 2013, passed in Company Application Nos. 247 and 248 of 2013, the order of dismissal was set aside and the Company Summons for Directions were restored.

5. The Company Summons for Direction bearing No. 609 of 2013 was filed by the Transferor. The Transferee too filed Company Summons for Direction bearing No. 610 of 2013. By orders dated 16th August, 2013, the Company Summons for Direction were disposed of. The Transferor filed Company Scheme Petition No. 137 of 2014 seeking sanction of this Court to the scheme of amalgamation. The Transferee too filed Company Scheme Petition No. 138 of 2014 seeking sanction of this Court to the scheme of amalgamation. Both the Petitions were admitted by this Court by its order dated 21st March, 2014.

6. The concerned Income Tax Officer for the Transferor and the Transferee Companies called upon the Companies to furnish certain information and documents by a letter dated 2nd April, 2014. The Regional Director also issued a letter dated 9th May, 2014, requesting the Petitioners' Advocates to provide the information to the concerned Income Tax Officer as sought by him. The Advocate for the Petitioners informed the Regional Director on 9th June, 2014 that the Petitioners had provided to the aforesaid Officer all information sought by him. The Office of the Official Liquidator filed its Report on 16th July 2014, inter alia stating that the scheme was not prejudicial to the interest of the creditors. The Office of the Regional Director filed its affidavit dated 26th August 2014 ("first affidavit") raising six objections. The Transferee filed an affidavit in reply dated 27th August 2014 ("first affidavit in reply") to the issues raised in the first affidavit of the Regional Director. The Regional Director filed a further affidavit dated 25th September 2014 ("second affidavit") raising further issues. The Transferee filed its affidavit in reply dated 7th November 2014 ("second affidavit in reply") to the second affidavit filed by the Regional Director. The final hearing of the above Petitions commenced on November 2014.

7. As more particularly set out hereinafter, since it was argued on behalf of the Regional Director that the idea of the Petitioners behind propounding the above scheme is inter alia to obtain sanction of this court to the scheme

with the appointed date of 1st April, 2008, and thereafter to file revised Income Tax returns in violation of Section 139 (5) of the Income Tax Act and the whole purpose of fixing a retrospective appointed date is to defeat the income tax demands and assessment proceedings either in progress or completed and the retrospective appointed date is nothing but a device to defeat the provisions of the Income Tax Act, particularly Section 139 (5), and the scheme therefore needs to be rejected, this Court directed the Regional Director to contact the Income Tax Department and to seek their views on the objections of the Regional Director. The Income Tax Department by its letters dated 3rd December 2014 addressed to the Regional Director informed the Regional Director that they were supporting the views/stand taken by the Regional Director. The said letters received from the Income Tax Department were placed before this Court by the Regional Director along with another further affidavit dated 4th December, 2014 ("third affidavit"). This affidavit was filed after the hearing had commenced. The Petitioners did not file and affidavit in reply to the third affidavit.

8. It is submitted on behalf of the Regional Director that the Petitioners have suppressed certain material facts from this Court, have made false and misleading statements and have also taken stands which are contradictory and inconsistent. It is inter alia submitted on behalf of the Regional Director that a false and misleading statement is made by the Petitioners in the Scheme to the effect that the Transferor was a wholly owned subsidiary of the Transferee with effect from 1st April, 2008, pursuant to the Share Purchase Agreements executed in the years 2008 and 2009. A contradictory statement is made in the affidavit in reply to the effect that the Transferor became the wholly owned subsidiary of the Transferee on 7th April, 2008.

9. It is pointed out on behalf of the Regional Director that the entire submission advanced on behalf of the Petitioners that the Transferee is the beneficial owner of the shares held in the Transferor by its shareholders and

therefore the Transferor is a subsidiary of the Transferee since 1st April, 2008 or 7th April, 2008 is false and incorrect and this is clear from the following:

9.1 On 1st April, 2008, the issued and paid up capital of the Transferor was Rs. 1,00,000/- comprising of 10,000 equity shares of Rs. 10/- each. These equity shares were held by the following persons:

(a) Mr. R.K. Byramjee : 5000 shares

(b) Mrs. M.K. Byramjee : 5000 shares

9.2 On 1st April, 2008, a Share Purchase Agreement ("2008 SPA") between the Transferor, Mr. R.K. Byramjee and Mrs. M.K. Byramjee was executed. Under this SPA, Mr. R.K. Byramjee and Mrs. M.K. Byramjee agreed to transfer their respective shareholdings in the Transferor to the Transferee in the manner and on the terms and conditions stipulated therein. The said SPA provides that the shares of the Byramjees were to be transferred to the Transferee on the closing date and on fulfillment of certain conditions precedent. The Petitioners have not stated in their pleadings as to when the transaction contemplated in the SPA was completed resulting in the Transferee becoming the beneficial owner of the shares of Byramjees. In fact, recital "H" of the Share Purchase Agreement dated 1st April 2009 ("2009 SPA") expressly states that the transaction contemplated by the 2008 SPA had not been completed. It is therefore clear that even as on 1st April, 2009, the Transferor was not the beneficial owner of the shares of the Byramjees.

9.3 On 7th April, 2008, additional 9,22,460 equity shares of the face value of Rs. 10/- each of the Transferor were issued and allotted to the following persons:

(a) M. Dinshaw & Co. Pvt. Ltd. : 2,50,000 shares

(b) K.B. & Sons (Agency) Pvt. Ltd. : 2,50,000 shares.

(c) Casby Logistics Pvt. Ltd. : 4,72,460 shares.

9.4 The balance-sheet of the Transferor as at 31st March, 2008, shows that the share application money for the shares issued and allotted to M. Dinshaw

and K.B. & Sons was paid by M. Dinshaw and K.B. & Sons themselves. It is not as if the share application money was paid or received by or on behalf of the Transferee. It is therefore clear that the investment by M. Dinshaw and K.B. & Sons in the shares of the Petitioner was on their own account.

9.5 On 1st April 2009, another Share Purchase Agreement between the Transferor, Transferee, the Byramjees, M. Dinshaw & Co. and K.B. & Sons was executed. Under this SPA, K.B. & Sons and M. Dinshaw agreed to sell their respective shareholdings in the Transferor to the Transferee in the manner and on the terms and conditions stipulated therein. This SPA also provides that the shares were to be transferred on the closing date and on fulfillment of certain conditions precedent. The Petitioners have not stated in their pleadings as to when the transaction contemplated under this SPA was completed resulting in the Transferee becoming the beneficial owner of the shares of K.B. & Sons and M. Dinshaw.

9.6 The balance-sheets of M. Dinshaw for the years ending 31st March, 2009, 31st March, 2010 and 31st March, 2013, show that M. Dinshaw had subscribed to the shares of the Petitioner on its own account and had paid for the same on its own behalf. There is no mention that this amount was paid on behalf of the Transferee nor is there any statement to the effect that the beneficial owner of the said shares was the Transferee. The balance-sheets also do not reflect any kind of arrangement between M. Dinshaw and the Transferee in respect of the said shares which would suggest that the latter was the beneficial owner of the shares.

9.7 The balance-sheet of the Transferee as at 31st March, 2012, shows an investment only in 4,72,460 shares of the Transferor. There is no mention that the Transferee is the beneficial owner of any other shares of the Transferor. Nor is there any mention of any arrangement with either M. Dinshaw or K.B. & Sons in respect of any shares of the Petitioner suggesting that the Transferee was the beneficial owner of the shares.

9.8 Form 2 filed by the Transferor on 9th September 2009 i.e. the return of allotment shows the shareholders of the Transferor as the Transferee, M. Dinshaw and K.B. & Sons and does not state that the Transferee was the beneficial owner of the said shares held by M. Dinshaw and K.B. & Sons.

9.9 On 11th August, 2008, a further 4,00,000 equity shares of the face value of Rs. 10/- each of the Transferor were issued and allotted to K.B. & Sons.

9.10 On 7th October, 2011, the Board of Directors of the Transferor and the Transferee approved the scheme. As mentioned hereinabove, in November 2011, the Transferor and the Transferee filed Summonses for Directions in respect of the said scheme and subsequently filed Company Scheme Petitions for sanction of the scheme in this Court.

9.11 As on 31st March, 2013, the share capital of the Transferor was held as follows:

(a) Transferee	: 4,72,460
(b) M. Dinshaw & Co. Pvt. Ltd.	: 2,50,000
(c) K.B. & Sons	: 6,00,000
(d) Mr. R.K. Byramjee	: 5,000
(e) Mrs. M.K. Byramjee	: 5,000

9.12 After the Summonses for Direction Nos. 609 and 610 of 2013 were filed by the Transferor and the Transferee in July 2013, on 24th July 2013, the Transferor filed two Form 20Bs i.e. the annual returns for the years ending 31st March, 2011 and 31st March, 2012. Along with these forms, the Transferor filed annexures containing details of its shareholding pattern. In these annexures it was stated for the first time that M. Dinshaw & Co., K.B. & Sons, Mr. R.K. Byramjee and Mrs. M.K. Byramjee held the shares as nominees of the Transferee.

9.13 On 28th July, 2013, the Transferor filed three Form 22Bs with the Registrar of Companies in respect of the shareholdings of Mr. R.K. Byramjee,

Mrs. M.K. Byramjee, M. Dinshaw & Co. and K.B. & Sons. In these forms it was stated that the beneficial interest in the shares held by the aforesaid persons in the Transferor vested in the Transferee. The Form 22B filed in respect of the shares of the Byramjees stated that the beneficial interest in respect of their shares vested in the Transferee on 1st April 2008. The same statement was made by the Byramjees in the declarations filed along with the form. As far as the other two Form 22Bs filed in respect of the shares of M. Dinshaw and K.B. & Sons and the declarations of M. Dinshaw and K.B. & Sons filed along with the same are concerned, the same stated that the beneficial ownership of the shares of M. Dinshaw and K.B. & Sons vested in the Transferee on 7th April 2008. The statements made in the above three Form 22Bs and the declarations filed along with the same were contrary to the factual position as borne out from the facts referred to above.

10. It is therefore submitted on behalf of the Regional Director that the above facts establish that the Petitioners have made false and incorrect statements in the Petition/Scheme that the Transferee is the beneficial owner of the shares in the Transferor since 1st April 2008/7th April 2008 and therefore the Transferor became the wholly owned subsidiary of the Transferee on 7th April 2008 and consequently the entire basis for fixing the appointed date on 1st April 2008 was fallacious. It is submitted that under Section 187C (4) of the Act (which was applicable at the relevant time), Form 22B was required to be filed by the Transferor with the Registrar of Companies within 30 days from the date of receipt of the declarations under sub-Sections (1) and (2) of Section 187C of the Act. In the instant case, the said Form 22Bs in respect of the purported declarations dated 1st and 7th April 2008 were filed by the Transferor only on 28th July, 2013. It is submitted that in the light of the facts on record, and the filing of Form 22Bs belatedly on 28th July 2013, it is proved that the beneficial ownership in respect of the shares of the Byramjees, M. Dinshaw and K.B. & Sons did not vest in the Transferee either

on 1st or 7th April, 2008 as alleged by the Petitioners. It is therefore submitted on behalf of the Regional Director that the purported declarations dated 1st April 2008 filed by the Byramjees and the purported declarations dated 7th April, 2008 filed by the Transferee, M. Dinshaw and K.B. & Sons with the Transferor are false and do not reflect the correct position.

11. It has been argued by the Petitioners that Section 187C provides for the consequences of not filing Form 22B and/or of the delayed filing thereof and that those are the only consequences which will flow from the non-filing and/or delayed filing of Form 22B. Consequently, the same will not invalidate the transaction or arrangement under which the beneficial ownership of the shares vested in the Transferee. It is also argued by the Petitioners that the only obligation of the Transferee, the Byramjees, M. Dinshaw and K.B. & Sons was to file declarations with the Transferor, which they did and that the default on the part of the Transferor in not filing Form 22Bs in time cannot prejudice them. It is further submitted on behalf of the Petitioners that the Transferee, the Byramjees, M. Dinshaw and K.B. & Sons cannot be penalized for the default of the Transferor in filing Form 22Bs within the stipulated period as they had no control over the Transferor. It is further argued that in any event M. Dinshaw and K.B. & Sons have accepted and consented to the Scheme being sanctioned and have thereby affirmed the said transaction and consequently there is no question of going behind the same in these proceedings. It was also argued by placing reliance on Section 611 of the Act, that it was always open to the Petitioners and the shareholders of the Transferor to file documents belatedly by payment of additional fees. The Petitioners relied on the decision of the Apex Court in the case of *BOI Finance v. Custodian and others*¹ in support of their contention that where the statute

1 AIR 1997 SC 1952

provides for the consequence of any breach or default, only that consequence, and no other, follows and that accordingly there was no question of invalidating the transfer for the late filing of Form 22B.

12. In answer to the submissions of the Petitioners, the Regional Director submits that Form 22B is not and cannot be proof of the existence of an arrangement between the Transferee on the one hand and the Byramjees, M. Dinshaw and K.B. & Sons on the other, under which the Transferee became the beneficial owner of the shares. Form 22B is filed only for the purpose of notifying the world at large about the pre-existing arrangement under which the legal ownership of the shares vests in one person and the beneficial ownership thereof vests in another. He submits that if the underlying arrangement is non-existent, Form 22B will not create such an arrangement. With regard to the purported declarations of the Transferee Company, the Byramjees, M. Dinshaw and K.B. & Sons, the Regional Director submits that there is no proof that the same were in fact filed with the Transferor Company, as alleged by the Petitioners. Even otherwise, the same are contrary to the facts on record. It is further submitted by the Regional Director that it does not lie in the mouth of the Transferee to say that the Transferee cannot be penalised for the default of the Transferor in duly filing the Form 22Bs inasmuch as it is the case of the Transferee Company that the Transferor was its wholly owned subsidiary with effect from 1st/7th April 2008 and as such, the Transferee could very well have caused the said forms to be filed by the Transferor within the stipulated period.

13. From the facts pointed out by the Regional Director, which are narrated hereinabove, more particularly from the 2008 SPA, recital (H) of the 2009 SPA and the balance-sheets filed by the Transferor and Transferee, it prima facie appears that the Transferee was not the beneficial owner of the shares of the Transferor with effect from 1st/7th April 2008. As correctly submitted by the

Regional Director, the mere filing of Form 22B does not establish or prove that the beneficial ownership of the shares vested in the Transferee, as Form 22B is filed only for the purpose of notifying the world at large about the pre-existing arrangement under which the legal ownership of the shares vests in one person and the beneficial ownership of the same shares vests in another. There must be a pre-existing and underlying arrangement under which the beneficial ownership of the shares vest in the Transferee, which has not been shown to exist in the present case. In fact, the record clearly suggests the contrary. The argument that the only obligation of the Transferee, the Byramjees, M. Dinshaw and K.B. & Sons was to file declarations with the Transferor which they purportedly did and that the default on the part of the Transferor in not filing the Form 22Bs cannot prejudice them is also difficult to accept i.e. in the absence of any underlying arrangement under which the beneficial ownership of the shares vest in the Transferee and as stated hereinabove more so when the record clearly suggests the contrary. To put it in other words, the said declarations prima facie appear to be ante dated. The argument that the Transferee, the Byramjees, M. Dinshaw and K.B. & Sons, cannot be penalized for the default of the Transferor in filing the Form 22Bs within the stipulated period as they had no control over the Transferor also cannot be accepted particularly in view of the fact that the Transferee claims to be the only shareholder of the Transferor with effect from 1st/7th April, 2008. If the Transferor was in fact the wholly owned subsidiary of the Transferee with effect from 1st/7th April 2008, the Transferee could very well have caused the Form 22Bs to be filed within the stipulated period by the Transferor. In view of the aforesaid facts, the arguments of the Petitioners on the basis of Section 187C and Section 611 (2) of the Act are of no avail and the decision of the Hon'ble Supreme Court in the case of *B.O.I. Finance Ltd. vs. Custodian and others* (supra) will not be of assistance to the Petitioners.

14. However, this Court enquired from the Learned Senior Advocate appearing for the Regional Director regarding the benefit that the Petitioners would receive through the scheme by making an incorrect statement that the Transferee was the beneficial owner of the entire shareholding in the Transferor Company since 1st/7th April 2008. The Learned Senior Advocate for the Regional Director stated that it appears that the object of the scheme was to evade paying capital gains tax on the sale/transfer of shares by the Byramjees, M. Dinshaw and K.B. & Sons to the Transferee which would have accrued in the event of the said shares being transferred to the Transferee in the normal and ordinary manner. However, by resorting to the device of beneficial ownership, the necessity of selling/transferring the shares was sought to be avoided and the Transferee sought to become the owner of the said shares without effecting any such transfer. Under the scheme the said shares were being cancelled on the basis that the Transferee was the beneficial owner thereof.

15. It is further pointed out on behalf of the Regional Director that apart from evading capital gains tax, it appears that the scheme is devised to evade payment of income tax by the Transferee. In this regard attention is drawn to Section 56(2)(viiia) of the Income Tax Act which inter alia provides that the receipt of shares of a Company by another Company without consideration will be treated as income in the hands of the latter, the income to be computed in the manner provided therein. It is submitted that by virtue of the device of beneficial ownership and the scheme, the Transferee is acquiring the shares of the Byramjees, M. Dinshaw and K.B. & Sons without any consideration. This transaction accordingly clearly attracts the provisions of Section 56(2)(viiia) thereby making the Transferee liable to pay income tax on the assumed consideration computed in accordance with the aforesaid Section.

16. In response it was contended by the Petitioners that if at all capital gains tax was payable, it would be payable by the Byramjees, M. Dinshaw and K.B.

& Sons, all of whom were not involved in the scheme of amalgamation and therefore the aforesaid submission of the Regional Director was irrelevant. The Regional Director has explained that the Byramjees, M. Dinshaw and K.B. & Sons cannot be said to be persons who are not involved in the scheme. They are all shareholders of the Transferor. Further their shares are being cancelled under the scheme. They are therefore clearly involved in the scheme. It is submitted that even assuming for the sake of argument that the Byramjees, M. Dinshaw and K.B. & Sons are not involved in the scheme, it is enough for the Regional Director to show that the motive behind the scheme is to evade capital gains tax. Merely because the persons evading capital gains tax may not be involved in the scheme itself will not legitimize the scheme.

17. The Learned Senior Advocate appearing for the Petitioners has submitted that aforesaid issues pertaining to fixing of the liability qua payment of income tax and capital gains may independently be decided by the tax authorities. In my view, the Learned Senior Advocate of the Petitioners is right and the aforesaid issues as regards the liability, if any, of the Petitioners and their shareholders, towards payment of capital gains tax as well as income tax can be left to the tax authorities to be decided in accordance with the applicable laws at the appropriate stage without being influenced by the observations made herein.

18. It is next submitted on behalf of the Regional Director that the scheme provides that the appointed date means 1st April 2008. This is the date on which the amalgamation of the Transferor with the Transferee is to take effect. In other words, it is on this date that the Transferor will be deemed to have merged with the Transferee. It will not be out of place to mention here that during the course of arguments, the Petitioners submitted that they were agreeable to have the appointed date as 1st April 2009. It is submitted on behalf of the Regional Director that upon merger of one Company with

another, the balance sheet of the Transferee is usually revised and restated in order to reflect the transfer of assets and liabilities of the Transferor. The revision and restating of the balance sheet of the Transferee will have to be carried out from the date the merger takes effect. Accordingly in the instant case, in the event of the scheme being sanctioned with the appointed date of 1st April 2008, the Transferee will revise and restate its balance sheet for the period from 1st April, 2008 onwards. As a corollary to this, the Transferor and Transferee Companies will both file revised Income Tax Returns giving effect to the amalgamation. It is submitted that the filing of revised returns is governed by the provisions of Section 139 (5) of the Act. It is well settled that a revised Income Tax Return can be filed only if the conditions stipulated in Section 139 (5) are satisfied viz. (i) that the assessee discovers any omission or wrong statement in the Income Tax return already filed and (ii) the revised Income Tax return is filed before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier. It is only when both these conditions are fulfilled that an assessee is entitled to file revised Income Tax Returns. In support of this submission, the Regional Director has relied on the decisions in (I) *CIT vs. A. Sreenivasa Pai*², (ii) *Golden Insulation & Engineering Ltd. vs. CIT*³, (iii) *F.C. Agarwal vs. CIT*⁴, (iv) *Sulemanji Ganibhai vs. CIT*⁵, (v) *CIT vs. J.K.A. Subramania*

2 (2000) 242 ITR 29 (Ker) para 12.

3 (2008) 305 ITR 427 (Del) para 14

4 (1976) 102 ITR 408 (Gau), paras 28 and 30

5 (1980) 121 ITR 373 (MP)

*Chettiar*⁶. It is submitted that if the scheme is sanctioned as it stands, it will amount to this Court permitting the Petitioners to file revised Income Tax Returns for the period from and after 1st April 2008 since this is the corollary to the approval of a retrospective appointed date covering previous assessment years. It is submitted that this would be violative of Section 139 (5) of the Income Tax Act inasmuch as the revised Income Tax returns will clearly not be filed on the basis of the discovery of any omission or wrong statement nor will they be filed within the period stipulated. It is submitted that it is obvious that the whole purpose of fixing a retrospective appointed date in this case is to defeat the pending or completed Income Tax assessments by filing revised Income Tax returns for the assessment years in which the assessment is either in progress or complete.

19. It is therefore submitted that the retrospective appointed date is nothing but a device to defeat the provisions of the Income Tax Act, particularly Section 139(5) thereof. In support of the submission that if the scheme is found to be violative of any law, the Court will refuse to sanction the same and that the Court has no power to sanction something which parties could not do by agreement, the Learned Senior Advocate appearing for the Regional Director has relied on the decision of the Hon'ble Supreme Court in the case of *Hindustan Lever vs. State of Maharashtra*⁷ and the decision of the Gujarat High Court in *Navjivan Mills vs. Kohinoor Mills*⁸.

6 (1977) 110 ITR 602 (Mad) para 15

7 (2004) 9 SCC 438, paras 9, 10, 11 and 12

8 (1972) 42 Comp Cas 265 (Guj.)

20. It is next submitted on behalf of the Regional Director that the contention that by fixing a retrospective appointed date, the Petitioners are clearly seeking to file revised Income Tax returns without satisfying the conditions stipulated under Section 139 (5) of the act is fortified by clause 6.2.1 of the Scheme which expressly permits the Transferee inter alia to file revised Income Tax returns and that too notwithstanding the expiry of the statutory period for filing such returns. Clause 6.2.1 of the scheme is reproduced hereunder:

“6.2.1 Upon this Scheme becoming effective, the Transferee is expressly permitted to revise and file its income tax returns and other statutory returns, including tax deducted at source returns, services tax returns, excise tax returns, sales tax and value added tax returns, as may be applicable and has expressly reserved the rights to make such in its returns and to claim refunds or credits, etc, if any. Such returns may be revised and filed notwithstanding that the statutory period for such revision and filing may have lapsed.”

21. It is submitted that the aforesaid clause 6.2.1 clearly shows that the Petitioners by the device of the scheme planned to file revised Income Tax returns in breach of Section 139 (5) of the Act. What is worse is that the Petitioners are seeking the sanction of this Court to perpetuate such an illegality.

22. As set out hereinabove, during the course of the hearing this Court orally directed the Regional Director to enquire with the Income Tax Department as to whether the Department supported the objections of the Regional Director. In response to the enquiry of the Regional Director, the Income Tax Department issued two separate letters dated 3rd December 2014 in respect of the Transferor and Transferee Companies which have been placed on record by the Regional Director by filing the third Affidavit. In the aforesaid letters, the Income Tax Department has inter alia pointed out certain facts with

regard to the pending assessments of the Transferor and the Transferee Companies. It has been pointed out that the Transferee has concealed income in respect of certain assessment years and that the Income Tax Department has raised demands under Section 271 (1) (c) of the Act. The total tax demanded from the Transferee in respect of the Assessment Years 2006-07, 2008-09, 2010-11, and 2011-12 is Rs. 2,94,81,414/- and the total tax demanded from the Transferor in respect of the Assessment Years 2009-10 and 2010-11 is Rs. 1,11,95,826/-. The Income Tax Department has confirmed the objections of the Regional Director and also stated that the Petitioners are not entitled to file revised Income Tax returns.

23. In response, the Petitioners have submitted that the only purpose of the appointed date is to identify the assets and liabilities of the Transferor that are to be transferred to the Transferee and to notify the shareholders of the same. The same is necessary in order to facilitate the shareholders who are voting on the scheme of amalgamation to decide what assets and liabilities are being transferred under the scheme of amalgamation. Also, the appointed date is relevant for the purposes of fixing the share valuation/share exchange ratio, as such valuation is made with reference to the assets and liabilities as on a particular date (the appointed date) and such date cannot be a prospective date but necessarily has to be an antecedent date. It is also contended that there can never be a prospective appointed date inasmuch as it is not possible to identify the assets and liabilities of a Company in future.

24. Relying on the decision of the Hon'ble Supreme Court in the case of *Miheer H. Mafatlal vs. Mafatlal Industries Ltd.*⁹ it is submitted that the role of the Company Court under Section 394 of the Act is limited to being

9 1997 (1) SCC 579 at page 601

supervisory in nature. The Company Court ought not to act as a Court of Appeal and substitute its views in place of the commercial wisdom of the shareholders.

25. It is further submitted on behalf of the Petitioners that the scheme of amalgamation is a voluntary agreement between the parties viz. the shareholders and the Company. So long as the scheme of amalgamation does not contravene any provision of law, the Company Court should not interfere with the commercial wisdom of the shareholders. The Regional Director has not relied on any provision of law or any decision of any Court which states that an appointed date in respect of a scheme of amalgamation cannot be an antecedent date. It is submitted that there is no legal bar to the appointed date being an antecedent date under the Act. In the absence of a bar under the Act, the shareholders of the Companies were free to choose any date as an appointed date in their commercial wisdom.

26. In support of their contention that the appointed date can be an antecedent date, the Petitioners have relied on the decisions of this Court in the case of *Bombay Gas Company Pvt. Ltd. (supra)*, *In Re. HCL Limited*¹⁰, *Gujarat Narmada Valley Fertilizers Ltd. (supra)* and *Tata Tea Limited*¹¹.

27. It is further submitted that the Regional Director has no locus to raise issues under the Income Tax Act. A circular was issued by the Ministry of Corporate Affairs, Govt. of India, on 15th January, 2014, to all the Regional Directors which circular was considered and interpreted by this Court in the case of *Universal Mine Developers and Service Providers Pvt. Ltd. and others*¹² in

10 (1994) 80 Comp. Cases 228 (Del)

11 (2008) 144 Com Cases 236 (Cal)

12 CSP No. 757 of 2013 & Ors.

its order dated 31st January, 2014. It is submitted that the circular makes it clear that if within 15 days of issuance of notice to the Income Tax Department no response as to their objections on the sanctioning of the scheme are received from them it is presumed that the Income Tax Department has no objection to the scheme being sanctioned. The said view has also been affirmed by this Court in *Universal Mine Developers* (supra). It is submitted that the concerned Income Tax Officers were served with notices on 28th March 2014. No objection to the sanctioning of the scheme nor any application seeking any extension of time for furnishing their objections to sanctioning of the scheme was received from the Income Tax Department within the requisite period of 15 days and therefore they are deemed to have granted their no objection to the scheme. The documents once having been furnished to the Income Tax Officer and no response in the nature of an objection having been received, it is deemed that the Income Tax Department does not have any objection to the sanctioning of the scheme. The Regional Director is precluded from then raising the issues which he seeks to raise. It is only after the hearing commenced that the Income Tax Officers have sent letters to the Regional Director stating their objections. The Income Tax Department neither appeared before this Court nor has filed any affidavit opposing the sanction of the scheme. It is submitted that paragraph 4 of the said circular clearly states that it is not for the Regional Director to decide the correctness or otherwise of the objections/views of the Income Tax Department or other regulators. In the facts of the present case, the Regional Director's actions are clearly in contravention of paragraph 4 of the circular. It is also submitted that this Court has in the case of *All India Bluestar Employees Federation and another vs.*

*Bluestar Limited*¹³ held that if timelines are fixed in matters pertaining to issuance of notices to creditors, etc., then timely steps are required to be taken otherwise the entire scheme becomes unworkable. It is submitted that in any event it is for the Tax Authorities and not for the Regional Director to consider questions or implication of tax laws. This Court, in exercise of its limited jurisdiction, is not to assume the role of the Tax Authorities. Those matters have to be left to the Tax Authorities to decide in accordance with law. In support of this submission, the Petitioners have relied on the decision of this Court in the case of *Trinity India Limited*¹⁴ and the decisions of the Hon'ble Supreme Court in *Tata Tea Ltd.* (supra) and in *Sequent Scientific Ltd.*¹⁵

28. It is next submitted on behalf of the Petitioners that in respect of the assessment proceedings pending sanction of scheme, the Hon'ble Supreme Court has in the case of *Marshall Sons & Co. (India) Ltd. vs. Income Tax Officer*¹⁶ held thus:

“15. Counsel for the Revenue contended that if the aforesaid view is adopted then several complications will ensue in case the Court refuses to sanction the scheme of amalgamation. We do

13 Appeal No. 554 of 1995 in C.A. No. 654 of 1998

14 Company Petition No. 105 of 2014

15 151 Company cases 1 Bom.

16 88 Company cases 528 (SC)

not see any basis for this apprehension. Firstly, an assessment can always be made and is supposed to be made on the Transferee taking into account the income of both the Transferor and Transferee. Secondly, and probably the more advisable course from the point of view of the Revenue would be to make one assessment on the Transferee taking into account the income of both of Transferor or Transferee Companies and also to make separate protective assessments on both the Transferor and Transferee Companies separately. There may be a certain practical difficulty in adopting this course inasmuch as separate balance-sheets may not be available for the Transferor and Transferee Companies. But that may not be an insuperable problem inasmuch as assessment can always be made, on the available material, even without a balance-sheet. In certain cases, best-judgment assessment may also be resorted to. Be that as it may, we need not pursue this line of enquiry because it does not arise for consideration in these cases directly.

16. In the light of the view taken by us on the principal question, it is not necessary to consider the alternate submission urged by Shri Poddar.

17. For the above reasons, the appeals are accordingly allowed. The writ petitions filed by the appellant in the High Court shall be deemed to have been allowed. We, however, make it clear that we have not expressed any opinion on the plea of the learned counsel for the Revenue that the amalgamation itself is a device designed to evade the taxes legitimately payable by the subsidiary company. If the Income Tax authorities think that they are entitled to raise this question in the proceedings under the Income Tax Act, it is open to them to do so by way of a separate proceeding according to law.

18. No costs.”

It is submitted that in the facts of the present case also, the Income Tax Department has in fact applied the principle of protective assessment and has passed an order on 8th December, 2011, for financial year 2008-2009 making a protective assessment pending sanction of the scheme by this Court. On the same basis, protective assessments have also been made by the Income Tax

Department for subsequent years. It is further submitted that the contention now sought to be raised by the Income Tax Department vide its letters dated 3rd December 2014 annexed to the third affidavit of the Regional Director are contrary to its own order dated 8th December, 2011 and orders for subsequent years. Also, by making protective assessments, the Income Tax Department had accepted the Scheme and was precluded from objecting to the same. It is further submitted that the said letters dated 3rd December 2014 appear to have been issued owing to the threat issued by the Regional Director to the concerned Income Tax Officers. The Regional Director has exceeded his jurisdiction in issuing such threats.

29. It is further submitted on behalf of the Petitioners that the Regional Director's apprehension in respect of any alleged misuse of clause 6.2.1 of the scheme of amalgamation by the Transferee by filing a revised return, has been subsumed by paragraph 6 (e) of the Regional Director's first affidavit and the Transferor's reply in para 6 of its affidavit dated 7th August, 2014. The same has also been dealt with by the Transferee in its first affidavit in reply. Without prejudice to its contention that the Petitioners are entitled to retain clause 6.2.1 in the scheme, in order to obviate any apprehension on the part of the Regional Director, the Petitioners submit that they are willing to delete clause 6.2.1 of the Scheme. This statement was made on behalf of the Petitioners during the hearing. Dealing with the decisions relied upon by the Regional Director in support of his arguments relating to Section 139(5) of the Income Tax Act, it is submitted on behalf of the Petitioners that the said decisions do not support the contention of the Regional Director and the judgments have no application to the present case.

30. I have considered the submissions advanced on behalf of the Petitioners as well as the Regional Director qua the scheme providing for the appointed

date as 1st April 2008. I have also considered the decisions relied upon by the Petitioners pointing out the limitations of the court while sanctioning a scheme filed under Section 394 of the Act. It is an undisputed proposition that the court can interfere with the decision/commercial wisdom of the shareholders if the Court is satisfied that the scheme has been framed with the intention of contravening the provision of any law. It is also well settled that the Court can interfere with the decision/commercial wisdom of the shareholders if the Court is satisfied that the scheme as framed in fact contravenes the provisions of any law, albeit unintentionally. There can be again no disagreement on the issue that the shareholders of companies are free to choose any date as an appointed date in their commercial wisdom. However, if the Regional Director nurtures any doubt qua any of the clauses in the scheme, including the date chosen as the appointed date, and finds that the same is contrary to law or apprehends that on the strength of such a clause contained in the scheme, the Company, after obtaining sanction from the Court, may use or misuse the same for contravention of any law including the provisions of the Income Tax, he is entitled to voice his doubt/apprehension before the Court, at the time the Court considers the grant of sanction to the scheme and it is always open to the Court to consider the doubt/apprehension expressed by the Regional Director and pass necessary orders either rejecting the scheme or sanctioning the same with/or without necessary clarifications. I also do not agree with argument advanced by the Petitioners that the Regional Director cannot object to the scheme on the ground that the same violates the provisions of the Income Tax Act and it is only the Income Tax Authorities who may raise an objection and that too only within the period stipulated in the circular dated 15th January 2014. Since this Court is required to ensure that a scheme of amalgamation does not contravene any provision of law, in my view, the Regional Director is not only entitled to but is duty bound to bring to the attention of the Court any provision in the scheme which may

contravene/circumvent the provisions of any law including the law pertaining to Income Tax. This is to ensure that a company does not obtain sanction of a scheme and thereafter use the same as a shield to protect itself from the consequences arising out of the contravention of provisions of law. In the present case itself, the Petitioners have included clause 6.2.1 in the scheme which expressly permits the Transferee inter alia to file revised Income Tax returns and that too notwithstanding the expiry of the statutory period for filing such returns and without satisfying the conditions stipulated by Section 139(5) of the Income Tax Act. The Regional Director has submitted that the Petitioners by the device of the scheme have planned to file revised Income Tax returns in breach of Section 139 (5) of the Income Tax Act and are seeking the sanction of this Court to perpetuate such an illegality. In support of his contention, the Regional Director has relied on several decisions of various High Courts which I have referred to above and which have held that a revised Income Tax Return can be filed if and only if the conditions stipulated in Section 139(5) are satisfied viz. (i) that the assessee discovers any omission or wrong statement in the Income Tax Return already filed and (ii) the revised Income Tax Return is filed before the expiry of one year from the end of the relevant Assessment Year or before the completion of the assessment whichever is earlier. In fact, it was only after the Regional Director made this submission that the Petitioners agreed to delete the said clause from the scheme. In the circumstances, but for the Regional Director's efforts in bringing these facts to the attention of the Court, the same would have gone unnoticed.

31. Further, the right/duty of the Regional Director to make a representation and offer his comments in respect of a scheme has received statutory recognition in Sections 394 and 394A of the Act. Both these provisions postulate that the Regional Director is required to examine the

scheme and offer his comments and views thereon, which are required to be considered by the Court. It is therefore clear that the legislature intended that the Regional Director will examine a scheme from all aspects and place his observations and views before the Court and the Court will consider the same before sanctioning the scheme. It is obvious that the Regional Director while making his observations and comments is entitled to consider the scheme from all aspects and is not restricted in any manner. He is entitled to consider the effect and implications of the scheme on any law and place his views before the Court if he finds that the scheme violates any law or is prejudicial to public interest or to the interests of the shareholders of the company or companies involved. In fact, it is the duty and obligation of the Regional Director to consider every scheme in the aforesaid manner and place his views and observations before the Court. To hold otherwise would be to defeat the intention of the legislature as reflected in Sections 394 and 394A of the Act. It is also to be noted that giving the Regional Director the opportunity to place all his observations on record cannot be said to prejudice anyone including the parties before the Court. It is always in the public interest that all aspects of a scheme are duly considered and decided before the same is sanctioned.

32. In support of his contentions, the Regional Director cited an unreported decision of the Learned Single Judge of the Goa Bench of the Bombay High Court dated 6th November 2012 passed in the case of *Commissioner of Income Tax v/s. Sesa Goa*¹⁷ where the Learned Single Judge followed an earlier decision of this Court in Jindal Iron and Steel Limited's case and held that it was only the Regional Director who had locus standi to oppose the scheme and the Income Tax Department had no locus to intervene in proceedings

¹⁷ Unreported decision in Company Application No. 70 of 2012 in Company Petition No. 11 of 2012.

under Sections 391 to 394 of the Act. The Regional Director also placed before me the decision of the Division Bench of the Goa Bench of the Bombay High Court in the same case passed on 14th February 2013 whereby the Division Bench dismissed the Appeal of the Revenue and confirmed the decision of the Learned Single Judge. In this case I am not required to comment on whether the Income Tax Authorities have any independent locus or not. However, it is apparent that these decisions support the contention of the Regional Director that he has the necessary locus to appear before the Court and place his views before the Court on all aspects of the scheme. In any event, as I have held above, this position is clear from the statutory provisions themselves. It was argued on behalf of the Petitioners that the Circular dated 15th January 2014 altered the law as laid down in *Sesa Goa*. As rightly submitted by the Regional Director, a circular cannot fetter or restrict the rights of the Regional Director conferred and imposed on him by statute. The Circular must yield to the statutory provisions and cannot be construed to override the statutory provisions. Even otherwise, as discussed below, the circular does not fetter or restrict the rights or duties of the Regional Director.

33. To appreciate the contentions of parties with regard to the Circular dated 15th January 2014, it is necessary to reproduce paragraphs 3 and 4 thereof and the same are accordingly reproduced below:

3. *An instance has recently come to light wherein a Regional Director did not project the objections of the Income Tax Department in a case under Section 394. The matter has been examined and it is decided that while responding to notices on behalf of the Central Government under Section 394A, the Regional Director concerned shall invite specific comments from Income Tax Department within 15 days of receipt of notice before filing his response to the Court. If no response from the Income Tax Department is forthcoming, it may be presumed that the Income Tax Department has no objection to the action proposed*

under Section 391 or 394 as the case may be. The Regional Directors must also see if in a particular case feedback from any other sectoral Regulator is to be obtained and if it appears necessary for him to obtain such feedback, it will also be dealt with in a like manner.

4. It is also emphasized that it is not for the Regional Director to decide correctness or otherwise of the objections/views of the Income Tax Department or other Regulators. While ordinarily such views should be projected by the Regional Director in his representation, if there are compelling reasons for doubting the correctness of such views, the Regional Director must make a reference to this Ministry for taking up the matter with the Ministry concerned before filing the representation under Section 394A.

34. It is submitted by the Petitioners that if the Income Tax Department does not raise any objection within 15 days of receipt of the notice from the Regional Director the Income Tax Department is deemed to have no objection to the scheme and cannot raise any objection after the expiry of this period. According to the Petitioners the word “may” used in the 3rd sentence of para 3 means “shall”. The Petitioners rely upon the order of this Court in *Universal Mine Developers and Service Providers Private Limited & Ors. (Supra)* in support of their aforesaid contention. It is further submitted by the Petitioners that by virtue of para 4 of the circular if the Regional Director did not agree with the views of the Income Tax Department, he was required to make a reference to the MCA for taking up the matter with the Finance Ministry before filing his representation under Section 394A, which was not done in the present case. According to the Petitioners, by not raising any objection within 15 days, the Income Tax Department had consented to the Scheme and accordingly if the Regional Director did not agree with this view, he ought to have pursued the matter in accordance with the procedure prescribed in para 4 of the Circular.

In this regard, the Petitioners rely upon the decision of this Court in the case of *All India Bluestar Employees Federation and Anr. v/s. Bluestar Limited (Supra)*.

35. In my opinion, the above contentions of the Petitioners with regard to the Circular are not sustainable. As rightly pointed out by the Regional Director, this Circular does not place any restriction on the rights and powers of the Regional Director. The Circular merely provides a mechanism for the Regional Director to invite the comments of the Income Tax Department and for the Income Tax Department to respond to the same. Under the Circular if the Income Tax Department does not communicate its objection to the Regional Director, the Regional Director may presume that the Income Tax Department is not objecting to the scheme. This however does not prevent the Regional Director from raising such objections or making such observations with regard to the scheme as he may deem fit including objections and observations pertaining to taxation laws. In view of the clear object of the Circular and what is stated above, there is no justification at all for considering the word “may” as “shall” as contended by the Petitioner. Para 4 spells out the procedure to be followed in the event of the Regional Director not agreeing with the objections and views of the Income Tax Department. In the present case, there was no occasion for the Regional Director to make any reference to the Ministry since the Income Tax Department had not offered its views on the scheme. By not offering its views it cannot be said that the Income Tax Department has conclusively and forever accepted that the scheme does not violate taxation laws. In fact this very case is a case in point, inasmuch as after notice to the Income Tax Department, which was by consent of parties, the Income Tax Department has come forth and placed its objections to the scheme on record.

36. As regards the order of this Court in the case of *Universal Mine Developers and Service Providers Private Limited (Supra)* it is apparent from the order that the same was passed only for the purpose of facilitating and streamlining the working of the Regional Director's office so far as scheme matters were concerned. A detailed schedule with timelines was prepared and finalised by the Court after inter alia taking into consideration the said Circular dated 15th January 2014. In this context, this Court in para 3 of the Order merely paraphrased the contents of the Circular. The interpretation of the Circular did not fall for the consideration of the Court in that case. In fact as is clear from the cause title, the Petitioners were not even represented. In the circumstances, the aforesaid order of this court is of no assistance to the Petitioners. The decision of this Court in the case of *All India Bluestar Employees Federation and Anr. V/s. Bluestar Limited (supra)* is also of no assistance to the Petitioners inasmuch as the issue in that case was completely different and the said Circular dated 15th January 2014 was not being considered in that case.

37. When the arguments in the matter were in progress and the Regional Director was doing his duty of pointing out what in his view was wrong and illegal, the Petitioners criticized the role played by the Regional Director and submitted that he was exceeding his jurisdiction. This Court therefore orally directed the Regional Director to ask the Income Tax Department to submit its views on the objections raised by the Regional Director. The Regional Director conveyed the aforesaid directions of this Court to the Income Tax Department and while doing so he has inter alia recorded that if the Income Tax authorities do not forward their views as directed by the Court, they may be hauled up for contempt. This is incorrectly interpreted by the Petitioners as a threat given by the Regional Director to the Income Tax Department to appear in Court and support the views of the Regional Director. Neither the Court nor the Regional

Director have asked the Income Tax Department to submit their letters or views in a particular manner but have only asked the Income Tax Department to give their independent views qua the objections raised by the Regional Director. This is clear from the letter of the Regional Director and his Senior Advocate. Moreover, the Petitioners whole-heartedly consented to this Court seeking the views of the Income Tax Department. In the light of the above, the question of any threat being administered to the Income Tax Department or the Income Tax Department having submitted its letters/views under threat does not arise and the contentions of the Petitioners in this regard are rejected.

38. As regards the Petitioners' contention that the objections of the Regional Director are subsumed by para 6 (e) of the first affidavit of the Regional Director read with para 6 of the affidavit in reply of the Petitioners, for the sake of convenience, both these paras are reproduced below:

“6 (e) That the Deponent further submits that the Tax issue if any arising out of this scheme shall be subject to final decision of Income Tax Authority and approval of the scheme by Hon'ble High Court may not deter the Income Tax Authority to scrutinize the tax returns filed by the Petitioner Company after giving effect to the amalgamation. The decision of the Income Tax Authority is binding on the Petitioner Company”.

“6. I say that the observation of the Regional Director in paragraph 6 (e) of the said Affidavit, regarding the Petitioner Company adhering to any order passed by the Tax Authority, is hereby agreed to, by the Petitioner Company subject to the right of the Transferee i.e. Casby Logistics Private Limited, to appeal or seek review/revision against such order, as per applicable laws.”

39. According to the Petitioners, since the Regional Director has stated that the tax issues arising out of the Scheme shall be subject to the final decision of

the Income Tax Authority and the approval of the scheme will not deter the Income Tax Authority from scrutinizing the Income Tax Returns filed by the Petitioners and the decision of the Income Tax Authority is binding on the Petitioners and since the Petitioners have accepted this position in their Affidavits in Reply, nothing survives in the objections of the Regional Director. In other words, according to the Petitioners, the objections of the Regional Director do not survive once the Petitioners accept that it will be open to the Income Tax Authorities to deal with the tax issues arising out of the scheme regardless of the approval of the scheme by this Court.

40. It is submitted on behalf of the Regional Director that the Petitioners have completely misconstrued the objection of the Regional Director contained in para 6 (e) of his affidavit. In this para the Regional Director has referred to the Income Tax implications that arise “*after giving effect to the amalgamation*”. This para therefore refers to the tax issues that may arise upon the scheme being sanctioned and the amalgamation of the two companies taking effect. This objection of the Regional Director proceeds on the basis that the scheme is sanctioned. It is therefore submitted that this objection is different from the objection of the Regional Director to the Scheme being sanctioned with a retrospective appointed date. In fact, the latter objection is an objection to the sanction of the scheme itself. The latter objection is contained in para 6 (c) of the first affidavit of the Regional Director as well as in the further affidavit of the Regional Director.

41. It is further submitted on behalf of the Regional Director that the two objections contained in paras 6 (c) and 6 (e) of the affidavit of the Regional Director are distinct and independent, the former being in the nature of an objection to the sanction of the scheme itself and the latter being in the nature of a protection regarding the income tax implications that may arise upon the

sanction of the scheme. In para 6 (c) the objection is to the appointed date itself whereas para 6(e) proceeds on the assumption that the appointed date has been approved by this Court. According to the Regional Director, once the scheme is sanctioned, it will mean that the appointed date has been accepted by this Court and that aspect will be concluded forever and it will not be permissible for the Income Tax Department to revisit or review the appointed date under para 6(e) of the affidavit of the Regional Director read with para 6 of the affidavit in reply of the Petitioners.

42. In my view the contentions of the Regional Director in this regard deserve to be accepted. The distinction between para 6(c) and 6(e) of the first affidavit of the Regional Director is apparent. As rightly pointed out by the Regional Director para 6(e) deals with the situation that arises in the event of the Court sanctioning the scheme. According to the Regional Director if the Court sanctioned the scheme then the tax issues that may arise from the amalgamation must be left open for the Income Tax Authorities to decide. In other words according to the Regional Director, the sanction of the scheme should not prevent the Income Tax Authorities from scrutinizing tax returns filed by the Petitioners after giving effect to the amalgamation. In other words the Petitioners should not escape the liability, if any, to taxation upon giving effect to the amalgamation. This is very different from the contention raised by the Regional Director in para 6(c) of his first affidavit as elaborated in his third affidavit to the effect that the scheme itself should not be sanctioned in view of the retrospective appointed date being contrary to the provisions of the Income Tax Act. As such it is not possible to accept the contention of the Petitioners that para 6(e) of the first affidavit of the Regional Director read with para 6 of the Affidavit in Reply of the Petitioners is a complete answer to the objection of the Regional Director.

43. In support of their contentions, the Petitioners have relied upon the decision of this Court in the case of *Trinity India Ltd. (supra)*. In that case, the Regional Director placed on record the letter of the Income Tax Department to the effect that tax issues, if any, arising out of the Scheme, would be subject to the final decision of the Income Tax Department and the approval of the scheme by this Court cannot deter the Income Tax Department from examining the Income Tax Returns filed by the Petitioner Company therein. With regard to this objection, this Court accepted the clarification of the Petitioner therein to the effect that the scheme would not have an impact on ongoing assessment proceedings and that it was from the appointed date that the Transferor therein would cease to be in existence and would merge with the Transferee in which case the assessment proceedings would be carried on against the merged entity. It is therefore clear that in Trinity India's case the Regional Director as well as the Income Tax Department accepted the appointed date and only sought a protection with regard to tax issues arising out of the scheme i.e. upon the amalgamation being given effect to. The aforesaid case is therefore of no assistance to the Petitioners and does not take their case any further.

44. The next decision cited by the Petitioners was the decision of the Calcutta High Court in the case of *Tata Tea Limited*. A perusal of para 18 which contains the conclusion of the Court reveals that there was no finding with regard to the objection relating to the capital gains tax and the only conclusion of the Court was that the question of payment of stamp duty cannot arise. The Court only recorded the submission regarding avoidance of capital gains tax but did not return any finding thereon. Accordingly this decision also is of no assistance to the Petitioners.

45. The next decision relied upon by the Petitioners was the decision of this Court in the case of *Sequent Scientific Ltd.* This decision was relied upon for the proposition that assuming that the scheme is in violation of the Income Tax Act, the same can be addressed at the appropriate stage by the Income Tax Authorities which was possible in view of para 6 (e) of the affidavit of the Regional Director read with para 6 of the affidavit in reply of the Petitioners. The facts of the aforesaid decision cannot be compared to the instant case. In *Sequent Scientific's* case the objection essentially was in the nature of a grievance about the breach or likelihood of breach of the conditions of a supply agreement between the intervener and the Transferor (para 12). In this context, this Court came to the conclusion that the transfer was involuntary in nature and therefore not in breach of the conditions of the supply agreement. Thereafter, this Court also held that assuming that the transfer was in breach of the supply agreement, the matter would have to be addressed at the appropriate stage and the intervener was free to invoke the terms of the contract and terminate the same and also claim damages and other reliefs as permissible by law (para 18). In *Sequent Scientific*, this Court was considering an argument of breach of contract whereas in the present case this Court is considering an argument that the scheme is in violation of the provisions of law viz. the Income Tax Act. Moreover, in *Sequent Scientific*, this Court came to the conclusion that the scheme did not violate the supply agreement between the intervener and the Transferor. This decision is again of no assistance to the Petitioners.

46. The Petitioners also relied upon the decision of this Court in the case of *Sadanand Varde* referred to in *Sequent Scientific*. In the case of *Sadanand Varde*, this Court (in a PIL) examined the objection pertaining to the violation of the Income Tax Act on its merits and recorded a categorical finding that the provisions of Chapter XXC were not attracted and that a No Objection

Certificate under Chapter XXC was not required prior to the sanction of the scheme. This Court did not hold that the objection of the Income Tax Department was liable to be ignored by this Court and that the Income Tax Department may raise the same in the course of assessment proceedings. This decision therefore also does not assist the Petitioners.

47. In my view therefore the Regional Director is right in saying that in the instant case the objection of the Regional Director qua the appointed date strikes at the root of the matter and if upheld will result in the scheme being rejected and in any event will result in the retrospective appointed date being rejected. In fact, if this Court sanctions the scheme unconditionally, the Income Tax Department will be bound by the same, including the appointed date, and cannot review the same.

48. The next contention raised by the Petitioners was that the Income Tax Department had passed protective assessment orders for previous years in accordance with the decision of the Hon'ble Supreme Court in Marshall's case and particularly the observations in para 15 thereof. According to the Petitioners, having made such protective assessments, the Income Tax Department had accepted the scheme and was therefore precluded from objecting to the same. It is not possible to accept the aforesaid contentions of the Petitioners for more than one reason. First of all, it is clear from the decision of the Supreme Court in Marshall's case, particularly para 15 thereof that a protective assessment is in the nature of a pro tem assessment pending sanction or rejection of a scheme by the Court. Accordingly, merely because a protective assessment is made, it does not mean that the Income Tax Department has accepted a scheme. It only means that the protective assessment is not a final assessment and the same would be finalised after the Court passes an order approving or rejecting the scheme. Accordingly it

cannot be said that by making protective assessments in the present case, the Income Tax Department has accepted the scheme.

49. The Regional Director further contends that the aforesaid contention of the Petitioners is really a plea of waiver and that the same has not been raised in their pleadings and consequently the Petitioners are not entitled to raise the same. Alternatively, he submits that in any event the scheme is violative of the Income Tax Act and there is no question of any estoppel against statute. Even otherwise according to the Regional Director the facts on record do not remotely suggest that the Income Tax Department has waived its right to object to the scheme by carrying out protective assessments. In my view there is much substance in the contentions of the Regional Director. It is clear that no such contention of waiver has been raised by the Petitioners in their pleadings. Hence it is not open to them to raise this contention during the course of arguments. In any case, as I already observed above, the mere making of protective assessments does not preclude the Income Tax Department from objecting to the scheme. Further, it is well settled that there is no estoppel against statute and consequently it is always open to the Income Tax Department to point out that the scheme is contrary to the provisions of the Income Tax Act. In any case it is always open to the Regional Director, who has not made any protective assessment, to point out that the scheme is in violation of Income Tax Act.

50. Next, I come to the contention of the Regional Director that the scheme is violative of Section 139(5) of the Income Tax Act and in particular the retrospective appointed date of 1st April 2008 is violative of Section 139(5) of the Income Tax Act. According to the Regional Director it is well settled that a revised income tax return can be filed if and only if the conditions stipulated in Section 139(5) are satisfied viz. (i) that the Assesse discovers any omission or

wrong statement in the income tax return already filed, and (ii) the revised income tax return is filed before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier. According to the Regional Director, once the scheme is sanctioned the Transferor and Transferee Companies will revise and restate their balance sheets for the period from 1st April 2008 onwards and file revised income tax returns giving effect to the amalgamation for the period from 1st April 2008 onwards without satisfying the mandatory conditions prescribed by Section 139(5) of the Income Tax Act. The Regional Director further points out from the letters of the Income Tax dated 3rd December 2014 that both the Transferor and Transferee Companies have concealed income in respect of certain assessment years and the Income Tax Department has raised demands on them. The total tax demanded from the Transferee Company is Rs.2,94,81,414/- and that demanded from the Transferor Company is Rs.1,11,95,826/-. According to the Regional Director it is clear that the Petitioners desire to escape income tax liability arising out of the aforesaid demands by filing revised returns retrospectively from 1st April 2008. Prima facie, I am satisfied that there is some substance in the contentions of the Regional Director. It is clear from the various decisions cited by the Regional Director that revised income tax returns can be filed only if the conditions prescribed by Section 139(5) are satisfied. It would appear that by virtue of the retrospective appointed date, the Petitioners may file revised income tax returns with effect from 1st April 2008 without satisfying the conditions. However, it is possible that the Petitioners may not file revised income tax returns retrospectively with effect from 1st April 2008. Accordingly, in my view it would be better to leave it to the Income Tax Department to decide whether the revised income tax returns, if filed, would be valid or would be violative of Section 139(5) of the Income Tax Act.

51. As regards the appointed date, according to the Petitioners, the retrospective appointed date is relevant only for the purpose of identification and quantification of assets and liabilities of the Transferor which would be transferred to the Transferee, to notify the shareholders of the same and for fixing the share valuation/share exchange ratio and not for the purpose of filing revised returns. The Petitioners even agreed to the deletion of Clause 6.2.1 of the scheme, which provided for the filing of revised returns. In the circumstances, in my view, it would be proper to direct that the Income Tax Department shall not be bound by the appointed date fixed under the scheme while carrying out pending and/or future assessments of the Transferor and Transferee companies whether on the basis of the income tax returns already filed or revised returns, if any, that may be filed or otherwise and shall carry out such assessments without being influenced by the observations made herein.

52. As regard the objection of the Regional Director pertaining to stamp duty, as it pertains to a post amalgamation stage, the same shall be decided by the Stamp Authorities at the appropriate stage.

53. Finally I come to the issue of suppression of material facts and false and misleading statements and contradictory and inconsistent stands by the Petitioners. According to the Regional Director the Petitioners have suppressed several material facts from the Court. The Petitioners have not disclosed the income tax demands on the Transferor and Transferee Companies. On the contrary, the Petitioners have made a false statement on oath in their affidavits dated 9th April 2014 filed with the Regional Director that they had no income tax liability. The Petitioners have further suppressed the fact that the 2008 SPA had not been effectuated and the transaction contemplated therein had not been completed. The Petitioners have further suppressed the fact that Form

22Bs were filed only on 28th July 2013 and that Form 20Bs were filed on 24th July 2013 and that prior to July 2013 the so-called arrangement pertaining to the beneficial ownership of the shares of the Transferor Company by the Transferee Company was not reflected in the accounts of the Transferor and Transferee Companies or M. Dinshaw and K.B. & Sons and that, in fact, M. Dinshaw and K.B. & Sons had always treated the shares held by them in the Transferor Company as their own investment. It is further pointed out that the Petitioners have made false and misleading statements *inter alia* to the effect that the Transferor was a wholly owned subsidiary of the Transferee and had become the wholly owned subsidiary with effect from 1st April 2008/7th April 2008.

54. The Petitioners did not address these submissions of the Regional Director during the course of arguments but did so in their Written Submissions. According to the Petitioners, the alleged suppression of facts is irrelevant to the sanction of the scheme. According to them there is no suppression at all since the transfer of beneficial interest is a matter concerning two individuals i.e. M. Dinshaw and K.B. & Sons, both of whom have admitted and affirmed the same by filing requisite declarations under Section 187C and have also expressly consented in writing to the scheme. It is further submitted that this Court in its supervisory jurisdiction is not required to examine the balance sheets etc. of the individual shareholders once the shareholders and the Transferee Company have affirmed the transaction.

55. I am unable to accept the explanation of the Petitioners. It is quite clear from the record that the Petitioners have been less than forthright in placing the facts on record. As I have already held, *prima facie* it is apparent that the Transferee was not the beneficial owner of the shares of the Transferor Company either on 1st or 7th April 2008. It is also clear that the Petitioners

have taken inconsistent stands in this connection viz. in one place they say that the relevant date on which the Transferee was the beneficial owner of the shares was 1st April 2008 and in another place they say that this date was 7th April 2008. The Petitioners have also not come forth with the correct facts in respect of the two SPAs or the effect thereof. Further, the Petitioners have suppressed the income tax demands, which have undisputedly been raised on them, in the Petitions as well as in their various affidavits filed in this Court. To my mind these were relevant facts which were required to be placed on record by the Petitioners. As rightly pointed out by the Regional Director, the Petitioners have falsely stated in the affidavits filed with me that there were no income tax liabilities. To my mind there is no doubt that the Petitioners have sought to mislead this Court. It is no answer to say that the Court cannot look into these matters in its supervisory jurisdiction. Suppression of material facts and making false and incorrect statements is a very serious matter with serious consequences and it is the duty of the Court to examine the allegations of suppression etc. carefully and if found to be correct to take appropriate action against the party concerned. It is also not an answer to say that M. Dinshaw and K.B. & Sons have affirmed the transaction and have consented to the scheme in writing. Even if that be so, it was the duty of the Petitioners to come clean with the Court and place all the facts on record.

56. The Regional Director prays that the Petitions ought to be dismissed on the ground of suppression alone. According to him a party should not be shown any latitude and indulgence in such matters. Ordinarily, I would have agreed with the Regional Director. However, in the facts of the present case and particularly in view of the final order I propose to make I am of the view that instead of dismissing the Petitions on this ground, imposition of costs on each of the Petitioners will meet the ends of justice.

57. In the circumstances, I pass the following order :

i) The scheme of amalgamation as proposed is sanctioned subject to the following conditions :-

- a) Clause 6.2.1 of the scheme shall stand deleted;
- b) the issues regarding the liability, if any, of the Petitioners and their shareholders towards payment of capital gains tax as well as income tax that may arise pursuant to the sanction of the scheme, are left open to the Income Tax Department to decide in accordance with law at the appropriate stage without being influenced by the observations made herein;
- c) in the event of the Petitioners filing revised income tax returns, the validity and permissibility thereof will be decided by the Income Tax Department, and while doing so, the Income Tax Department will not be bound by the appointed date of 1st April 2008 fixed by the scheme;
- d) the Income Tax Department shall not be bound by the appointed date fixed under the scheme while carrying out pending and/or future assessments of the Transferor and Transferee companies whether on the basis of the income tax returns already filed or revised returns, if any, that may be filed, or otherwise, and shall carry out such assessments without being influenced by the observations made herein.

ii) The Petitioners will pay the Regional Director costs quantified at Rs. 25,000/- each.

iii) The Petitioners will pay further amounts of Rs.25,000/- each as and by way of costs. However these amounts be paid to the High Court Legal Services Committee.

The Company Scheme Petitions are accordingly disposed of.

(S.J. KATHAWALLA, J.)