



# VIDHIK LEGIT ADVOCATES

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*“If you want to improve the organization, you have to improve yourself and the organization gets pulled up with you.”*

*- Indra Nooyi*



J-221/222, Tower No.5, 2nd Floor,  
International Infotech Park,  
Vashi Station Complex,  
Sector 30A, Vashi,



022-27819292/49706400



khushi@vidhiklegit.com

## DIRECT TAX:

### **Re-assessment Proceedings when valid even in case of assessment made u/s 143(3). – NDTV CASE**

#### **FACTS OF THE CASE**

1. During the FYs 2007-08 to 2011-12 NDTV invested in a number of foreign subsidiaries, primarily in the UK and Netherlands. During the FY 2006-07 and FY 2008-09, NDTV received funds amounting to Rs. 1127 crs. through various subsidiaries named as NNPLC, NNIH and USBV.
2. NDTV filed its Return of Income for the AY 2008-09, which was assessed u/s 143(3). During the course of original assessment proceedings, AO examined the issue of Step Up Coupon Bonds issued by NNPLC, for which NDTV stood as guarantor and revised the assessment income by adding the guarantee commission for this transaction.
3. With respect to the AY 2009-10, AO was of the view that the introduction of funds in NNIH was actually NDTV's unaccounted money and concluded that it was a sham transaction. This was further examined by the Dispute Resolution Panel (DRP), which allowed the lifting of the corporate veil. DRP in view of the facts and finding as mentioned above and taking the totality of the picture into consideration, held that assessee has brought an amount of Rs.642 cr. being unexplained money in to its books through its subsidiary NDTV Networks BV Netherlands. Additionally stated that, as per the admission of the assessee the above subsidiary has been subsequently liquidated, which shows that the same was floated only to create a front for introducing the above amount.
4. In this background of circumstances, the revenue issued a notice, dated 31.03.2015 under Section 148 of the Act (impugned notice) and sought to re-open the assessment of AY 2008-09. Among the various reasons stated, one of the reasons stated that the NNPLC had only a small capital without any business activities, fixed assets, and a new entrant without any performance record. In such case, it appears unnatural for the investors to make huge investment in NNPLC. Therefore, the natural inference was that NDTV's own funds were introduced in NNPLC in the name of bonds. Additionally the reasons stated that complaints were received in the case of NDTV from a minority shareholder alleging money introduced in NNPLC was routed back to NDTV through the various subsidiaries.

#### **ISSUES INVOLVED**

The following questions arise for decision in the two petitions:

1. Whether the impugned notice for re-opening of assessment for the AY 2008-09 is valid as per Section 147 of the Act?
2. Whether the impugned order of provisional attachment of NDTV's assets is valid and permissi-

## Decision:

### Part 1:

The learned counsel for NDTV has argued that the complete details regarding the issuance of the Step Up Coupon Bonds by NNPLC and guaranteed by NDTV were submitted during the original assessment proceedings under Section 143 of the Act. On the basis of this information, the AO had made enquiries to FT &TR, Central Board of Direct Taxes (CBDT) in respect of the bonds issued and made a transfer pricing adjustment of the guarantee fee earned by NDTV in the original assessment order. NDTV stressed that there had been no suppression or withholding of any material fact by it and the impugned notice under Section 147 of the Act was issued on a "mere change of opinion"

The Additional Solicitor General appearing for the revenue contended that the AO. had "reason to believe" that there had been escapement of income. This was on the basis of the DRP proceedings for the AY 2009-10 wherein the DRP held that the transaction routed through NDTV's subsidiary NNBV was sham and required lifting of the corporate veil. The learned ASG also submitted that in cases of sham transactions, it was not necessary to record how NDTV had failed to disclose material facts. The learned ASG also submitted that in cases of sham transactions, it was not necessary to record how NDTV had failed to disclose material facts.

In the background of the circumstances of the case, the court formed an opinion that there exists complex and circuitous structure of subsidiaries and the transactions entered therein are closely connected and provide a live link for the formation of the belief of the AO that there has been escapement of income in AY 2009-10 and for the previous assessment year, AY 2008-09 as well because the investments continued that year.

As regard the issue of true and full disclosure of the transaction at the time of assessment proceedings, Court held that, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the "true" and "full" facts in the case and the I.T.O. would have the jurisdiction to reopen the concluded assessment in such a case.

### Issue 2:

NDTV argued that the extraordinary power under Section 281B cannot be invoked merely on grounds of difficulty in recovering taxes and the Respondent has failed to indicate any overt activities of NDTV in alienating its assets to the detriment of the Respondent. On behalf of the Revenue, it was submitted that the order of provisional attachment was legal and valid and had been passed with the due approval of the Commissioner.

The Court viewed that a reasonable apprehension that NDTV may liquidate the assets thwarting the recovery of tax liability is not unwarranted. **The court further noted the AO's decision not to attach the bank accounts and other trade receivables of NDTV so as to ensure unhampered operation of its business.**

## **COMPETITION LAW:**

### **Section 4 of the Competition Act, 2002 - Prohibition of abuse of dominant position:**

*(Shri Rathi Steel (Dakshin) Ltd. v. GAIL (India) Ltd)*

#### **Facts:**

Shri Rathi Steel (Dakshin) Ltd (“Informant”) was engaged in manufacture and sale of TMT bars - It entered into Gas Sale Agreement (“GSA”) with the Opposite Party (“GAIL”) to procure natural gas. Informant filed application with information alleging abuse of dominant position by GAIL on account of incorporation of unfair terms and conditions in Gas Supply Agreement (“GSA”) and for imposition of take or pay liability (“ToP liability”) by it despite intimation to it by informant that due to regular increase in prices of Re-gasified Liquefied Natural Gas (“RLNG”), Informant had been forced to reduce its daily contracted quantity.

#### **Issues:**

- i) Whether GAIL was dominant in relevant market for supply and distribution of natural gas to industrial consumers?
- ii) Whether while imposition of ToP liability as per contractual terms could not per se be regarded as abuse of dominant position?

#### **Decision:**

i) It was held by the Hon’ble CCI that since GAIL was a significant player in business of supply of natural gas across India with relatively larger size, resources and expertise when compared to any other player, GAIL had a dominant position in specified market for supply and distribution of natural gas to industrial consumers at Alwar.

li) The Hon’ble CCI also stated that while imposition of ToP liability as per contractual terms could not per se be regarded as abuse of dominant position, same being imposed in an exploitative manner without justification or to ensure de facto exclusivity thereby hurdling potential entries or expansion of competitors warranted investigation under provisions of Act prohibiting abuse of dominant .

lii) Further since facts in instant information prima facie suggested contravention of section 4, investigation by DG has been ordered along with connected earlier matters.

In view of the same, the Hon’ble CCI has ordered an investigation in the instant case. Since the allegations in the instant matter are similar to and connected with the issues in the earlier matters already being investigated by the DG (*i.e.* Case Nos. 16 to 20 of 2016), the Commission has decided to club the instant case with pending Case Nos. 16 to 20 of 2016. The DG has been instructed to file a consolidated investigation report in all the above mentioned cases.

“Gail India abused its dominant position by imposing arbitrary terms in Gas Sale agreement”: CCI

## COMPANY LAW:

### **Constitution of Audit Committee by a Company after due date is punishable with fine only, compounding to be allowed:**

The National Company Law Tribunal, Ahmedabad Bench held that where a company had constituted audit committee and complied with requirement under section 177 of the Companies Act, though belatedly, and punishment provided for said violation was fine only; application of company for compounding offence under the said section was to be allowed.

***(NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH: Shruti Power Projects (P.) Ltd., C.P. NO. 5/441/NCLT/AHM/2017; ORDER DATED APRIL 13, 2017)***

## **SEBI**

### **SECURITIES AND EXCHANGE BOARD OF INDIA (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) (FOURTH AMENDMENT) REGULATIONS, 2017**

Vide notification dated August 14, 2017 the Board made the following Regulations to further amend the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 wherein the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, in regulation 70, - (i) in sub-regulation (1), in clause (c), after the words and figure "Sick Industrial Companies (Special Provisions) Act, 1985 or" and before the words "the Tribunal", the words "**the resolution plan approved by**" shall be inserted.

Further, the existing sub-regulation (5) and (6) shall be substituted by new sub-regulations as specified in the said circular.

*([http://www.sebi.gov.in/legal/regulations/aug-2017/securities-and-exchange-board-of-india-issue-of-capital-and-disclosure-requirements-fourth-amendment-regulations-2017\\_35635.html](http://www.sebi.gov.in/legal/regulations/aug-2017/securities-and-exchange-board-of-india-issue-of-capital-and-disclosure-requirements-fourth-amendment-regulations-2017_35635.html))*

## **INSOLVENCY AND BANKRUPTCY CODE:**

### **Pending winding up petition wouldn't bar initiation of insolvency proceedings:**

A reading of Section 7 of the Insolvency and Bankruptcy Code, 2016, read with section 271 of the Companies Act, 2013/Section 433 of the Companies Act, 1956, provides a Corporate insolvency resolution process.

**Facts:**

Applicant (operational creditor) of respondent company filed petition for winding up of Respondent company. During pendency of winding up petition, State Bank of India (financial creditor) and its associates filed petition to initiate insolvency resolution process.

**Issue:**

Whether pendency of winding up proceeding before admission of insolvency proceeding would not bar either initiation or continuation of such insolvency proceedings?

**Order:**

The Hon'ble NCLT stated that when winding up proceedings were at an advanced stage before High Court, any order passed at different forum would lead to conflicting orders. Hence it was held that in case of the pendency of winding up proceeding at a stage before admission of insolvency proceeding, would not bar either initiation or continuation of such insolvency proceedings. Further specified that on admission of petition triggering insolvency process, applicant could as well represent its claim before Interim Insolvency Resolution Professional (IIRP). The Hon'ble NCLT stated that in case where winding up petition has not been admitted, that is, the same is at an initial stage, only then a simultaneous insolvency proceeding can be admitted.

Hence the said application for intervention in proceeding for triggering insolvency resolution process has been dismissed.

The NCLT held that in pendency of winding up proceeding before admission of insolvency proceeding would not bar either initiation or continuation of such insolvency proceedings.

**(NATIONAL COMPANY LAW TRIBUNAL AHMEDABAD BENCH; Industrial & Commerce Bank of China v. Alok Industries Ltd.; IA NO. 188 OF 2017 C.P. (I.B.) NO. 48/7/NCLT/AHM/2017; JULY 18, 2017)**

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