IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 09.08.2023

\+ **W.P.(C) 4876/2017 & CM APPL. 21131/2017**

PR DIRECTOR GENERAL OF INCOME TAX (ADMN & TPS) ..... Petitioner

Versus

M/S THE INDIAN PLYWOOD MFG. CO. PVT. LTD. & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Shlok Chandra, Sr. Standing Counsel, Ms. Priya Sarkar, Jr. Standing Counsel with Mr. Keshav Garg, Advocate.

For the Respondents : Mr. Anunaya Mehta and Mr. Vinayak Thakur, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The Principal Director General of Income Tax (Admn. & TPS) [hereafter '**DGIT**'] has filed the present petition impugning an order dated 01.07.2016 (hereafter '**impugned order**') passed by the Board

for Industrial and Financial Reconstruction (hereafter '**BIFR**') in Case No.53/1995 relating to respondent no.1 – M/s The Indian Plywood Mfg. Co. Pvt. Ltd. (hereafter '**the Company**').

2. In terms of the impugned order, the BIFR had directed the Income Tax Authorities to comply with its earlier order dated 26.02.2013 within a period of 45 days.

3. The aforesaid order dated 26.02.2013 passed by the BIFR modified the Rehabilitation Scheme (hereafter '**the Scheme**'), which was approved by the BIFR under Section 18(5) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereafter '**SICA**') by an order dated 13.02.2001. The Scheme was amended to the limited extent of including additional exemptions from payment of income tax under the Income Tax Act, 1961 (hereafter '**IT Act**').

The controversy

4. The DGIT assails the impugned order, essentially, on two fronts. First, that further concessions, as contemplated in the order dated 26.02.2013, could not be granted as the Scheme had come to an end. According to the DGIT no further concessions could be considered or granted without extending the term of the Scheme. Second, that in terms of the order dated 26.02.2013, the Scheme was modified to require the Income Tax Department to consider the grant of further concessions as specified in the said order and there is no requirement to necessarily grant the same.

5. The DGIT preferred an appeal[1] against the impugned order before the Appellate Authority for Industrial and Financial Reconstruction (hereafter **'AAIFR'**) under Section 25 of SICA. However, in terms of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (hereafter '**the Repeal Act**'), which came into force with effect from 01.12.2016, SICA stood repealed and the DGIT's appeal before the AAIFR stood abated. Thus, the DGIT has filed the present petition praying that the directions to comply with the order dated 26.02.2013 – which is construed by the Company as a direction to grant further concessions – be set aside.

6. Mr. Mehta, learned counsel appearing for the Company contested the present petition on several grounds. First, he submitted that the present petition is not maintainable. According to him, since the remedy of an appeal against any revival scheme or an order of the BIFR, under Section 25 of SICA, is no longer available as a result of the legislative repeal of SICA; a challenge to the orders passed by BIFR would not be maintainable in any other forum as well.

7. Second, he submitted that in terms of the Insolvency and Bankruptcy (Removal of Difficulties) Order, 2017[2], the DGIT's remedy would be an appeal before the National Company Law Appellate Tribunal (hereafter '**NCLAT**') and it is not open for the DGIT to file a petition under Articles 226 and 227 of the Constitution of India. He also

[1] Appeal No. 33/2016
[2] S.O. 1683(E) dated 24.05.2017

submitted that in terms of Section 5 of the Repeal Act, the repeal of SICA does not affect a rehabilitation scheme sanctioned by the BIFR. He referred to ***Ashapura Minechem Ltd. v. Union of India & Ors***[3] in support of his contention that appeal against the order of BIFR would lie to NCLAT

8. Third, he submitted that in terms of SICA, the BIFR would continue to have jurisdiction over a sick company, notwithstanding that its net worth has turned positive, till it is de-registered. He submitted that the order dated 26.02.2013 had the effect of modifying the Scheme which continues to be binding and the DGIT's understanding that the term of the Scheme had come to an end is erroneous. He also contended that the Scheme merely includes projections for seven years, however, that does not imply that the Scheme has ceased to be operative after the expiry of the said period of seven years. The BIFR continued to monitor the implementation of the Scheme; thus, the order dated 26.02.2013 modifying the Scheme is binding on the parties. He referred to the decision in the case of ***Ghanshyam Sarda v. Shiv Shankar Trading Company & Ors***[4]. in support of his contention.

Factual context

9. Briefly stated the relevant facts necessary to address the aforesaid controversy are as under:

[3] 2017 SCC OnLine Del 11784
[4] (2015) 1 SCC 298

10. The Company filed a reference before the BIFR under Section 15(1) of SICA, which was registered as Case No.53/1995. By an order dated 05.10.1995, the BIFR declared the Company as a Sick Industrial Company within the meaning of Section 3(1)(o) of SICA and appointed Central Bank of India as the operating agency to prepare a rehabilitation package for the Company.

11. The Draft Rehabilitation Scheme was prepared in January 1996, and was circulated. However, the promoters of the Company expressed their difficulty to contribute ₹8 crores, which was envisaged as their contribution in the Draft Rehabilitation Scheme. The Draft Rehabilitation Scheme was subsequently revised and discussed at various hearings.

12. In the meantime, the Company made a proposal for settlement of dues to two of its financial creditors, Central Bank of India and Union Bank of India, which was approved. The revised Draft Rehabilitation Scheme was circulated contemplating one time settlement of dues with various financial creditors. The said Draft Rehabilitation Scheme was approved by an order dated 25.01.2001 (the Scheme).

13. The Scheme, *inter alia*, provided that (i) the dues of Central Bank of India, Union Bank of India, Sakura Bank Limited and the Bank of Nova Scotia would be settled by payment of a sum of ₹511.78/- lacs; (ii) the Company would downsize its manufacturing operations by closing its unviable units at *Dandeli* and *Dharwad*; (iii) the dues of the workmen at *Dharwad* would be settled at an agreed value of ₹125 lacs;

(iv) the Company would endeavour to arrive at a similar settlement with the workmen at *Dandeli*; (v) the manufacturing operations at the units located at *Hungarcutta*, *Nettana* and Mumbai would be revived; (vi) the arrears of payment to various statutory dues aggregating ₹194.20 lacs (as on 31.03.2000), would be partly paid within a period of three months and the balance would be converted to long term debt to be repaid in 16 quarterly instalments along with interest at the rate of 12% per annum;(vii) the dues payable to excise dues aggregating ₹149.86 lacs would be paid in 12 quarterly installments along with interest at the rate of 20% per annum; (viii) arears of wages and salaries amounting to ₹76 lacs would be carried forward for a period of two years; (ix) the outstanding dues of SBICI, an unsecured creditor, would be settled at ₹45.32 lacs; (x) other unsecured and presenting creditors would be repaid aggregating to an amount of ₹605.37 lacs, which would be settled in 24 quarterly instalments carrying along with it, interest at varying rates ranging from Nil to 14% per annum; and (xi) the Company would sell the surplus machinery and land and mobilise ₹460 lacs.

14. The total dues as on 31.03.2000 were specified at ₹4464.03 lacs. The Scheme provided that the said dues would be repaid in seven years in the manner as specified in the Scheme.

15. The Scheme also provided the source of funds for repayment of the dues, which included contribution by promoters of the Company by subscription of preference shares as well as loans, sale of assets, and internal generation of funds. Article 9 of the Scheme sets out the reliefs

of the concessions envisaged from various secured creditors; statutory authorities; Government of India and workmen. Clause 9.8, which sets out the reliefs and concessions to be provided by the Income Tax Department, Government of India, is reproduced below:

> "9.8 **The Government of India (Income Tax Department)**
>
> a) To consider to allow the company to carry forward its accumulated losses and unabsorbed depreciation beyond the period of eight years till the networth becomes positive.
>
> b) To consider to grant exemption under Section 41(i) of the Income Tax Act, 1961, in respect of waivers agreed to by banks.
>
> c) To consider to exempt the company from capital gains tax on the sale of Dharwad land and other surplus assets of the company.
>
> d) To consider to exempt the company from MAT, during the period of rehabilitation, from the year 2000-01 to the year 2006-07.
>
> e) To consider to withdraw the attachment order on the assets of the company u/s 281B of the Income Tax Act, 1961.
>
> f) To consider to waive penalty/interest on late payment of tax deducted at source on salaries, interest and payment to contractors.
>
> If the above reliefs are not sanctioned, the company will be required to pay capital gains tax on Rs.460 lakhs, which is the projected income from the sale of surplus assets during the year 2001-02. The company will also have to start paying Income Tax, from the fourth year of rehabilitation. As a result, the closing cash balances would become negative right from the second year of rehabilitation. Inspite of the fact that the promoters are inducting large amounts with a view to rehabilitate the company, the company will

> experience severe cash crunch during these years, which could affect the commercial operations and repayments. The cash balance at the end of the seventh year would be Rs.528.17 lakhs. The total tax waiver sought by the company in respect of the above reliefs envisaged from the IT Department would work out to Rs.544.52 lakhs. The details are given in Annexures 12 and 13."

16. It is also relevant to mention that the terms and conditions as set out in the Scheme expressly provide that the Company would satisfy the monitoring agency regarding physical progress on the Scheme and that the expenditure as contemplated under the Scheme, is incurred. It is also important to note that Scheme also provided that if there was any shortfall in the Scheme, the same was required to be made by the Company and / or its promoters without seeking any further reliefs and concessions. Clause (c) of Article 11 of the Scheme is set out below:

> "c) The company shall satisfy MA that the physical progress as well as expenditure incurred on the Scheme is achieved as per the original schedule. To this end, the company shall furnish to MA such information and data as may be required by it at intervals stipulated by it. Any financial shortfall arising out of the delayed implementation of the schedule or for any other reason shall be met by the company / promoters without any recourse to FI/Banks or seeking any further reliefs/concessions from them than what has already been provided for in the Scheme."

17. Admittedly, the DGIT extended the reliefs as envisaged under the Scheme. It permitted carry forward of the losses to the extent of ₹710 lacs for an adjustment against the income of the Company,

notwithstanding that, carry forward of such losses was beyond the period as stipulated under the IT Act.

18. Apparently, some of the assets sold by the Company were not a part of the Scheme and no permission of the BIFR was sought for making such sales. Taking note of the same, the BIFR by its order dated 06.04.2010 declared the sale of the assets as null and void. The BIFR also set aside the Scheme and revoked all reliefs and concessions.

19. Being aggrieved by the order dated 06.04.2010 passed by the BIFR, the Company had preferred an appeal[5] before the AAIFR. The Company was successful and by an order dated 30.12.2011, the AAIFR upheld the sale of the assets and set aside the BIFR's order dated 06.04.2010. The AAIFR observed that there was no specific order passed by the BIFR under Section 22A of SICA restraining sale of assets other than those assets, which were contemplated to be sold under the Scheme. Thus, the sale of assets could not be declared as null and void. However, the AAIFR also held that a company ought to have sought modification of the Scheme under Section 18(5) of SICA and that the proceeds of the sale of assets were required to be utilised for rehabilitation of the Company. The AAIFR also directed the BIFR to consider the Company's application[6] seeking modification of the Scheme by way of additional reliefs and concessions from the Income Tax Department.

[5] Appeal No.122/2010 dated 10.08.2010
[6] MA No. 151/BC/2009 dated 30.09.2009

20. Additionally, the AAIFR directed the BIFR to consider how the sale proceeds of assets could be used while considering the MDRF (Modified Draft Rehabilitation Scheme).

21. In compliance with the orders passed by the AAIFR, the BIFR considered the Company's application[4] for modification of the Scheme on merits. The Company, *inter alia,* sought an additional relief from the Income Tax Department in respect of the sale of shares, which were gifted by the promoters of the Company as a part of their promoters' contribution. The sale of the shares so gifted had resulted in capital gains, which were chargeable to income tax.

22. The said request was opposed by the Income Tax Department. It was the Income Tax Department's unequivocal stand that it had granted all reliefs and concessions as envisaged in the Scheme. In this context, it was the Company's stand that the additional modification of the Scheme did not prejudice the income tax authorities as the question whether additional reliefs would be granted was at the discretion of the income tax authorities.

23. The BIFR allowed the Company's application and modified the Scheme in terms of Section 18(5) of SICA. A tabular statement indicating Clause 9.8 as included in the Scheme and the modified Clause as set out in the BIFR's order dated 26.02.2013 is set out below:

"CLAUSE	**ORIGINAL CLAUSE**	**MODIFIED CLAUSE**
9.8	RELIEFS AND CONCESSIONS	RELIEFSAND CONCESSIONS

	GoI (Income-tax Dept.):	GoI (Income-tax Dept):
	a) To consider to allow the company to carry forward its accumulated losses and unabsorbed depreciation beyond the period of eight year till the networth becomes positive;	"No modification"
	b) To consider to grant exemption under section 41(i) of the Income Tax Act, 1961, in respect of waivers agreed to by banks;	b) To be deleted
	c) To consider to exempt the company from capital gains tax on the sale of Dharwad Land and other surplus assets of the company;	c) To consider to allow the company to set off capital gains tax on the sale of Dharwad land and other surplus assets of the company as per the sanctioned scheme of 2001, including the shares gifted by the promoters to the company, against past carry forward losses and unabsorbed depreciation and other allowances.
	d) To consider to exempt the company from MAT during the period of rehabilitation from the year 2000-01 to the year 2006-07;	"No modification"
	e) To consider to withdraw the attachment order on the assets of the company	"No modification"

	u/s 281B of the Income Tax Act, 1961; f) To consider to waive penalty / interest on the late payment of tax deducted at source on salaries, interest and payment to contractors."	

24. Thereafter, the Company applied to the Income Tax Department for grant of the reliefs in terms of the order dated 26.02.2013. However, the said reliefs were not granted. In the meanwhile, the Company filed an application[7] before the BIFR, *inter alia*, seeking extension of rehabilitation period as contemplated under the Scheme, up to 31.03.2015. The Company also sought directions from the BIFR for the Income Tax Department to comply with the order dated 26.02.2013, whereby the Scheme was modified. The Income Tax Department opposed the Company's application[4].

25. While the said application was pending, the Company filed another application[8] before the AAIFR, *inter alia,* seeking that directions to be issued by the Income Tax Department to provide the additional concessions. The said application was dismissed by the AAIFR by an order dated 07.01.2016 on the ground that the appeal in which the said application was filed, was already disposed of.

[7] MA No.358/2014 dated 01.08.2014
[8] MJA No.21/2015 in Appeal No.122/2010

26. The Company filed a writ petition[9] before this Court to agitate the relief as sought in its application[4], which was pending before the BIFR, as the BIFR was not functional, at the material time. The said petition was disposed of by this Court by an order dated 18.05.2016 as members of the BIFR were appointed and the BIFR, which was not functional for a brief period of time, had resumed functioning. This Court also directed the BIFR to consider the Company's application within a period of three months from the said date.

27. Thereafter, the BIFR listed the pending applications including MA No. 358/BC/2014, whereby the Company had sought the following relief:

> "a) For extension of the rehabilitation period contained in the sanctioned scheme up to 31.03.2015 in terms of the provisions of Section 18(5) read with section 18(9) of SICA, 1985.
>
> b) For direction to Provident Fund & ESIC Authorities to comply with the direction of the Hon'ble Bench given at the hearing held on 30.09.2008 within 30 days and not demand the damages as SS-01 did not envisage the payment of the same.
>
> c) For direction to Income Tax Authority to comply with the directions and order of Hon'ble Bench given at the hearing held on 26.02.13 within 30; days.

[9] W.P.(C) 968/2016

d) For such other directions and orders as the facts and circumstances of the case may warrant."

28. The BIFR did not allow the said application[7]. But by the order dated 18.05.2016 the BIFR passed certain directions, including directions to the Income Tax Department to comply with the BIFR's order dated 26.02.2013.

29. Aggrieved by the said order, the DGIT preferred an appeal before the AAFIR. As noted at the outset, the said appeal[1] abated with the Repeal Act coming into force.

Reasons and Conclusion

30. In the aforesaid context, the first and foremost question to be addressed is whether the present petition is maintainable. Mr Mehta has earnestly contended that the present petition is not maintainable as SICA was repealed. He had also submitted that an appeal would now lie with the NCLAT in terms of the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017[2], issued by the Central Government in exercise of its powers under Section 242(1) of the Insolvency and Bankruptcy Code, 2016. He also referred to the decision of this court in ***Ashapura Minechem Ltd. v. Union of India & Ors***[3]

31. In terms of the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017[2], two further provisos were inserted under Section 4(b) of the Repeal Act, which read as under:

> "Provided also that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under sub- section (1) of section 31 of the Insolvency and Bankruptcy Code, 2016 and the same shall be dealt with, in accordance with the provisions of Part II of the said code:
>
> Provided also that in case, the statutory period within which an appeal was allowed under the Sick Industrial Companies (Special Provisions) Act, 1985 against an order of the Board had not expired as on the date of notification of this Act, an appeal against any such deemed approved resolution plan may be preferred by any person before National Company Law Appellate Tribunal within ninety days from the date of publication of this order."

32. The contention that an appeal would lie against the order of BIFR to NCLAT after the repeal of SICA, is unmerited as the said provisos have been held to be *ultra vires* the Insolvency and Bankruptcy Code, 2016, by the NCLAT in ***GMB Ceramics Limited v. Spartek Ceramics Limited India & Ors.***[10].

33. The said view was accepted by the Supreme Court in ***M/s Spartek Ceramics India Ltd. v. Union of India & Ors.***[11]. The relevant extract of the said order is set out below:

> "2) Having heard learned counsel in all the three appeals before us for some time, and having gone through the judgment dated 28.05.2018 passed by the National Company Law Appellate Tribunal (NCLAT), we are of the view that the judgment of the NCLAT holding that the appeal filed by the Central Government in that case not

[10] Company Appeal (AT) Insolvency No.160/2017, decided on 28.05.2018
[11] Civil Appeal No.7291-7292/2018 along with other Appeals, decided on 25.10.2018.

> maintainable in view of the fact that the Notification dated 24.05.2017 travels beyond the scope of the removal of difficulties provision is correct. We are of the view that, having held that the appeal is not maintainable, the appellate Tribunal should not have adjudicated upon either the limitation aspect of the case or the merits of the particular Scheme before it."

34. In view of the unambiguous decision of the Supreme Court upholding the view of the NCLAT, the decision of this Court in ***Ashapura Minechem Ltd. v. Union of India & Ors.***[3] upholding the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017[2], is no longer good law.

35. In view of the above, the contention that an appeal would lie against the order of the BIFR before the NCLAT is rejected.

36. We are also unable to accept that the DGIT is remediless against an order passed by the BIFR solely for the reason that SICA, which provided for an appeal against a rehabilitation scheme or any orders passed by the BIFR, stands repealed.

37. According to Section 5(1)(c) of the Repeal Act, the Repeal of SICA would not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment or affect any order made by the Board for sanction of the schemes. Thus, the scheme sanctioned by the BIFR would continue to be binding and would not be affected by the Repeal of SICA. However, the same does not imply that any person aggrieved by the rehabilitation scheme or any

subsisting orders of the BIFR is without any remedy at all. It is settled law that there is no inherent or fundamental right of an appeal, the right to appeal is available only if the statute provides for the remedy of an appeal. However, the fact that there is no statutory appellate remedy does not preclude this Court from exercising powers under Articles 226 and 227 of the Constitution of India. The recourse of this Court under Articles 226 and 227 of the Constitution of India is not precluded or proscribed where the relevant statues do not provide a remedy of appeal. Although this Court while exercising its powers under Articles 226 and 227 of the Constitution of India does not undertake a full merits review – which may be available in cases where an appeal is provided by the statute – a party is not precluded from challenging the orders passed by the statutory authorities on the ground that they fall foul of the constitutional guarantees or are otherwise contrary to law.

38. Thus, we reject the contention that the present petition is not maintainable

39. The next question to be examined is whether the impugned order is contrary to law. It is difficult to accept the Company's contention that the Scheme would be operative notwithstanding that the term as indicated in the Scheme has expired.

40. Section 17 of SICA empowers the BIFR to pass appropriate orders if it is satisfied that a company in respect of which a reference is made, has become a sick industrial company. In such circumstances, the BIFR is required to decide whether it is practicable for the sick

industrial company to make its net worth exceed the accumulated losses within a reasonable time. If the BIFR decides that it was so, it was required to make an order under Section 17(2) of SICA to afford the company such time and subject to such restrictions and conditions as may be specified, to make its net worth exceed its accumulated losses. However, if the BIFR is of the view that it was not practicable for a sick industrial company to make its net worth positive within a reasonable time and it was necessary to adopt measures as specified under Section 18 of SICA in relation to the said company, it was required to give directions for preparation of a scheme for providing for such measures.

41. In terms of Section 18(1) of SICA where an order is made by the BIFR under Section 17(3) of SICA, the operating agency specified in the order is required to prepare a scheme as expeditiously as possible and ordinarily within a period of ninety days from the date of the order, which would provide for any of the measures as set out in Sections 18(1) or 18(2) of SICA. It is clear from the scheme of SICA, as in force at the material time, that a revival scheme entailing the measures as specified under Section 18 of SICA would be so framed to ensure an expeditious revival of a sick industrial company whereby, it could make its net worth exceed its accumulated losses. The scheme was required to be prepared ordinarily within a period of ninety days from the date of the BIFR's order directing such a scheme to be prepared.

42. Since the object of the revival scheme under Section 18 of SICA is to ensure revival within a reasonable period, the contention that such

a scheme once sanctioned would continue to be operative for any indefinite period of time, notwithstanding that the scheme entailed the sick company to make its net worth positive within the period as specified is, plainly, unmerited. The measures as specified under Section 18 of SICA are not open ended but for the specified object of reviving the sick company.

43. The reliance placed by Mr Mehta on the decision of the Supreme Court in ***Ghanshyam Sarda v. Shiv Shankar Trading Company & Ors.***[4] is erroneous. There is no cavil with the proposition that once a company has been registered under SICA, the jurisdiction to decide whether its net worth has become positive and to deregister the same would rest with the BIFR. Merely because a sick company has made its net worth positive after it was registered with SICA did not exclude it from the jurisdiction of the BIFR. However, the said decision is not an authority for the proposition that once a rehabilitation scheme has been sanctioned envisaging revival of the company within the stipulated period; the said scheme would continue to be operative even after the specified period had long lapsed.

44. As noted above, the Company had, in fact, sought modification of the Scheme by seeking that its term be extended. An extension of the period of the Scheme would entail substantially altering not only the assumptions on which the scheme rests but also its parameters. In terms of Section 18(5) of SICA, the BIFR was empowered to review any

sanctioned scheme or make any such modification as it deems fit by an order in writing as it deems fit. Section 18(5) of SICA is set out below:

> "**18. Preparation and sanction of schemes.—**
>
> xxx xxx xxx
>
> (5) The Board may on the recommendations of the operating agency or otherwise, review any sanctioned scheme and make such modifications as it may deem fit or may by order in writing direct any operating agency specified in the order, having regard to such guidelines as may be specified in the order, to prepare a fresh scheme providing for such measures as the operating agency may consider necessary."

45. In terms of Section 19 of SICA, where a scheme entailed any sacrifice, concession or financial assistance from the Central Government, State Government, Banks, Public Financial Institutions, State Level Institutions or any other authority, the same was required to be circulated to the concerned government, bank, institution or authority and no such scheme could be sanctioned without their consent. In terms of Section 19(4) of SICA, where such person declined its consent, it was not permissible for the BIFR to sanction the scheme. The relevant extract of Section 19 of SICA is set out below:

> "**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.
>
> (2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given.
>
> xxx xxx xxx
>
> (4) Where in respect of any scheme consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit."

46. Clearly, no modification of the Scheme could be sanctioned requiring the Income Tax Department to give further concessions without the department consenting to grant such an extension.

47. Admittedly, the Company's application seeking modification of the scheme by extending the term remained pending with the BIFR. In terms of Section 18(5) of SICA, it was open for the BIFR to modify the Scheme and extend its term if it considered it apposite. However, no such modification could be sanctioned without the consent from the said concerned government, banks, institutions or authorities if the modification of the Scheme entailed any concession or financial assistance from such persons.

48. In view of the above, there is merit in the contention that the Scheme sanctioned by the BIFR had expired. The Scheme contemplated measures for exceeding the net worth within the period specified in the Scheme and in the manner as stipulated therein *viz* by settlement with banks and workmen, repayment of statutory dues in instalments over a specified period of time, and infusion of funds by the promoters and sale of certain assets, and other measures.

49. The measures mentioned in the Scheme were timebound measures and were required to be implemented within the given time frame stipulated, therein. In view of the above, there is merit in the DGIT's contention that without extension or modification of the Scheme, no additional concessions could be included in the Scheme.

50. The last question to be examined is whether the BIFR's order dated 26.02.2013, whereby the Scheme was modified, necessarily required the Income Tax Department to grant further additional concessions. Plainly, the answer to this question is in the negative. This is for two reasons. First, that the obligation to extend further concessions could not be imposed on the Central Government (Income Tax Department) without its consent. The Income Tax Department had not consented for extending any further concession. And therefore, the order dated 26.02.2013 requiring the department to consider the grant of the further concessions, cannot be interpreted as making it obligatory on the department to grant such concessions. Second, it was the Company's stand before the BIFR that the modifications of the Scheme

as proposed did not prejudice the Income Tax Department as it retained the discretion whether to grant such concessions. The relevant extract of the BIFR's order dated 26.02.2013, which clearly indicates the above is set out below:

> "(2.1) The advocate representing DIT(R) submitted that the relief and concessions as envisaged in SS-01 have already been granted to the company and the relief now sought under the above M.A. are beyond the scope of the SS-01 and hence, he has objections to the consideration of the said relief. The decision of the Department has been conveyed vide letter dated 16-05-2006 and there will not be any change in the said letter and no further relief will be granted to the company. The representative of the company of the intervened at this stage to state that no prejudice to the Income Tax Authority will cause if the M.A. is allowed as the grant of additional income tax relief will be at its sole discretion and not binding of them."

51. Mr Mehta's contention that the expression, "*to consider to allow the company to set off capital gains ....*"must necessarily be read as "*to allow the company to set off capital gains tax ….*", is plainly erroneous and also militates against the Company's express stand before the BIFR. Mr Mehta had contended that there are decisions of this Court interpreting the expression "to consider to allow" in the manner as canvassed by him. However, it is not relevant to examine the same. As in the present case, it was the Company's stand before the BIFR that the additional concessions as proposed did not obligate the Income Tax Department to necessarily grant the same and it retained the discretion to do so.

52. Before concluding, it is also relevant to examine the additional tax concessions as sought by the Company. In terms of the Scheme, the promoters of the Company were required to make good any shortfall in the projections under the Scheme. It is stated that the promoters of the Company as a part of their contribution, gifted shares of some other companies to the Company. The sale of the said shares would result in capital gains and the Company sought to avoid payment of tax on such gains.

53. In respect of the aforesaid it is important to note that the Scheme did not envisage the promoters' contributing shares or other assets to make good the shortfall in the projections. The promoters were required to make the shortfall in liquid funds. Thus, the promoters had not complied with the Scheme which they now submit is binding on all other parties. It also appears that the entire exercise of gifting the shares to the Company and the Company selling the same was with the object of ensuring that the capital gains arise in the hands of the Company so as to enable the Company to claim further exemption. The promoters could instead of gifting the shares to the Company, sell the same and contribute the funds realised for the Scheme. But this would result in the promoters being liable to pay the capital gains tax which it appears, they desired to avoid.

54. Neither the order dated 26.02.2013 nor the impugned order indicate that the BIFR had examined the transactions, which had led to

the capital gains arising in the hands of the Company or the context in which additional concessions were sought.

55. In view of the above, the impugned order cannot be sustained. The same is set aside. The Income Tax Department is not required to grant any further concessions contrary to the IT Act, to the Company.

56. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

AUGUST 09, 2023
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