

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

RESERVED ON	28.06.2019
DELIVERED ON	04.07.2019

CORAM:

THE HON'BLE MR.JUSTICE K.RAVICHANDRABAABU
and

THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY
W.A. (MD) Nos.566 to 569 of 2019

and

C.M.P(MD) Nos.4710 to 4713 of 2019

The Assistant Commissioner
of Income-tax Circle 1,
Trichy, No.44, Williams Road, Cantonment,
Tiruchirapalli 620 001

... Appellant/Respondent
in all Writ Appeals

Vs.

M/s Dalmia Power Limited,
Rep. by its Authorised signatory,
Shri R.Gururajan,
Dalmiapuram,
Thiruchirapalli 620 001

...Respondent in W.A
(MD) Nos.566 & 567 of
2019 / Petitioner in
W.P.(MD) Nos.25314 &
25315 of 2018

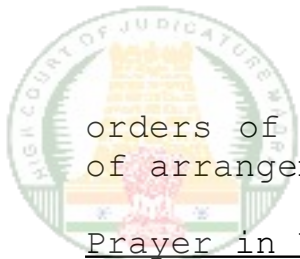
M/s Dalmia Cement (Bharat) Limited,
Rep. by its Deputy Executive Director (Finance)
and authorized signatory Shri R.Gururajan,
Dalmiapuram,
Thiruchirapalli 620 651

...Respondent in W.A
(MD) Nos.568 & 569 of
2019 / Petitioner in
W.P.(MD) Nos.25317 &
25318 of 2018

COMMON PRAYER: Writ Appeals are filed under Clause 15 of Letters Patent Act against the orders passed by this Court in W.P.(MD) Nos.25314, 25315, 25317 & 25318 of 2018 respectively, dated 30.04.2019.

Prayer in WP(MD). 25314/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Certiorarified Mandamus calling for the records on the file of the respondent in PAN AAJCS2658E / circle 1 / TRY / 2016-17 dated 05/12/2018 recalling the notice issued by the respondent pursuant to the revised return filed by the petitioner and quash the same direct the respondent to complete the assessment for the year 2016-2017 taking into account the revised return of income filed by the petitioner on 27.11.2018 and also the



orders of the national company law Tribunal, approving the scheme of arrangement and amalgamation.

Prayer in WP(MD). 25315/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Certiorarified Mandamus calling for the records of the first respondent in order number PAN AAJCS2658E / circle 1 / TRY / 2016-17 dated 17/12/2018 for the assessment year 2015-16, rejecting the revised return of income filed by the petitioner, quash the same and direct the respondent to recompute the income of the petitioners in respect of AY 2015-16 dated on revised return of income filed by the petitioner 27.11.2018 pursuant to the orders of the National Company Law Tribunal, approving the scheme of arrangement and amalgamation.

Prayer in WP(MD). 25317/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a writ of Certiorarified Mandamus, calling for the records on the file of the Respondent in PAN:AADCA9414C/Circle 1/TRY/2016-17 dated 05.12.2018, recalling the notice issued by the Respondent pursuant to the revised return filed by the Petitioner and quash the same direct the Respondent to complete the assessment for the assessment year 2016-17 taking into account the revised return of income filed by the petitioner on 27.11.2018 and also the orders of the National Company Law Tribunal, approving the scheme of arrangement and amalgamation.

Prayer in WP(MD). 25318/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a writ of Certiorarified Mandamus, calling for the records of the First Respondent in order number PAN:AADCA9414C/Circle 1/TRY/2016-17 dated 17.12.2018 for the Assessment Year 2015-16, rejecting the revised return of income filed by the Petitioner, quash the same and direct the Respondent to recomputed the income of the Petitioners, in respect of AY 2015-16 based on revised return of income filed by the petitioner on 27.11.2018 pursuant to the orders of the National Company Law Tribunal, approving the scheme of arrangement and amalgamation.

In all Writ Appeals:

For Appellant/
Respondent

: Mr.G.Rajagopalan,
Additional Solicitor General
For Mr.N.Dilip Kumar

For Respondent/
Petitioner

: Mr.N.Venkatraman
Senior Counsel for
Mr.N.V.Balaji



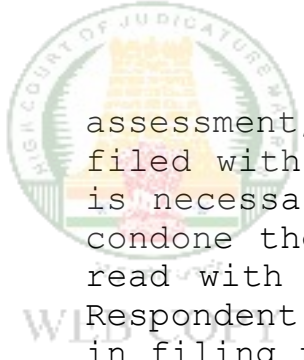
C O M M O N J U D G M E N T

(The Judgment of the Court was made by **SENTHILKUMAR RAMAMOORTHY, J**)
Since common issues arise in all the four Writ Appeals, this common judgment is pronounced in respect thereof.

2. These Writ Appeals are filed by the Respondent in the Writ Petitions. The said Appellant/Respondent is aggrieved by the common order dated 30.04.2019, whereby the Writ Petitions filed by the respective Respondent herein were allowed and the orders impugned in the respective Writ Petitions were quashed and, consequently, the Appellant herein was directed to complete the assessment in respect of Assessment Years 2015-16 and 2016-17 within a period of twelve weeks from the date of receipt of the order on the basis of the revised returns that were submitted by the respective Respondent herein.

3. The specific question that arises for consideration in these Writ Appeals is whether the Appellant herein is bound to accept the revised returns filed by the respective Respondent herein in respect of the Assessment Years 2015-16 and 2016-17 without insisting upon the filing of an application to condone delay under Section 119 (2) (b) of the Income Tax Act, 1961 (the Income Tax Act) read with Circular No. 9/2015 (the Circular) of the Central Board of Direct Taxes (the CBDT). In the Writ Petitions, it was contended by the respective Respondent herein that the Schemes of Arrangement between the respective Respondent and its shareholders, wherein the respective Respondent herein is the Transferee Company, provided expressly for the filing of revised returns beyond the specified time. Therefore, upon the sanction of the scheme by the National Company Law Tribunal (NCLT), it becomes obligatory for the Appellant to accept the revised returns for the respective assessment years without insisting on the filing of an application under Section 119 (2) (b) of the Income Tax Act read with the Circular. On the contrary, the case of the Appellant herein is that the order of the NCLT specifically provided that all necessary permissions would be obtained and compliances carried out by the Transferee Company pursuant to the sanction of the Schemes of Arrangement. Therefore, the Appellant states that the respective Respondent herein is required to file the necessary application to condone delay and only, thereafter, could the revised return be taken on file and considered as per the Income Tax Act.

4. At the hearing, the learned Additional Solicitor General submitted that Rule 12 (3) of the Income Tax Rules specifies as to when income tax returns should be filed electronically. He further submitted that the relevant provision in respect of filing of a revised return is Section 139 (5) of the Income Tax Act, which provides for the filing of the revised return before the end of the relevant assessment year or before the completion of

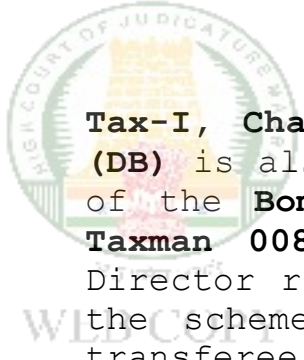


assessment, whichever is earlier. If the revised return is not filed within the time limit specified above, he submitted that it is necessary for the assessee concerned to file an application to condone the delay under section 119 (2) (b) of the Income Tax Act read with the Circular. In view of the fact that the respective Respondent herein did not file an application to condone the delay in filing the revised return, the impugned orders were issued.

5. The learned Additional Solicitor General further submitted that it was erroneously concluded in the impugned common order in the Writ Petitions that Sections 139 (5) and 119 (2) (b) of the Income Tax Act do not apply to the facts of this case. In order to reach this conclusion, he submitted that the learned judge erroneously applied the judgment of the Hon'ble Supreme Court in **Marshall Sons & Co. vs. Income Tax Officer, 223 ITR 809** (the Marshall case). He submitted further that the learned judge erroneously relied upon the judgment in **Pentamedia Graphics Ltd. Vs Income Tax Officer 236 CTR 809** (Pentamedia Graphics ITO case) to conclude that section 139 (5) of the Income Tax Act is inapplicable to this case. In this regard, he reiterated that Section 139 (5) is the only provision in the Income Tax Act that deals with the filing of a revised return and that, therefore, if the said provision is inapplicable there is no scope for filing a revised return.

6. In response, the learned senior counsel who appeared for the respective Respondent herein referred to the impugned order of the learned judge. In particular, he referred to paragraphs 21, 24, 25, 26, 30 to 32 in order to contend that the Writ Court correctly analysed the implications of the sanction of the Scheme of Arrangement and held that the Appellant herein cannot raise objections to the filing of the revised return on account of not objecting to the specific clause in the Scheme of Arrangement whereby the respective Respondent herein became entitled to file revised returns even after the expiry of the due date. He further submitted that Section 119 (2) (b) of the Income Tax Act read with the Circular confers administrative powers on the authority concerned to condone delay in cases wherein the revised return contains omissions or errors. Consequently, he submitted that it is wholly inappropriate that an application to condone delay should be presented before an administrative authority when the NCLT sanctioned the Scheme of Arrangement in exercise of quasi-judicial powers.

7. The learned senior counsel, thereafter, distinguished the three judgments that had been relied upon by the Appellant herein in the Writ Petitions. In specific, he submitted that the judgement in **Pala Marketing Co-operative Society Ltd. vs. Union of India (2008) 167 Taxman 238 (Ker.)** is not an amalgamation case. Likewise, he submitted that the judgment in **Commissioner of Income**



Tax-I, Chandigarh vs. Harjinder Kaur (2009) 180 Taxman 23 (P&H) (DB) is also not an amalgamation case. With regard to the decision of the **Bombay High Court in re Casby CFS (P) Ltd., (2015) 231 Taxman 0089**, he pointed out that, in that case, the Regional Director raised specific objections with regard to the clauses in the scheme that enable the filing of a revised return by the transferee company concerned. In spite of that, the court sanctioned the scheme of arrangement and instead held that the income tax authorities may deal with the tax issues arising out of the scheme regardless of the approval of the scheme by the court. In this case, the learned senior counsel submitted that the Appellant did not raise objections to the Scheme of Arrangement although it was put on notice as per Section 230 (5) of the Companies Act, 2013.

8. The learned senior counsel for the respective Respondent concluded his submissions by pointing out that the Scheme of Arrangement acquires statutory force upon being sanctioned by the court and is, therefore, binding on statutory authorities, such as the Appellant. In this regard, he relied upon the judgement of the Supreme Court in **J.K. Bombay vs. New Kaiser -I-hind Spinning and Weaving Co. Ltd., AIR 1970 SC 1041**, wherein it was held that the scheme of arrangement is statutorily binding even on creditors and shareholders who dissented from or opposed the sanction of the scheme.

9. By way of rejoinder submissions, the learned Additional Solicitor General referred to the order of the NCLT. In particular, he referred to paragraph 11 of the order and pointed out that the order specifies that the scheme is binding on shareholders, creditors and employees. By implication, he submitted that it is not binding on statutory authorities such as the Appellant herein. In this connection, he also referred to paragraph 12 of the said order which specifies that necessary permissions should be obtained and compliances should be satisfied. Accordingly, he submitted that the procedures prescribed in the Income Tax Act with regard to the filing of a revised return, including belated filing thereof, should be adhered to by the Respondent herein notwithstanding the sanction of the Scheme of Arrangement.

10. By way of concluding submissions, the learned senior counsel for the respective Respondent herein referred to paragraph 21 of the judgment of this court in Pentamedia Graphics ITO case, wherein it was held that once the scheme had been sanctioned with effect from a particular date, it is binding on everyone including the statutory authorities. Consequently, it was further held therein that the return filed on the basis of the state of affairs as of the appointed date cannot be ignored on the strength of Section 139 (5) of the Income Tax Act. By referring to paragraph



11 of the order of the NCLT, he submitted that it is incorrect to state that the scheme of arrangement is not binding on statutory authorities.

11. We considered the pleadings, documents, oral and written submissions of both sides carefully. The facts, in brief, are that Dalmia Power Limited (the Respondent in W.A. Nos. 566 and 567 of 2019) filed its return of income for the Assessment Years 2015-16 and 2016-17 on 17.09.2015 and 30.09.2016, respectively. Likewise, Dalmia Cement (Bharat) Limited (the Respondent in W.A. 568 and 569 of 2019) filed its return of income for the Assessment Years 2015-16 and 2016-17 on 30.11.2015 and 30.11.2016, respectively. Thereafter, pursuant to the sanction of the Scheme of Arrangement the respective Respondent attempted to file revised returns without filing an application to condone delay on the basis that the sanctioned Scheme of Arrangement and, in particular, Clause 64 (c) thereof, entitles such filing and is binding on the Appellant herein. This was rejected by the Appellant herein on the basis that it should be preceded by an application to condone delay.

12. The question to be answered in this case throws up the larger question as to whether the Scheme of Arrangement is binding on statutory authorities and, if so, in what manner and to what extent. In order to answer this question, it is necessary to understand the nature and scope of the jurisdiction of the court/tribunal while dealing with applications for sanction of schemes of arrangement. In this regard, it is relevant to mention that High Courts exercised jurisdiction in respect of the sanction of schemes of arrangement and compromises under the Companies Act, 1956, whereas, the said jurisdiction is conferred on the NCLT under the Companies Act, 2013. The Supreme Court dealt with the scope and jurisdiction of the Companies Court under section 391 and 394 of the Companies Act, 1956 in **Hindustan Lever Employees Union versus Hindustan Lever Ltd., 1995 Supplement (1) SCC 499** (the Hindustan Lever case) wherein, at paragraph 6, in relevant part, it was held as follows:

"Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered between parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the courts have evolved, the principle of "prudent business management test" or that the scheme should not be a device to evade law."

<https://hcservices.ecourts.gov.in/hcservices/> Similarly, in **Miheer H. Mafatlal vs. Mafatlal Industries (1997) 1 SCC 579** (the Miheer Mafatlal case), the



Supreme Court held as follows with regard to the scope of the court's jurisdiction under section 391 and 394 of the Companies Act, 1956:

"29. However further question remains whether the court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by section 391 subsection

(2) On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the court. The court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently the company court's jurisdiction to that extent is peripheral and supervisory and not appellate. The court acts like an umpire in a game of cricket who has to see that both teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire....

.... in view of the aforesaid settled legal principles, therefore, the scope and ambit of the jurisdiction of the company court has got clearly earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by section 391 (1) (a) have been held.

2. That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by section 391 subsection (2).

3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class members of the class.

4. That all necessary material indicated by section 393



(1) (a) is placed before the voters at the meetings concerned as contemplated by section 391 subsection (1).

5. That all the requisite material contemplated by the proviso of subsection (2) of section 391 of the Act is placed before the court by the applicant concerned seeking sanction for such a scheme and the court get satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

7. That the company court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of the scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the court's jurisdiction."

From the above judgments of the Hon'ble Supreme Court, it is evident that the court exercises supervisory jurisdiction and not appellate jurisdiction while sanctioning schemes of arrangement or compromise so as to ensure that the scheme is broadly fair and reasonable and not in violation of public policy or law. It also emerges from the judgment in the Lever case that the basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered



between parties that it should not be unfair or contrary to public policy or unconscionable.

14. In this regard, the judgments that were relied upon by the learned senior counsel for the Respondent herein should also be examined to understand the principles laid down therein. The judgment of the Supreme Court in the Marshall case pertains to the issuance of notices by the Income Tax Department to call upon the transferor company in the scheme of arrangement to file returns in respect of the period between the appointed date and the date of sanction of the scheme of arrangement. In that factual context, the Supreme Court held that the transferor company, which had ceased to exist as a result of the scheme of arrangement, cannot be called upon to file returns and that the transferor company carried on business between the appointed date and the date of sanction of the scheme as an agent of the transferee company and that, therefore, it is the transferee company that should file the returns. This case advances the cause of the respondent herein to the extent that the transferee company would be entitled to submit returns or revised returns for the period subsequent to the appointed date instead of the transferor company concerned. In this case, the Appellant herein is not objecting to the filing of the revised return by the Respondent herein instead of the transferor company. Consequently, this judgment cannot be relied upon to contend that the procedures prescribed in the Income Tax Act with regard to filing of revised returns, including the belated filing thereof, need not be complied with in view of the sanction of the Scheme of Arrangement. The next judgment to be considered is that of the Supreme Court in the JK Bombay case. In this case, the Supreme Court held that once a scheme is sanctioned by the court, it is binding on the company, the creditors and the shareholders and has statutory force. It was further held therein that such a scheme would be binding even on creditors and shareholders who dissented from or opposed the scheme. It should be noted that the Supreme Court did not hold that the scheme would be binding on statutory authorities in respect of statutory functions carried out by such authorities under other statutes or that it would override such statutory powers.

15. The judgment of this court in the Pentamedia Graphics ITO case remains to be considered. In paragraph 21 of the said judgment, this court held that the time limits specified in section 139 (5) of the IT Act would have to be considered in light of the appointed date under the scheme and the law laid down by the Supreme Court in the Marshall case. In addition, it was held therein that "the merits or otherwise on the returns filed, however, is a matter of assessment for the authorities to consider and pass order in accordance with law." In effect, this judgment provides a basis for requesting the income tax authority to condone delay in the application filed for that purpose. This judgment does not, in our view, indicate that the procedural



requirements under the Income Tax Act with regard to filing an application for condoning delay need not be complied with.

16. In this connection, it is also relevant to consider another judgment in Pentamedia Graphics Ltd. versus the Bombay Stock Exchange (2008) 145 Com. Cas. 327 (the Pentamedia Graphics BSE case). In this case, the scheme of arrangement envisaged and provided for the automatic listing of the shares of an unlisted company. After the sanction of the scheme by the High Court, the Bombay Stock Exchange refused to list the shares in view of non-compliance with its bye-laws and this was challenged by the company concerned. In this factual context, this Court held as under:

" 42. In the face of such requirement, it must be noted that the compliance of the provisions of securities laws, the stock exchange requirements and the listing agreement is absolute if any company wishes to have the shares listed thereon. While the requirement of no objection is not a mandatory requirement for granting a scheme, at the same time, it must be noted that any scheme approved containing a clause for listing before an exchange must necessarily comply with the mandate of the securities laws, rules and regulations and guidelines made under the Acts and the listing agreement. Hence, even after the sanction of the scheme, it is open to the stock exchange to insist on compliance of its regulations as a condition for listing, and in the event of any violation thereof, reject an application. By such rejection, the scheme, per se does not become bad or the order of this court granting sanction violated. It must be noted that when the court grants an approval to the scheme, it is on the satisfaction that the arrangement or the compromise is not violative of the provisions of the Companies Act and is not against public interest. But where in the process of implementing the scheme as approved by the court, an authority, in exercise of its statutory power or a regulation, finds that the implementation of a clause in the scheme as approved may not be implemented for violation of the securities laws and thus, the public interest would suffer, I do not think any objection could be taken to such a view taken by an authority validly constituted. When an expert body assesses various aspects as regards the requirement on listing as required under law, it is well within its jurisdiction to pass an order rejecting the plea for listing, if it is satisfied on the materials therein, such listing is in violation of the securities laws. In considering the scope of the jurisdiction of the authorities functioning under the Securities Act of this court under section 391, one must keep in mind the clear-cut respective jurisdiction on matters before it.

<https://hcservices.ecourts.gov.in/hcservices/>

43. It must be noted that SEBI acts on its own field, given the jurisdiction as a regulatory agency in the matter of



dealing with stocks, shares and debentures. The intricacies on the listing of the companies is entirely with the stock exchange. Section 4 of the Securities Contracts (Regulation) Act empowers SEBI to recognise the stock exchanges. It also controls the rule-making of the said exchanges. Stock exchanges are held to be regulatory authorities. Their bye-laws bind not only buyers, sellers and brokers but also third parties who are affected by the transactions on the stock exchange. They are entitled to regulate all matters connected with the business of the stock exchange. The bylaws have the effect of the statutory force. Hence given the expertise in the above field, the exclusive province of the stock exchange to grant recognition subject to the compliance of the securities laws, regulations and the listing agreement, in the context of clause 24 (f) is not to be confused with the jurisdiction of this court granting approval of the scheme. The applicants have, no doubt, filed a copy of the scheme and the petition proposed to be filed. However considering clause 24 (g), even after the grant of approval to the scheme, it is open to the stock exchange to reject the plea for listing, when it is satisfied that such listing would be violative of the securities laws, there is no disrespect to the order of approval granted by this court. The authority who is to judge on the merits of listing is competent to arrive at a decision in terms of the laws pertaining to the listing. In this view of the matter one has to look at section 392 of the Companies Act".(emphasis added).

17. The other aspect that should be borne in mind, in this case, is that notice was served on the Income Tax Department as per section 230 (5) of the Companies Act 2013. In response to such notice, the record does not disclose that the Income Tax Department raised objections to the Scheme of Arrangement. Consequently, the question arises as to whether the Appellant is bound by the Scheme of Arrangement in view of its failure to raise objections. In order to answer this question, the relevant clause in the scheme of arrangement should be examined. Clause 64, sub clause (c) is relevant and reads as under:

"Amalgamated company and Transferee Company shall be entitled to, amongst others, file/or revise its income tax returns (emphasis added), TDS/TCS returns, wealth tax returns, service tax, excise duty, sales tax, value added tax, entry tax, cess, professional tax or any other statutory returns, if required, credit for advance tax paid, tax deducted at source, claim for sum prescribed under section 43B of the Income Tax Act on payment basis, claim for deduction of provisions written back by amalgamated company and transferee company previously ~~disputed~~ in the hands of Amalgamating Company and Transferor Company (relating to the transferred undertaking) respectively under the Income Tax Act, credit of tax under section 115 JB



read with 115JAA of the Income Tax Act, credit of foreign taxes paid/withheld, if any, pertaining to Amalgamating Company and Transferor Company (relating to the transferred undertaking) as may be required consequent to implementation of the scheme and where necessary to give effect to the scheme, even if the prescribed time limit for filing or revising such returns have lapsed without incurring any liability on account of interest, penalty or any other sum (emphasis added). Amalgamated Company and Transferee Company shall have the right to claim refunds, tax credits, set off's and/or adjustments relating to the income or transactions entered into by them by virtue of the scheme with effect from Appointed Date. The taxes or duties paid by, for, or on behalf of, Amalgamating Company and Transferor Company (pertaining to Transferred Undertaking) relating to the period on or after Appointed Date, shall be deemed to be the taxes or duties paid by Amalgamated Company and Transferee Company respectively and Amalgamated Company and Transferee Company shall be entitled to claim credit or refund for such taxes or duties."

18. The aforesaid clause opens with the words "the amalgamated company and the transferee company shall be entitled to". Is this a clause that enables the Amalgamated Company and the Transferee Company to file returns, including revised returns, before the relevant tax authorities, including belatedly by requesting for a waiver of penalty, interest, et cetera, and make the various claims for credit, deductions, et cetera, as set out above, or is it a clause that confers an entitlement on the Amalgamated Company and the Transferee Company, which is binding on the respective statutory authorities, to the various benefits set out therein? If it is construed as a clause conferring an entitlement to all these benefits, the NCLT would be effectively taking over the jurisdiction of the relevant tax authorities under the relevant tax statutes to examine and decide these issues. Especially when viewed in the context of the exercise of supervisory jurisdiction by the NCLT, akin to that exercised by a civil court while considering a memorandum of compromise under Order 23 of the CPC, as held by the Supreme Court in the Hindustan Lever case, and the lack of subject matter expertise, it is evident that clause 64 can only be construed as an enabling clause to which the Appellant herein did not object when notified about the Scheme of Arrangement under Section 230 (5) of the Companies Act 2013. In effect, the Appellant herein would be obligated to consider the revised return if filed by the Amalgamated Company and the Transferee Company in accordance with the provisions of the Income Tax Act. It cannot be reasonably inferred that the Appellant herein agreed to consider such revised return irrespective of whether it complies with the procedural and statutory requirements under the Income Tax Act merely because clause 64



was not objected to by the Appellant herein.

19. In this connection, it is relevant to refer to paragraph no.12 of the order of the NLCT dated 20.04.2018, wherein it was held as under:

"12. While approving the Scheme as above, it is clarified that **this Order will not be construed as an order granting exemption** (emphasis added) from payment of stamp duty or taxes or any other charges, if payable, as per the relevant provisions of law or **from any applicable permissions that may have to be obtained or, even compliances that may have to be made as per the mandate of law**" (emphasis added).

From the above paragraph of the order of the NLCT, it is abundantly clear that the respective respondent herein was required to obtain applicable permissions and fulfil all applicable compliances as per the mandate of law and that the order sanctioning the Scheme of Arrangement is not to be construed as an order granting exemption in respect thereof. Therefore, the NLCT also made it clear that the respective respondent herein would be required to approach the relevant statutory authorities, whenever required, in respect of applicable permissions and compliances.

20. The conclusions that can be drawn from the above analysis are as follows:

- a. The NCLT exercises supervisory jurisdiction and not appellate jurisdiction while considering the sanction of schemes of arrangement or compromise.
- b. In exercise of supervisory jurisdiction, the NCLT examines whether the scheme concerned has been approved by the requisite majority of shareholders and/or creditors, as the case may be, and whether the scheme is fair, reasonable and not opposed to public policy or law. In effect, it examines whether the scheme is a lawful contract. For the above purpose, it does not examine the scheme minutely with a tooth comb.
- c. The scheme is binding on all shareholders and/or creditors, as the case may be, including dissenters, because they approve the scheme at specially convened meetings by the requisite three fourths majority. The scheme is binding on employees if it provides that employees would be absorbed on terms that are not inferior to the existing terms.
- d. The statutory authorities, who are notified under section 230 (5) of the Companies Act 2013, and who do not object to the scheme, are put on notice about the scheme, including the appointed date therein, and therefore, would be bound to consider returns or revised returns, etc. that are filed pursuant to the scheme of arrangement



provided they are filed in accordance with statutory procedure and decide the same independently on merits as per law. However, unlike shareholders and creditors who vote on, approve and effectively subscribe to the scheme of arrangement, it cannot be said that the statutory authorities are bound by the scheme or that they are bound to give effect to all the enabling clauses of the scheme of arrangement or compromise by waiving statutory requirements, in that regard, under the relevant laws.

21. When these principles are applied to the facts of this case, it is clear that the Appellant was notified about the Appointed Date and the fact that the Transferee Company concerned has taken over the assets and affairs of the Transferor companies concerned with effect from such date. In addition, the Appellant has been notified that the Scheme of Arrangement enables the Amalgamated Company and Transferee Company to file returns and revised returns before the relevant tax authorities, including the income tax authority. However, it cannot be said that the Appellant consented to waive the procedures or statutory requirements prescribed in the Income Tax Act for the above purposes. In this regard, it is also relevant to bear in mind that the Order of the NCLT whereby the Scheme of Arrangement was sanctioned also mandated that necessary permissions should be obtained and compliances fulfilled. Consequently, the impugned common order is liable to be and is hereby set aside. Hence, the respective Respondent herein is required to comply with the procedure for filing a revised return belatedly. Nevertheless, upon the filing of such application, the Appellant shall consider the same by bearing in mind the principles laid down herein and in the judgments discussed herein.

In fine, all these Writ Appeals are allowed but there shall be no order as to costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (co)

// True Copy //

Sub Assistant Registrar (CS)

+2 cc to Mr.N.Dilip Kumar , Advocate SR.No.73766

+4 cc to Mr.N.V.Balaji , Advocate SR.No.73288,73287,73285,73286

sts

Judgment made in

W.A. (MD) Nos.566 to 569 of 2019

04.07.2019