R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 3507 OF 2018

Olympia Industries Limited .. Petitioner

Versus

Union of India & Ors. .. Respondents

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- Mr. V.M. Chavda for the Petitioner
- Mr. Akhileshwar Sharma for the Respondents

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CORAM : AKIL KURESHI &
S.J. KATHAWALLA, JJ.

Reserved on : JULY 1, 2019.
Pronounced on : JULY 9, 2019.

JUDGMENT (Per Akil Kureshi, J.)

1. The petitioner has challenged an order dated 2.11.2017 as at 'Exhibit A' to the petition passed by the Addl. Asstt. Director of Income Tax (Recovery), New Delhi by which the petitioner's application for waiver of income tax pursuant to a scheme framed by the Board for Industrial and Financial Reconstruction ("BIFR" for short) came to be rejected.

2. Brief facts are as under:-

2.1 Petitioner is a company registered under the Companies Act. Since, the petitioner company was making consistent loss, the company filed a reference before BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA" sometime in the year 2002. On 17.4.2002 the Industrial Development Bank of India ('IDBI' for short) was appointed as an operating agency under Section 16(2) of the SICA. The proceedings before the BIFR were heard from time to time. In October 2006, IDBI formulated Draft Rehabilitation Scheme. A joint meeting of the stakeholders was convened on 26.11.2009. IDBI had prepared background notes for such joint meeting in which in connection with the income tax waivers, following clause was inserted:-

> **"11.3.1 FROM CBDT**
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> a) To consider to exempt / grant relief to the company from the provisions of Section 41(1), 45, 72(3), 43-B, 79, 80 read with 139, 115JB and provisions of Chapter XVII of the Income Tax Act.
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> b) To consider to waive penal interest, simple interest, compound interest, liquidated damages on the liability of the company, if any, as on cut off date."

3. On 15.2.2012, the BIFR sanctioned a draft scheme in connection with the tax waivers by the State as well as Income Tax Department. It was observed as under:-

> "2. In the hearing held today (15.2.2012) the representative of IDBI (OA) submitted that they have received objections from Inds. & Mines Deptt., of Govt of Gujarat saying that the State Govt. can not grant any relief to the company since at present there is no policy for providing reliefs and concessions to the sick company. IDBI (OA) referred to para 11.3 of circulated DRS and said that no monitory relief has been sought by the company. The Bench observed that it is possible that the State Govt comes up any time with a new policy giving reliefs and concessions to the sick companies hence this para may not be deleted. The Bench considered it appropriate to prefix "to consider" to this relief so as to enable the company to avail the reliefs and concessions, if any, are provided by the State Govt. in future. Hence, the Bench directed that "to consider" be preferred to the para 11.3 a) in place of "to grant".
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> 2.1 The ld. advocate of DIT (R) referred to Deptts. letter dt. 15.2.2012 stating that the company has not quantified any tax liability in the projected statement. The reliefs sought by the company can be considered only after the details are received from the company. The Bench noted that in sub paras of a) to d) of 11.2.2 "to consider" has already been prefixed. The Bench further noted that the reliefs sought in sub para d) of para 11.2.2 cannot be granted as it is not at all admissible under the provisions of Income Tax Act. The Bench further observed that details in respect of para (a) to (c) can only be submitted by the company after the P&L Accounts are finalized accounts are audited and returns of Income Tax are submitted by the company. In view of aforesaid observations, the Bench directed to delete sub para d) of para 11.2.2 and retain sub para 1) to c) without any change.

4. On 10.1.2014, the BIFR noted that the company had ceased to be a sick industrial company, and it was, therefore, discharged from the purview of the Board with certain directions, one of them being that unimplemented provisions of the sanctioned scheme shall continue to be implemented by all concerned.

5. It appears that on 15.2.2012, the Income Tax Department had written to the petitioner for providing details and documents with regard to the reliefs kept for consideration of the Department under the Scheme. The petitioner did not reply to such letter. Yet another letter was, therefore, written by the Department on 28.9.2016 and upon not receiving any response sent reminder on 22.11.2016. Only thereupon, the petitioner under communication dated 26.12.2016 sent necessary documents to the Department. The principal claim of the petitioner was for being allowed to carry forward the loss for the assessment years 1999-2000 to 2002-2003 totaling to Rs. 9.32 Crores (rounded off) beyond the statutory period. Under communication dated 17.4.2017, the CBDT refused to accept such request for which following reasons were cited:-

> "11. The relief from the revenue is allowed as a last resort. That is why the relief is kept for the consideration of the revenue to be allowed only when it is must for the success of a scheme sanctioned under the SICA Act, 1985. It cannot be allowed as a matter of routine just because an industrial unit is facing a resource crunch. Therefore, the relief from revenue is allowed only when without the same a sanctioned scheme which is otherwise successful, would fail. That does not appear to be the scenario here. The cash flow of the company is constantly improving. Admittedly, there is no debt on the company and the DSCR is comfortable. The profits are steadily rising. In fact as per figures generated from the Bombay Stock Exchange (BSE) the nine months profits for the year ending Dec., 2016 shows fivefold rise to Rs. 591.23 lacs from Rs. 107.43 lacs in the corresponding period of 2015. Recognizing this turnaround in business, the share price of company reached all time high at Rs. 382 on 2.2.2.2017 and the share currently as on 1.3.2017 trades at Rs. 335 in BSE as against Rs. 100/- on 16.5.2016. This clearly shows that company is not in need of any help from the revenue and the sanctioned scheme has successfully revived the sick company even without any relief from us. During the entire sanctioned scheme period starting from 1.4.2011 to 31.3.2017, the company has paid taxes only in A.Y. 2016-17 and would also pay the same in A.Y. 2017-18. Its reserves had increased to Rs. 12.99 crores as on 31.3.2016 and would rise meteorically by the end of this year as its nine months earning per share rises to Rs. 11.59 as on 31.12.2016 as compared to Rs. 2.65 on 31.12.2015. All these details show that the company has successfully implemented the sanctioned scheme and needs compliment but no compensation in the form of any Income Tax Relief.
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> 12. In the backdrop of above facts, the competent authority i.e

C.B.D.T. has not found your case fit for grant of any relief."

6. The petitioner sought review / reconsideration of the said decision which was also rejected by impugned order dated 2.11.2017. It was recorded that the Department had objected to grant of such reliefs under letter dated 13.1.2012 at the time of preparation of the draft Rehabilitation Scheme. Thus, no consent for granting the relief was given by the Department, without which the scheme would not bind the Department.

7. In such background, the learned counsel for the petitioner submitted that the respondents have committed error in rejecting the petitioner's claim for relaxation of the tax demands. The petitioner's principal claim was for carrying forward the lapsed unabsorbed business losses. This was also part of the scheme. The Department merely had to quantify the benefit. The directions contained in the scheme would bind the Department. The provisions of SICA Act and consequently those made in the scheme would have effect notwithstanding any of the provisions contained in any other law. Learned counsel submitted that the words used "to consider" in this scheme carried the mandate to the Department to grant the benefit. In this context, learned counsel relied on the decision of the Delhi High Court in case of **Union of India Vs. Cimmco Ltd & Ors.**[1] and that of Madras High Court in the case of **CIT Vs. Tube Investments of India Ltd**[2]**.** Learned counsel submitted that the entire philosophy beyond the SICA is that all stakeholders should make sacrifice so that a company which is sick, can be revived. This would be in the interest of labour as well as the lending financial institutions.

8. On the other hand, learned counsel for the Department opposed the petition contending that the petitioner had not shown any urgency in pursuing the scheme before the Department. Right from the year 2012, the Department had written several letters to the petitioner to supply necessary details but such details were not supplied. The claim of the petitioner is thus, highly belated. Further, there was no mandate in the scheme to the Department to grant the tax waiver. There was only a

1 Decision dated 28.2.2014 in W.P.(C) 626/2014, C.M.APPL. 1246/2014
2 (2012) 341 ITR 199 (Mad)

suggestion to consider the same. The Department has examined the relevant aspects and come to the conclusion that the same cannot be granted.

9. Chapter II of SICA pertains to references, inquiries and schemes. Section 15 of the SICA pertains to reference to the Board. Upon such reference being made under Section 16, inquiry into working of sick industrial company would be undertaken. Section 17 pertains to powers of Board to make suitable order on the completion of inquiry. Section 18 of SICA pertains to preparation and sanction of schemes. Sub-section (1) of Section 18 envisages preparation of the draft scheme by the operating agency appointed by the Board. Under clause (a) of sub-section (3), the scheme prepared by the operating agency would be examined by the Board and the scheme with or without modification in draft format would be sent to the company and the operating agency. Under sub-section (4) of Section 18, the Board would sanction the scheme which would come into effect from the specified date.

Section 19 pertains to rehabilitation. Relevant portion of this Section reads thus:-

> **19. Rehabilitation by giving financial assistance**.—(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.
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> (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 1[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].
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> (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.

As per sub-clause (1) of Section 19, a scheme may envisage either preventive, ameliorative or remedial measures by the Central Government, State Government, banks etc. Under sub-clause (2) of Section 19, such scheme shall be circulated to provide financial assistance for the consent within 60 days from the date of circulation or within such extended period as the Board may allow. Sub-section (3) of Section 19 provides that where in respect of any scheme, the consent under sub-section (2) is given by a person required by the scheme to provide financial assistance, the Board would sanction the scheme accordingly.

10. The crux of Section 19 of SICA is that where any waiver or concession is to be granted by the Central Government, State Government or the like under the scheme, the scheme would be circulated to such authority for its consent and only upon such consent being given, that such term in the scheme would be binding to such Government or authority.

11. In the impugned order dated 2.11.2017, the Authority has made a reference to letter dated 13.1.2012 under which the the Department had objected to the grant of the reliefs of tax concession at the time of preparation of the scheme. It was in this background, the impugned order records that no consent was given by the Department for such reliefs without which in view of Section 19 of the Act, the BIFR could not have given directions for tax waiver. In this context, the expression 'to consider' has to be understood. The petitioner has not disputed the existence of the said letter dated 13.1.2012 or that the said letter did not contain the Department's objection to grant of the relief. Learned counsel for the petitioner merely stated that the letter appears to have been written by the Department directly to the Board and the petitioner, therefore, had no knowledge about the same.

12. In any case, in view of clear stand of the Department raising specific objection at the time of framing of the scheme against grant of tax waiver, the BIFR could not have in the final scheme given directions for giving such benefits. As noted, in the scheme itself, this aspect has been discussed. We have reproduced the relevant portion of this final scheme. For better appreciation, we have also reproduced a paragraph pertaining to State tax waiver in which the State Government contended before the Board that the Government of Gujarat has no policy for providing such relief of State tax concession. The Board, however, noted that it is possible that the State Government may come up with a new policy in future. It was, therefore, that the Bench had considered it appropriate to prefix "to consider" to this relief so as to enable the company to avail the benefits if provided by the State Government in future. In the words of the Board, therefore "Hence, the Bench directed that 'to consider' be prefixed to the para 11.3 a) in place of "to grant". In the context of income tax concession, in para 2.1 of the said scheme, the reference was made to the Department's letter dated 15.2.2012 stating that the company had not quantified its tax liability in the projected statement and that the reliefs sought by the company can be considered only after the details are received from the company. In this context, the Board noted that at an appropriate place, the words " to consider" have already been prefixed.

13. The combine reading of para 2 and 2.1 of the said scheme would clearly bring about the purpose and intent of use of the said expression 'to consider'. In the context of state tax, the Board clearly noted the stand of the State Government that there is no policy of the State Government to waive the taxes. The Board was, however, of the opinion that the expression "to consider" would enable the company to claim such benefits if in future, the Government policy changes. On the other hand, in the context of income tax waiver, the Department contended that the company has not quantified the tax liability and therefore, the relief can be considered only after the details are received from the company. Without quantification, thus, the Department was not willing to give any concession or tax waiver. It was, in this context that the Board noted that expression 'to consider' has already been used.

14. This discussion and the context in which the said expression has been used, makes it abundantly clear that the scheme did not contain any mandate to the Income Tax Department to grant the tax concession requested by the petitioner company. Firstly, the Department had objected to any concession being granted. Secondly, before the Board, it was pointed out that without quantification, the Revenue would not be in a position to give any concession and thirdly, in this respect, the scheme envisaged only to consider the request for tax concession. We, therefore, cannot accept the contention of the petitioner that under the scheme, the direction was issued to the Income Tax Department to grant the benefit and that all that was left to be done was to compute the benefit.

15. Delhi High Court in case of CIMMCO Ltd (supra) was dealing with an entirely different situation. It was a case in which the sick company had requested for certain concessions from the Railway Authorities in the process of competing for tender for supplying wagons. In this regard, the Court held that the concessions envisaged in Section 19 of SICA were not necessarily confined to the financial concessions. It was the scheme under the SICA which required the railways to consider the bid of the company after excluding the period of closure. It was, in this context, the Court held that this term in scheme was not merely recommendatory. The facts are thus, clearly different.

16. The facts in case of Tube Investments of India (supra) were that the assessee was a sick company in whose case the scheme under SICA was sanctioned. This scheme provided that the Income Tax Authorities may consider allowing deduction under Section 43B of the Income Tax Act, 1961 on interest payable by the assessee to the bank and financial institutions even though the same had not been paid during the year under consideration. The main question before the Court was whether this scheme would have overriding effect over the provisions of Section 43B of the Income Tax Act which recognizes certain deductions only upon actual payment. The Court referred to Section 32(1) of the SICA and held that the scheme would have effect notwithstanding anything in consistent therewith contained in any other law which would include the Income Tax Act also. As a side issue, the Revenue had also contended that the scheme merely prescribed consideration of the said benefit and gave no direction to the Income Tax Authorities to grant it. The Court held that the scheme should be read as a whole and that the authority was therefore bound to grant such benefit. From the judgment, it is not clear whether the Income Tax Department had opposed granting of any such concession to the company when the scheme under SICA was being framed. In the present case, as noted, the Income Tax Department had objected to any tax waiver being granted in favour of the company.

17. In the result, we do not find any merits in the petition. The same is dismissed.

[S.J. KATHAWALLA, J.] **[AKIL KURESHI, J]**