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COMPANY LAW

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I INTRODUCTION

IN THE year 2020 the world witnessed the deadly COVID-19 virus pandemic followed by complete lockdowns, closures, isolation, and work from home. During pandemic the courts/tribunals continued to deliver crucial judgments through electronic medium. Despite this, the year 2020 has witnessed the passage of many important judicial pronouncements on company law on various issues like amalgamations, mergers, and acquisitions. It has been a busy year for the corporate judicial system including NCLAT as well as the Supreme Court and various high courts all over India. There have been certain landmark cases that are very significant in the arena of company law.

II INSOLVENCY AND BANKRUPTCY

The Insolvency and Bankruptcy Code, 2016 (Code) was enacted with a view to consolidate and amend the laws relating to reorganization and insolvency resolution in a time-bound manner. The purpose of the Act was to maximize the value of assets, promote entrepreneurship, clear availability of credit and balance the interests of various stakeholders. The Insolvency and Bankruptcy Code ("IBC") has invited a lot of discussion during recent times, with numerous companies facing the wrath of the COVID-19 pandemic and the resulting financial challenges. Since the Code is still in its nascent stages of implementation, judicial pronouncements play a very important role in clarifying the legislative intent of the provisions of the Code, and the way they are to be interpreted. We have summarized and captured herein, 5 significant insolvency judgments that we have come across in 2020.

In *Bajulal Vardharji Gurjar* v. *Veer Gurjar Aluminum Industries (P) Limited,*[1] the Supreme Court held that the limitation period of three years will apply even in those cases where the default in repayment of loan took place before enactment of the Insolvency and Bankruptcy Code (IBC), 2016. The factual matrix of the case was that the corporate debtor had defaulted in payment of loans, its account with Corporation Bank was classified as Non-Performing Asset (NPA) on July 8, 2011, and that with Indian Overseas Bank on August 5, 2011. The proceedings were initiated against the

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1 AIR 2020 SC 4668; [2020]222CompCas115(SC); [2020] 118 taxmann.com 323 (SC).

corporate debtor in the Debt Recovery Tribunal. In the meanwhile, the JM Financial Assets Reconstruction Company (P.) Limited, which is Respondent initiated a corporate insolvency resolution process against the corporate debtor under the IBC. The adjudicating authority or National Company Law Tribunal (NCLT) admitted the application and appointed an interim resolution professional.

Aggrieved by the decision, the appellant preferred an appeal before the National Company Law Appellate Tribunal (NCLAT). The NCLAT upheld the order of the NCLT and thus the appellant moved the Supreme Court. The main contention, in this case, was regarding the period of limitation. It was argued by the appellant that the application, which was filed after three years of the date of default, was barred by limitation under section 137 of the Limitation Act. While refuting the submissions, the respondent argued that the application under section 7 of the Code was not barred by limitation only because the initial date of default mentioned therein was August 8, 2011.The limitation period for application under section 7 is three years as provided by article 137 of Limitation Act, which commences from the date of default and is extendable only by the application of section 5 of Limitation Act if any case for condonation of delay is made out. The court ruled that the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of a period of limitation, relevant facts are required to be pleaded and requisite evidence is required to be adduced. The apex court ruled:[2]

> There is nothing in Code to indicate that period of limitation for purpose of an application under section 7 is to commence from the date of commencement of Code itself, similarly, nothing provided in Limitation Act could be taken as a basis to support the proposition.

The Supreme Court held that the appellate tribunal had been in error in applying the period of limitation provided for mortgage liability for purpose of limitation applicable to the application in question thus, an application made by financial creditor under section 7 in the month of March 2018, seeking initiation of CIRP in respect of corporate debtor with a specific assertion of date of default as 8-7-2011, having been filed much later than a period of three years from the date of default as stated in the application was to be rejected as being barred by limitation.

In *Vishal Vijay Kalantri*v. *DBM Geotechnics and Constructions (P.) Ltd.,*[3] the Supreme Court refused to interfere in an Insolvency and Bankruptcy Code (IBC) proceedings in the instant case wherein the Committee of Creditors (CoC) had rejected a settlement proposal by as large as 99.68 percent vote. The apex court observed that the NCLT and NCLAT cannot sit in an appeal on commercial wisdom of the Committee of Creditors. In this case, the Resolution Professional came up with a resolution plan for APSEZ under the provisions of the IBC. The CoC subsequently approved the resolution plan by 99.68 percent votes. Meanwhile, the appellant came up with a settlement proposal which was also considered by the CoC but rejected by 99.68 percent votes. The appellant approached the NCLAT but failed to obtain any relief. Thereafter,

2 *Id.*, para 36.

3 [2020] 118 taxmann.com 230 (SC).

the appeal moved to the Supreme Court. The apex court in a terse judgment upheld the order of the NCLAT saying, "in the circumstances, we see no reason to interfere in the matter. The appeal is, accordingly dismissed."

The Supreme Court on February 26, 2020 in *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited* v. *Axis Bank Etc.,*[4] has decided on two main issues relating to third party security which have entirely revamped lending transactions, as security from third parties was a typical manner of securing dues, until the NCLT judgments in May 2018. The factual matrix of the case was that the Jaiprakash Associates Limited (JAL) is a Public Listed Company and Jaypee Infratech Limited is its subsidiary. JAL obtained finance from a consortium of banks and financial institutions, ICICI Bank Limited, Standard Chartered Bank Limited and State Bank of India the security of which *inter alia* comprised of mortgage created by JIL of certain lands held by it.

IDBI Bank Limited, a creditor of JIL, instituted a petition under section 7 of the Insolvency and Bankruptcy Code, 2016 before the NCLT, Allahabad Bench for seeking initiation of CIRP against JIL while alleging that JIL had committed a default in repayment of its dues to the tune of 526.11 crores.NCLT initiated CIRP against JIL on August 9, 2017.The NCLT on May 9, 2018 and May 15, 2018 approved the decision of the IRP of JIL rejecting the claims of the JAL Lenders to be recognized as financial creditors of the Corporate Debtor JIL on the strength of the mortgages created by Corporate Debtor JIL as collateral security of the debt of its holding company JAL.Further, the NCLT on May 16, 2018 held certain transactions by which the Corporate Debtor JIL had mortgaged its properties as collateral securities for loans and advances made by the JAL Lenders, as being preferential, undervalued, and fraudulent under section 43, 45 and 66 of the Code.The National Company Law Appellate Tribunal, New Delhi on August 1, 2019 by a common order set aside the NCLT order dated May 16, 2018 and also allowed the appeals by the Lenders of JAL to be financial creditors of Corporate Debtor JIL. However, the entire NCLAT judgement had only been in relation to the order dated May 16, 2018 passed by NCLT on the application for avoidance filed by the IRP and no reasons were given for reversing the NCLT judgments of May 9, 2018 and May 15, 2018.

Major issues involved:

i. Whether the mortgage transactions in question deserve to be avoided as being preferential, undervalued and fraudulent under Section 43, 45 and 66 of the Code?

ii. Could the JAL Lenders be recognized as financial creditors of the Corporate Debtor JIL on the strength of the mortgage created by the Corporate Debtor, as collateral security of the debt of its holding company JAL?

The Supreme Court has carefully analysed each provision of section 43 to see whether the mortgage transactions by JIL in favour of the JAL Lenders is preferential and has identified five key requirements which need to be satisfied for a transaction to fall within its ambit.

4 Civil Appeal Nos. 8512-8527 of 2019.

i. Whether such transfer is for the benefit of a creditor or a surety or a guarantor?

i. In the present case the Supreme Court held that the creditor-debtor relationship between the banks and the corporate debtor (i.e. the parties to the transaction in question) will not be decisive of the question of ultimate beneficiary.

ii. The court further held that as JIL owed operational debts towards JAL, JAL was an operational creditor of JIL.

iii. It was further held that the nature of mortgage created by JIL in favour of the JAL Lenders, made JAL the ultimate beneficiary as it was able to raise finance based on such mortgage.

iv. Thus, the transactions in question were made for the benefit of a creditor as the creditor was the ultimate beneficiary despite not being a party to the transaction sought to be set aside.

I. As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?

Considering the facts of the matter, the court held that corporate debtor JIL owed antecedent financial debts as also operational debts and other liabilities towards JAL. As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with section 53? The court held that JAL was obviously put in an advantageous position *vis-à-vis* other creditors because of the receipt of huge amount of loans by way of facilities and by way of the abovementioned transaction JAL's liability towards its creditors has been reduced in so far as the mortgaged properties is concerned. Considering these facts JAL stands clearly benefited by way of distribution of assets being made in accordance with manner other than laid down in section 53, at the cost of exclusion of other creditors and stakeholders of corporate debtor JIL.

If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date? Coming to the look-back period and contention of section 43 and 44 having only prospective effect, the bench was of the view that both the sections came into operation as the comprehensive scheme of corporate insolvency resolution and liquidation from the date of being effective, and merely because the look-back period is envisaged for the purpose of relevant time, it cannot be said that the provision itself is retrospective in operation. Further, the contentions urged on behalf of the respondents would result in postponing the effective date of operation section 43(4) for a period of 2 years in case of related parties and one year in the case of unrelated party, and thereby, effectively postponing the application of entire section 43 for a period of two years which was never the intention of legislature and thus such contentions were rejected.

The Supreme Court thus noted that all the requirements of section 43 were satisfied in the present case and the transactions were hit by section 43 and the IRP was correct in issuing directions for release and discharge of the mortgages under section 44.The

Supreme Court did not elaborate on whether the transactions were also undervalued and fraudulent as they had already been decided as preferential and their avoidance was approved. However, the Supreme Court noted that in the present case the NCLT recorded combined findings on the transactions being preferential, undervalued, and fraudulent without making requisite enquiries to find out whether the transactions were indeed undervalued or fraudulent. The Bench therefore remarked that in the future it would be appropriate to deal with each question and issue separately and distinctly as the scope of enquiry to determine whether a transaction is undervalued is entirely different from determining whether it is fraudulent and/or preferential.

As per section 8(1) IBC, an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor, copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed. After the expiry of the period of 10 days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under subsection (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process [section 9(1)]. After the application is accepted, the adjudicating authority shall initiate a corporate insolvency resolution process (CIRP), under section 10 and shall thus proceed to appoint an interim resolution professional under section 16 of the said Act.

In this case,[5] the NCLAT allowed the appeal filed against the impugned order passed by the adjudicating authority (NCLT) under section 9 and declared the appeal illegal and set aside the order. The NCLAT observed that the object of the Code is maximizing the value of assets of the corporate debtor and to bring it out of insolvency, not the recovery of money. The Tribunal further observed that if there is a dispute as per relevant provisions of the Code, it is incumbent on the adjudication authority to reject the petition/application as per provisions under section 9 of the Code. It has already been laid down by the Supreme Court of India in many important cases that the IBC provisions cannot be invoked. Since the apex court has clearly laid down the mechanism to be operated by operational creditor in terms of section 8 and 9 of the Code, it is very clear that the undisputed debt is *sine qua non* of initiating CIRP as also the debt should be due and payable. The Tribunal held the appeal to be allowable, as the order of the adjudicating authority did not meet the criteria laid down by the apex court.

Section 63 of the Insolvency and Bankruptcy Code, bars any suit or proceedings in a civil court or any other authority in any matter on which the NCLT or the National Company Law Appellate Tribunal has jurisdiction under this Code. As per section 60 of the Code, the Adjudicating Authority, in relation to any insolvency resolution and liquidation for corporate persons, including corporate debtors and personal guarantors thereof, shall be the NCLT having territorial jurisdiction over the place where the registered office of the corporate persons located.

5 NCLAT 636 of 2020.

Further, section 238 of the Code grants IBC an overriding effect by insertion of a non-obstante clause and ensuring that provisions of the Code will continue to be in full force even if they are inconsistent with any other law of the country. It is also stated in section 231 of the Code, that no civil court shall have the jurisdiction in any matter where the adjudicating authority or the Board is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such adjudicating authority or the Board under this Code. Section 33 of the Code bars every suit or proceeding instituted against the corporate debtor when a liquidation order has been passed.In *E. C. John* v. *Jitender Kumar Jain*[6] NCLAT set aside the order of the NCLT and quashed the civil suit against the corporate debtor. The Tribunal further observed that, even though the filing of a civil suit is barred in terms of the code, the correct course for the liquidator is to approach the court where the civil suit was pending and point out the pertinent provisions of law. Also, the NCLT should not quash the proceedings pending before the court.

Section 61 of the Insolvency and Bankruptcy Code, 2016 provides for appeals from the NCLT to NCLAT. Similarly, section 62 of IBC provides that an appeal from the order of NCLT on a question of law shall lie before the Supreme Court. Such appeal shall be filed within a period of 90 days. The issue of whether an application under Section 9 of the Code will be maintainable, in case of the pre-existing dispute was decided by the NCLAT in the present case. As per section 9 of IBC, the operational creditors of a company may initiate a corporate insolvency resolution process if a default has occurred.

In *Kuntal Construction Pvt. Ltd.* v. *Bharat Hotels Ltd.,*[7] an appeal was filed under Section 61 of IBC, to initiate the Corporate Insolvency Resolution Process (CIRP) against the respondent or corporate debtor for an outstanding amount of Rs 14 89,966. The NCLAT dismissed the appeal against the NCLT order for rejecting the application filed under section 9 on the grounds of pre-existing dispute. The tribunal observed that, since there was a dispute existing prior to the issuance of section 8 notice and IBC is not intended to substitute a recovery forum, the insolvency provisions cannot be invoked. While dismissing the petition on merits, the NCLAT elucidated that: "No one can take a recourse saying a judgment was not communicated to them as it is the duty of the counsel to keep a track of the status after the matter is reserved for pronouncement."

It further held that non-communication of the judgment is not a valid ground for requesting condonation of delay.

Section 5(20) of the Code defines the operational debt as a claim in respect of the provisions of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any state government, or any local authority.

6 CAT 542 decided on Jan.30, 2020.

7 CAT 459 of 2020, decided on Jan. 30, 2020.

In *M. Ravindranath Reddy* v. *G. Kishan.,*[8] Ravindranath Reddy, the tribunal interpreted the scope of Operational debt with respect to the service sector. The issue that came before the tribunal was whether a landlord by providing lease, will be treated as providing services to the corporate debtor, and hence, an operational creditor within the meaning of Section 5(20) read with section 5(21) of the Insolvency and Bankruptcy Code, 2016?

Unlike goods, services are intangible, and a large part of the business industries is present in the service sector. Any sum of money is classified as an operational debt when the amount falls under the ambit of "claim" as defined under section 3(6) of the Code. Also, when such a claim falls within the confines of the definition of "debt" under section 3(11) of the Code, meaning it should be by way of a liability or obligation due from any person. Thirdly, when such a "debt" strictly falls within the scope of "operational debt" as provided in Section 5(21) of the Code, *i.e.,* the claim should arise in respect ofprovision of goods or services including employment; ora debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any state government, or any local authorityand if the claim does not fall under any of the three categories mentioned above, the claim cannot be classified as an operational debt.

The Indian Appellate Insolvency Tribunal, namely, the NCLAT held in the present case that, any debt arising without nexus to the direct input to the output produced or supplied by the corporate debtor, cannot, in the context of the IBC, be considered as an operational debt, even though it is a claim amounting to debt and therefore, lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus, cannot fall within the definition of operational debtor.

III AUDITOR OF A COMPANY

In the case of a government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any state government or government, or partly by the Central Government and partly by one or more state government, the Comptroller and Auditor-General of India shall appoint the auditor under sub-section (5) or sub-section (7) of section 139 of the Act, and direct such auditor the manner in which the accounts of the company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor-General of India which, among other things, include the directions, if any, issued by the Comptroller and Auditor-General of India, the action taken thereon and its impact on the accounts and financial statement of the company. The CAG shall have a right to the conduct a supplementary audit of financial statement of the company and comment upon or supplement such audit report within 60 days from the date of receipt of the audit report under section 143 (5). Any comments given by the CAG upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements under section 136 (1) and be placed before the annual general meeting of the company at the same time and in the same manner as the audit report. The CAG may, by an order, cause test audit to

8 NCLAT (2020) 342.

be conducted of the accounts of company covered under section 139 (5) or 139 (7) and the provisions of section 19A of the Comptroller and Auditor-General's (Duties, Powers, and Conditions of Service) Act, 1971, shall apply to the report of such test audit.

In *Mukesh Maneklal Choksi* v. *Union of India and Zen Shaving Limited.,*[9] the NCLAT held that the auditor cannot be debarred for five years under Companies Act, 2013 in the absence of evidence supporting fraudulent intentions.

IV COLLECTIVE INVESTMENT SCHEME

In *Osians Connoisseurs of Art (P) Limited* v. *Securities and Exchange Board of India*[10] the Supreme Court held that a collective investment scheme (CIS) operated by a private trust is not legal. The apex court made it clear that under the SEBI (Collective Investment Scheme) Regulations, 1999, a collective investment scheme can only be floated by a collective investment management company and in no other form.The issue, in this case, relates to two trusts – Yatra Art Fund Trust-I and Yatra Art Trust Fund-II – which were set up under the Indian Trusts Act, 1882 to collect funds from investors for investment in works of arts. The market regulator SEBI raised objections to the fund-raising activities of the Trusts saying that they fall within the purview of the Collective Investment Scheme and hence should be registered as CIS under the relevant regulations.The vexed dispute could not be resolved to the satisfaction of the litigants either by the SEBI or the Securities appellate tribunal and ultimately reached the Supreme Court.

The apex court tried to deal with the issue in the light of the provisions of the SEBI (CIS) Regulations, 1999. As per Regulation 2(h), 'Collective Investment Management Company means a company incorporated under the Companies Act, 1956 and registered with the Board under these regulations, whose object is to organize, operate and manage a collective investment scheme.'Regulation 3 states that 'No person other than a Collective Investment Management Company which has obtained a certificate under these regulations shall carry on or sponsor or launch a collective investment scheme.'The Supreme Court ruled that under the statutory scheme of things, a collective investment scheme can only be floated by a collective investment management company and in no other form.In the similar vein the apex court observed that "Once the statutory scheme becomes clear thatthe collective investment scheme that was being carried on by the appellants in the form of a private trust would be in the teeth of the Statute read with the CIS Regulations and would thus be illegal.

V DEBENTURES

In *the canning Industries Cochin Ltd. (CAICO)* v. *SEBI,*[11] an appeal has been filed against the order passed by the Whole Time Member (WTM), Securities and Exchange Board of India which issued various directions under section 11, 11(4), 11A, 11B and 19 of the Securities and Exchange Board of India Act, 1992. The contention of the appellant is, that Section 42 of the Companies Act, 1956 is not applicable in the instant case and that the issue of the share capital is under section 62(3) of the Companies

9 Company Appeal (AT) No. 89 of 2019, dated Feb. 17, 2020.

10 [2020] 117 taxmann.com 393 (SC).

11 Appeal No. 115 of 2019 decided on Jan. 28, 2020.

Act, 2013 which has not been considered. The contention of the learned senior counsel for SEBI is, that since the offer of FCDs was for more than 200 persons, the said offer is a deemed public offer and therefore part one of the chapter 1 of the Companies Act is required to be followed. In the judgment, the tribunal held that, as per section 71(5) of the Companies Act, 2013 "No company shall issue a prospectus or make an offer or invitation to the public or to its members exceeding five hundred for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees and the conditions governing the appointment of such trustees shall be such as may be prescribed. A perusal of the aforesaid provision indicates that no offer can be made to its members exceeding 500 for the subscription of its dentures unless the company, before such offer or issue has appointed a trustee. Thus, the restriction is that debentures could be issued to only 500 persons if there is no trustee appointed by the company. However, the restriction of 500 persons is done away if a trustee was appointed by the company. In the instant case, it is an admitted fact that a trustee was appointed. Thus, there was no restriction to the number of shareholders to whom the debentures would be issued. In the light of the aforesaid, the impugned order passed by the whole-timemember cannot be sustained.

VI DEPOSITS

In *Ateet Bansal* v. *Unitech Ltd*[12] the issue was related to the default in payment of fixed deposits which got matured. The factual matrix of the case was that the depositor Ateet Bansal bought an FDR from respondent company for a period of three years and an amount of Rs. 1,45,217 was payable to the depositor upon maturity of the deposit. The respondent through an application under section 74(2) of the Companies Act, 2013 proposed to make payment to its depositors of matured amount with interest from the date of maturity till the date of payment through a rescheduled plan. The depositor had approached the respondent several times since his fixed deposit got matured with them but on all such occasions the respondent did not pay the maturity amount and did not pay any attention to appellant's demand and never replied regarding the outstanding payment. Appellant filed a company petition in March, 2019 in NCLT under section 73(4)[13] of Companies Act, 2013 read with section 45Q of the Reserve Bank of India Act, 1934 for payment of maturity amount of the aforesaid deposit with 12.5% interest P.A. due thereon in accordance with the terms and conditions of the deposit. The said petition had been admitted by the NCLT, New Delhi Bench in March 2019. Thereafter, no reply was filed by the Respondent and the impugned order dated May 30, 2019 was passed directing the respondent to pay Rs. 1,45,217/- to the appellant with pendent lite and future interest @ 10% from the date of filing till the receipt.The NCLAT directed the Unitech Ltd to repay the number of deposits to its deposit holders with interest. It further observed:[14]

> Appellants are entitled to a decree under their respective matured FDR. The amount is decreed in favour of the respective appellant together

12 2020 (4) TMI 517: [2020] 219 Comp Cas 532.

13 This section provides for the prohibition of on acceptance of deposits from public.

14 *Id.,* para 13.

with pendent lite and future interest @ 12.5% p.a. from the date of maturity of the respective FDR till receipt thereofand the respondent will pay Rs.50000/- each to the above three appellants towards cost of litigation, costs etc.

The observation of NCLAT in his case is quite appreciable that "the rules have been made to protect the interest of deposit holders and for the benefit of the economy of the country. Rules have not been to reward the defaulting company by reducing the rate of interest and not paying the interest from the maturity date to filing the petition".

VII DIRECTOR OF A COMPANY

In *Tata Sons (P.) Ltd. v. Cyrus Investments (P.) Ltd*[15] the Supreme Court stayed the order of the NCLAT that reinstated Cyrus Mistry as executive chairman of the Tata Sons. As widely anticipated, the stay was granted by the Apex Court on January 10, 2020, in the high-profiled *Tata Sons (P.) Limited* v. *Cyrus Investments (P.) Limited* case. The case began with a boardroom coup in 2016 during which Mistry was ousted from the post of Executive Chairman of Tata Sons and directorship of other Tata companies. Aggrieved by the developments, the Shapporji Pallonji Group, holding 18 percent share capital in the Tata Group, moved an application under sections 241-242 of Companies Act, 2013 alleging prejudicial and oppressional acts of majority shareholders (Tata Group). NCLT dismissed the application.

On an appeal, the NCLAT declared the resolution passed by the Board of Directors of Tata Sons removing Mistry as the Executive Chairman of the Company on October 24, 2016, as illegal. The NCLAT restored Mistry to his original position as Executive Chairman of Tata Sons and consequently director of the Tata companies for the rest of the tenure.As a sequel to that, the appointment of the person as 'Executive Chairman' replacing Mistry was declared illegal.While the NCLAT was pronouncing the judgment, the senior counsel appearing on behalf of the Tata Sons, prayed for the suspension of the part of the judgment relating to reinstatement of Mistry as Executive Chairman and Director of Tata Sons.The NCLAT agreed to suspend its order of reinstating Mistry as executive chairman of Tata Sons for four weeks, thus giving time to the company to go in for appeal at the higher forum.The litigants moved the Supreme Court which stayed the order of the NCLAT.

Section 149(1) of the Companies Act, 2013 requires that every company shall have a minimum number of 3 directors in the case of a public company, two directors in the case of a private company, and one director in the case of a one person company. A company can appoint maximum 15 directors. A company may appoint more than fifteen directors after passing a special resolution in general meeting. The prescription under Clause (b) and First proviso to sub-section (1) of section 149 (1) of Companies Act 2013 which is relating to minimum and maximum number of directors in a company shall not be applicable to section 8 Company. In case of government company - section 149(1)(b) and the first proviso to section 149(1) shall not apply. Hence, maximum limit of appointment of number of Directors is not applicable. In *Registrar of Companies,*

15 [2020] 113 taxmann.com 296 (SC).

West Bengal v. *Karan Kishore Samtani,*[16] the NCLAT held that the number of directorships by a director is adequate. The respondent was the director, for more than 20 Companies and he resigned as the director of the company Fabius Properties Pvt. Ltd and the same was accepted by the Board of Directors of the Companies. However, the intimation of his resignation was sent to the Registrar of Companies. Regarding the resignation of the directors of the company the proviso to sub section (2) of section 168 of Companies Act, 2013 clarifies that the director who shall be liable even after his resignation for the offences which occurred during his tenure. In *Harish Jain* v. *Haveli Restaurant & Resorts limited,*[17] the NCLAT dismissed the claims of appellant on the ground that he failed to prove his resignation letter is a forged document. In this case, anappeal was preferred by the original Petitioner / Appellant assailing the order of the NCLT, Chandigarh by which the NCLT dismissed the petition alleging oppression and mismanagement and seeking restoration of 50% of shareholding in the company. The case of the petitioner was that he owned 50% shareholding of the company at the time of incorporation in the year 1997 and the same was subsequently reduced to zero by the Respondents by indulging into acts of oppression and mismanagement. It was alleged by the Petitioner that the director resignation letter (bearing his signatures) was forged by the Respondents as also stated by the handwriting expert in his report. Further, it was *inter alia* contended that no board meeting or notice was given to the Petitioner for increasing the capital of the company which resultantly relegated the shares of the Petitioner as negligible. The Petitioner claimed to have got the knowledge of the said facts only in 2015 in a family meeting and therefore has approached the NCLT, Chandigarh within the limitation period.

The NCLAT rejected the contentions of the Petitioner and upheld the order of the NCLT that the petition was not maintainable, being time barred and because the Petitioner is not a shareholder of the company. The NCLAT based its decision on the following observations that: a) The NCLAT rejected the contention of the Petitioner that the resignation letters were forged and observed that the Petitioner failed to show that he has not attended the meeting dated 31.10.2011 (or has not received the notice) wherein the change in the constitution of board was an agenda. Further, the handwriting expert's report cannot be relied upon as the same was based on the photocopy of the documents and not the original and has been procured by the Petitioner himself; b) Further, it was observed that the Petitioner was always aware of increase in the capital of the company which is evident from the fact that he signed the annual returns of the Respondent company for the year 1999, 2001 and 2003. Therefore, he cannot take a plea that he had no knowledge about transfer of his shares and increase in paid up capital of the Respondent Company. c) The Petitioner failed to show anything to rebut the fact that owing to a family settlement the Petitioner had sold his entire shareholding in the company and acquired 100% shareholding in another family-owned company. d) The NCLAT also relied on the collateral proceedings instituted (and dismissed) against the company by one Sohan Singh to discredit the contention of the Petitioner that he got to know about the alleged facts only in the year 2016.

16 Company Appeal (AT) No.13 of 2019 dated June 24, 2020.

17 [Company Appeal (AT) No. 390 of 2018 decided on Feb 26, by NCLAT.

Liability of directors

Section 179(1) provides for joint and several liability of directors of a private company for the dues of the company, subject to conditions. The pro vision provides for liability of the directors only when the taxes could not be recovered at all from the company. Where a notice issued is against the director for the dues of the company, notice should express the satisfaction that the amount had not become recoverable from the company. Notice is otherwise invalid as pointed out in *Sonal Nimish Patel* v. *Asst. CIT.*[18] At the same time, in this case, it was also pointed out, in the particular facts and circumstances of the case mentioned in an affidavit, where the recovery proceedings had been initiated prematurely, that it was open to the department to prove by filing an affidavit-in-reply that the action taken is within the scope of section 179.

In *Rajesh Kumar Yaduvamshi* v. *Serious Fraud Investigation Office*[19] it was decided that the person as a nominee director of the company cannot be summoned for offences in respect of sections 128, 129, 448 read with sections 447 of the Companies Act, 2013 without any specific allegations against him in investigation report. The main issue in this case was whether the petitioner can be prosecuted for the alleged fraud committed by BSL and whether the petitioner can be prosecuted for the alleged fraud committed by BSL andor promoters solely because the petitioner was a director of BSL and whether there is any material on record to indicate that the petitioner was complicit in the commission of the alleged offence. The court held that "whereas the bench noted thatneither the complaint made by the SFIO, nor the Investigation Report submitted by the SFIO contains any specific allegations against the petitioner of being complicit or having acted in bad faith."

VIII CORPORATE INSOLVENCY RESOLUTION PROCESS

In *Maharasthra Seamless Ltd.* v. *Padmanabhan Venkatesh*[20] the Supreme Court concerning provisions of the Insolvency and Bankruptcy Code (IBC), 2016 made it clear that it is not necessary that bid of any resolution applicant must be matched with the liquidation value of the assets. The liquidation value of assets can be higher than the bid under the corporate insolvency resolution process under the IBC.In this case, Indian Bank initiated a corporate insolvency resolution process against the United Seamless Tubulaar Private Limited. At the end of the process, Maharashtra Seamless Limited (MSL) was declared a successful resolution applicant.

The adjudicating authority, the National Company Law Tribunal, Hyderabad Bench (NCLT), on January 21, 2019, approved MSL's resolution plan, which among other things involved an upfront payment of Rupees 477 crores. While approving the resolution plan, the NCLT said that it met all the requirements of section 30(2) of the Code which primarily deals with payment to creditors.

Not satisfied with the order, corporate debtor Padmanabhan Venkatesh and Indian Bank moved the NCLAT. The appellants wanted the MSL to increase the upfront

18 [2020] 422 ITR 275 (Guj).

19 Crl. Rev. P. 1308/2019 and CRL.M.A. Nos. 43209/2019 decided on Sep. 21, 2020.

20 [2020] 113 taxmann.com 421.

payment to creditors to Rs 597.4 crore, which was the liquidation value. The NCLAT upheld the appeal and asked the MSL to deposit an additional sum failing, which the resolution plan would be set aside.The MSL moved the Supreme Court against the order of the NCLAT.

The main issue before the Supreme Court was whether the bid amount under the resolution plan should necessarily match the liquidation value. "No provision in the Code or Regulations has been brought to our notice under which requires the bid of any resolution applicant to match with liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016," the Supreme Court said.The object behind prescribing such a valuation process, the apex court added, was to assist the CoC to decide on a resolution plan properly.The court observed:

> Once, a resolution plan is approved by the CoC, the statutory mandate on theAdjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-section (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan.

IX OPPRESSION AND MISMANAGEMENT

In *Aruna Oswal* v. *Pankaj Oswal*[21] the apex court held that up till the civil court has not finalised the partition suit,NCLT cannot presume the final holding of shares which the petitioner might get by the civil court.The dispute between the Oswal family in relation to nomination of the shares of Oswal Agro Mills Limited, the Supreme Court has set aside the order of the NCLAT. The NCLAT held that a petition relating to 'oppression and mismanagement' filed by a shareholder, was maintainable on the premise that such shareholder had a legitimate claim to inheriting the shares of the company. It is important to note that under the Indian Companies Act, 2013 (Companies Act), only an individual with at least 10% shareholding in an Indian company can file a petition on the grounds of oppression and mismanagement in the affairs of the said company.

The factual matrix of the case was that late Abhey Oswal held controlling shareholding in a listed company – viz. 39.88% (Shares) in OswalAgro Mills Ltd (Company). Prior to his demise in March 2016, Abhey Oswal had made a nomination under section 72 of the Companies Act appointing his wife Aruna Oswal (Nominee) as the nominee for his shares in the Company. Pursuant to this nomination and post her husband's demise, in April 2016, the Nominee was registered as the holder of the shares. Pankaj Oswal (Pankaj), the eldest son of Abhey Oswal, challenged the registration of the shares by the company in the name of the nominee and contended that he was entitled to a one-fourth portion of the shares as legal heir of the deceased.

The Supreme Court noted that, on a *prima facie* review of section 72 of the Companies Act, securities vested with a nominee are vested absolutely and supersede

21 Civil Appeal No.9340 of 2019, decided on July 6, 2020.

disposition made by any other law. This interpretation is further buttressed by Rule 19(8) of the Companies (Share Capital and Debentures) Rules, 2014, under which a nominee becomes entitled to receive the dividends or interests and other advantages, including a right to participate in the meetings of the company, to which he would have been entitled to if he were the registered holder of the securities. However, in the absence of a nomination, a legal representative (such as an heir) would be well within his / her right to have a legitimate expectation to a portion of the shares in question and, therefore, to maintain an oppression and mismanagement petition. In the instant case, the nomination in relation to the shares was made and registered by the Company. Whether the same is valid or not or whether the legal heirs of the late Abhey Oswal have a supervening right over such Shares is a matter of civil dispute. It is amply clear, however, that on the date of institution of the NCLT petition for oppression and mismanagement, Pankaj did not hold the requisite 10% shareholding in the company to maintain such a petition. Thus, the Supreme Court held that Pankaj must establish his right of inheritance before a civil court to the extent of his claim on the shares.

The court distinguished on facts several other cases which dealt with statutory provisions on property being vested pursuant to a nomination. Since these cases did not concern nomination in respect of shares, the court did not apply the findings in those rulings to the instant case.The Supreme Court set aside the NCLT and NCLAT orders with liberty to Pankaj to file the oppression and mismanagement petition afresh. Further, it held that the decision regarding nomination and inheritance of the shares would have to be decided by the pending civil court litigation in High Court of Delhi and that the NCLT or NCLAT were not the appropriate forum for deciding matters of inheritance.While the Supreme Court has not given any verdict in the present case on the above debate, it has made a prima facie observation that a nominee is vested with the shares of a company and such nomination would override any other law, including the law of inheritance. However, the Supreme Court has also held that the claim of the individual in this case having a better title over the shares than the registered nominee, by virtue of being a legal heir, is a matter of civil dispute and must be decided by the high court.The Supreme Court has treated the question of the maintainability of the oppression and mismanagement petition as the real bone of contention in the present case. The court categorically held that a shareholder must meet the eligibility threshold of holding at least 10% shares in the company before initiating an action of oppression and mismanagement. Any action taken by a shareholder who does not meetthis criterion is a '*misconceived exercise*'.

This case[22] dealt with the issue of oppression and management under sections 397 and 398 of the Companies Act, read along with section 402 of the Companies Act 1956/2013. The contention mainly raised was whether the appointment of an Additional Director without the presence of a minority shareholder could be treated as oppression and mismanagement of the minority shareholder. The court held that merely adding an additional signatory to a bank account cannot be claimed to be an act of oppression.

22 *Arti Meenakshi Muthiah* v. *MCTM Global Investments Pvt. Ltd*, Company Appeal (AT) NO. 315 OF 2018, by National Company Law Tribunal, Single Bench, Chennai.

The factual matrix of the case was that the first respondent company is a closely held family company. The company was incorporated by M.Ct. Muthiah in 1988 and the shareholding was equally held by the M. Ct Muthiah and his wife, second respondent. M. Ct Muthiah died in September 2006 and his shareholding in first respondent was equally divided into his legal heirs. The appellant (original petitioner) had filed a company petition before the Company Law Board, Chennai against the respondents under section 397 and 398 read with section 402 of the Companies Act 1956/2013 alleging oppression and mismanagement by the respondents and after establishment of NCLT the petition was transferred to NCLT, Chennai Bench. After hearing the parties, the NCLT Chennai dismissed the petition. Being aggrieved by the impugned order the appellant has filed the present appeal.

Major issues in this case were:

i. Whether the act of transfer of shares of the third respondent to from joint ownership between the second and the third respondent without disclosing it to the appellant be considered suppression and consequently, illegal?

ii. Whether the appointment of additional director without the appellant being present be considered as illegal and amounting to oppression and mismanagement?

iii. whether the act of purchasing land by the respondent company can be considered illegal?

iv. whether the disassociation of the respondents from the trust can amount to oppression by the majority shareholders?

The tribunal addressed the first issue and held that the respondent had the right to freely transfer shares as there was due compliance with the law. Especially when the shares in question did not belong to the appellant. The transfer was declared not illegal because the transfer allowed the shareholding to remain in the family and also the fact that the transfer was made in 2013 before the application was presented by the appellant to the NCLT in 2015.The tribunal also held the transfer was legal as the appellant was not able to prove the harm to her stake in the respondent company because of the joint ownership of shares by the second and third respondents. The counsel for the appellant claimed that the meeting in question was scheduled for 10 a.m. on 06.1.2015 had not enlisted the appointment of the Additional Director in its agenda. The counsel for the respondents answered that a typographical error cannot be used by the appellant as leverage and contended that any private company can appoint an additional director according to the Companies Act. The counsel for the respondent also brought forward the regular absences of the appellant from the board and general meetings of the company. The tribunal observed in this issue that the appellant failed to attend the meeting and did not wait for much to ensure that she had the intention to attend the meeting. The tribunal held that failure to attend the meeting by which the resolution to appoint an additional director was approved by the majority shareholders could not be observed as illegal. The appellant counsel contended that the lands were purchased to facilitate the right to passage for the third respondent’s residence. The counsel for the respondents replied to this contention that the property was purchased for a commercial

decision. The respondents' counsel argued that accruing loss on the purchase does not mean that the judicial interference cannot be sought to set aside the said transaction.

The tribunal rejected the appellant's argument held that decision to either sell or purchase land is a commercial decision, the consequence of such a decision will be borne by the respondent company itself. Therefore, it calls for no judicial interference.The appellant's counsel argued that the trust had a bank account in Indian Overseas Bank and to keep the money meant for the construction of school protected from being used for other purposes by the second respondent, the appellant transferred the money to her personal HDFC bank account.

It was brought to the attention of the tribunals by the counsel for the respondent that the money orders transferred to the personal account of the appellant were used not for the trust but for the appellant's own personal use and because of this, the respondent had frozen the bank accounts to stop the siphoning of funds by the appellant. The tribunal observed that this issue would not give rise to illegality or oppression and mismanagement. The reason was that the appellant had herself siphoned the funds for her personal use and she could not adequately prove that she had not.

After looking into the facts of the case and the arguments presented by the counsel for the appellant and the respondent, the tribunal concluded that the facts did not give rise to oppression and mismanagement towards a minority shareholder. The judgment of the tribunal has concluded that just because a minority shareholder is absent in the appointment of an Additional Director, that will not amount to oppression and mismanagement under the Companies Act, 2013.

X SHARES

Under the Companies Act, 2013 the various financing options are available to companies for issuing different types of securities. In each case of an issuance of security, the issuer must comply with various laws, including the ones prescribed under the Act. If a company wants to raise capital by issuance of convertible debentures, provisions of section 71 of the Companies Act read with Rule 18 of the Companies (Share Capital and Debentures) Rules, 2014 shall be complied with. However, the question to be considered is whether conformity with the provisions laid down in section 62 and section 42 of the Act and the corresponding guidelines for the further issuance of shares and the requirement for private placement also applies to the issuance of convertible debentures? Section 42 of the Act governing the issuing of shares on a private placement basis was altogether subbed by the Companies (Amendment) Act, 2017. Notwithstanding the substitution, the underlying theme did not change, offer and issue of securities to certain investor(s) only *i.e.,* 'select group of persons'. The Securities Appellate Tribunal ("SAT") on January 28, 2020, has interpreted the rules pertaining to the private placement of securities in the case of *Canning Industries Cochin Ltd.* v. *SEBI*.[23]

In the instant case, the offer of FCDs has been made only to the shareholders of the company. The offer of shares to the company's shareholders cannot be termed as an

23 Appeal No. 115 of 2019, Jan. 28, 2020.

offer to a 'select group of people. The court explained the term "select group of persons" is not a technical expression but has to be understood in its ordinary popular sense, namely, an offer made privately such as to friends and relatives or a selected set of customers distinguished from approaching the public or to a section of the public by advertisement, circular or prospectus addressed to the public. Thus, the restriction of subscription of shares to 200 persons or more is not applicable in the instant case as it is not a private placement. Thus, section 42 read with Rule 14(2)(b) of the Securities Rules are not applicable in the instant case. It is further found further that the company had passed a special resolution under section 62(3) read with section 71 in respect of issuance of FCDs. The prospectus and the explanatory statement clearly state that the only members holding equity shares were eligible for allotment. The offer of FCDs was made to the existing shareholders of the company. Consequently, the company was not required to ensure compliance with the limit of allottees as applicable in the case of private placement of securities.

The said offer of FCDs has the features of public issue, yet the tribunal made it falls under the provisions of section 62(3) of the Act read with debenture-related provisions, which is not part of the basic provision relating to issue of securities under section 23 of the Act. After discussing the different principles of fund raising in the light of the SAT decision, the position taken by SAT is totally at odds with the basic understanding of the provisions of sections 62 and 42 of the Act. The restricted interpretation adopted by the tribunal would certainly leave the stakeholders baffled. While SAT has hit hard on the topic by holding the offer independent under section 62(3), it strongly seems to have missed the deeming provision under section 42 which gives the offer in the instant case, the colour of a public issue. Henceforth, it will be intriguing to see whether this issue is referred again to SAT or a high court to find the lost boundary.

IX TAXATION OF INCOME

A property meant for deriving rental income therefrom is to be treated as a source of property income. But where it is used for the assesse's business and not solely for deriving rental income, such income will be business income .Where in a rare case , assessee's business itself is finding tenants for property owners, then the assessee's activity is one of the business ,so that the rental income received by him or the lease amount received from the lease will be assessable as business and not income from property as was decided in the facts of the case in a group of two case in a *PSTS Heavy Lift and Shift Ltd* v. *Deputy CIT*.[24] It, therefore, disallows expenditure in earning exempt income. Where expenditure was allowed on estimated at 5% in respect of dividend income such allowances was upheld by the high court in *CIT* v. *Syndicate Bank*.[25] In coming to the conclusion, the high court pointed out that the substantial question of law arising in the case was squarely covered by the decision Supreme Court in CIT v.

24 [2020] 422 ITR 492 (Mad).

25 [2020] 422 ITR 298 (Kam).

Essar Tele holding Ltd,[26] wherein it was held that section 14A read with rule 8D, being prospective, could not be applied for a year earlier to amendment.

Likewise, cash credits can be added only in the year which they were introduced in the assessee's books and not in any other year. A borrowing justified on the test of commercial expediency cannot be added on mere suspicion. Where a credit has been accepted without any unreasonably or perversity, the high court would not interfere as mere suspicion is not good enough to warrant addition as was decided in *Ivan Singh* v. *Assistant CIT.*[27] The tendency of income-tax department to suspect and add every cash credit as income has come in for adverse criticism of the high court in *Adhithiya Gears P. Ltd* v. *Asst CIT*[28] in a case of cash credits of Rs 4,10,000 . In three names supported by affidavit of the lender, a close relative ,in a transaction before a chartered accountant, without any further examination .Even the appellate authorities ,who have similar duties has failed to exercise the same. The high court found that the law, that the burden of proof is on the assessee, could not be applied earphones without examining all the relevant facts. It is the duty of not only the assessing officer ,but also the appellate authorities ,including a tribunal , to ensure that there is a fool proof case for addition of credits in the name of the third party .In a matter of decision relating to the cash credits ,the decision is usually one relating to the facts and not law ,so that the High Court Will not entertain any appeal against the tribunal decision on cash credits ,where concurrent finding of the first appellate authority and the Tribunal were in favour of the assessment departmental appeal was dismissed I'm not invoicing any question of law by the high court, in *Pr. CIT* v. *Om Prakash dhanwani.*[29] Following *Santosh Hazari* v. *Purushotham tiwari*[30] and *Mangalore Ganesh video works* v. *CIT*[31]*Sir chunnilal* v. *Mehta and sons limited* v. *Century Spg and Mfgco. Ltd*.[32]

> Where an assessee with substantial turnover made its Main purchase from ITC the assessing Officer tell fed the expenditure on account of purchaser from two parties were bogus. The reasoning of assessing officer vault that the lorry receipts and other related documents reflecting the movement of goods from purchase to sale, we're not established since the addition was based upon a negative presumption it was deleted in first appeal. The tribunal upheld the order in first appeal point in out that the purchase world made through regular banking channels and no part of the purchase was shown to be bogus in *CIT* v. *Vaman International Private Ltd*.[33]

26 [2018] 401 ITR 445 (SC).
27 [2020] 422 ITR 128 (Bom).
28 [2020] 422 ITR 218 (Mad).
29 [2020] 422 ITR 315 (MP).
30 [2001] 3 SCC 179.
31 [2015] 378 ITR 640 (SC).
32 [1962] AIR 1962 SC 1314.
33 [2020] 422 ITR 520 (Bom).

First appeal was upheld by the tribunal the high court held in *CIT* v. *Seven Seas Distillery (Pvt.) Ltd,*[34] that in view of specific exemption granted by the Ministry of Finance coma which permitted dot borrowing, even if the following is not so repayment of domestic loan there could have been no need to text deduction at source. On the fact that the foreign loan was utilised as working capital, the exemption under section 10 (15)(iv)(f) would have application as search use word mean that utilisation industrial development, apart from grant of this specific exemption, there was number other justification in respect of deductibility of interest on foreign loan used for industrial development in India.

XII EXEMPTIONS

Section 10(17A) exempts Ari word awarded to an individual for his public service in protecting public interest and service to society in our significant manner as are ascertainable from the materials our label in public domain. It is under this law that the awards given by the central government in respect of meritorious service in Kashmir and similar award for naming the notorious activities of one Veerappan in Karnataka and Tamil Nadu came up for exemption for president's police medal among other awards search awards received from the state government were held to be exempt under section10(17A) in *K.Vijaya Kumar* v. *Pr CIT.,*[35] while pointing out the merits of the award relating to action against Veerappan and to the sordid story of his kidnapping of the film star Raj Kumar and 3 others, so as to justify the award for distinguished services given to the police personnel in the light or the notoriety of Veerappan and the threat he posed to the country.

XIII EFFECT OF BOARD CIRCULARS

Board circulars are binding on the authorities but not on the courts. Section 144 C of the Income Tax Act provides for the method by which disputes relating to transfer pricing can be resolved. This section can be prospectively applied. It was under this circumstance's circular issued in 2013 proposing to make variations in income under section 144 C on or after October 1,2009 cannot be applied. It was held that in order to apply to a matter relating to 2009 by the circular issued three years thereafter as was held in V*edanta Ltd* v. *Asst .CIT.*[36] In other words, a legal provision can be effective only from the date on which it becomes law and a circular making it effective for a period even earlier is not binding on the courts and has to be ignored as not valid in law . It is based upon the general proposition that board circulars are binding on the authorities and not on courts.

In order that a trust is exempt a charitable institution, it should have been registered under section 12 A at the time of allowing the exemption though the proviso to section 12A (2) justify the exemption, it cannot override the main provision, nor could it be given retrospective effect. At any rate, it is not a matter, which can be considered an appeal as the power of registration is not vested in the appellate authority. In this context the proviso to section 12A (2) could not have been enter treated without considering

34 [2020)422 ITR 229.

35 [2020] 422 ITR514 (Mad).

36 [2020] 422 ITR 262 (Mad).

the main section because the proviso has to be understood harmoniously with the main section miracle, so that the tribunal grant of exemption with reference to the provisos to section 12A(2) add mistaken as it does not override the main provision. The exemption allowed was, therefore found to be erroneous in *CIT(Exemptions)* v. *Shiv Kumar Sumitra Devi Smarak ShikshanSansthan*.[37] End these contacts, where the benefit of the board circular was sought to be availed of, the high court pointed out that where the statute is clear, it is the statute, which has to be followed and not the instructions.

In another case, where the assessee lent it's borrowed monise to sister concern at a lower rate, interest was party disallowed. Commercial expectancy was not considered. The concept of matching principles cannot be blindly applied for every transaction on the part of assessee. What's the rate of interest charge is one of business decisions, on which the revenue cannot lightly disregard the agreement between parties, even where they are members of the same group. Where similar issue has been decided in favour of the assessee, disallowance of interest on borrowed capital under section 36(i)(iii) was held unjustified in CIT v. *Shriram Investments.*[38]

XIV CORPORATE SOCIAL RESPONSIBILITY

Corporate Social Responsibility (CSR) is the initiative of a company to assess and take responsibility for the company's effects on the environment and impact on social welfare. The term, generally, applies to company's efforts that go beyond what may be required by regulators. Corporate social responsibility is a form of corporate self-regulation integrated into a business model. CSR functions as a built-in, self-regulating mechanism whereby a business monitors and ensures its active compliance with the spirit of the law and its response to societal needs.The government introduced mandatory CSR requirements in Companies Act, 2013. The 2013 Act mandates companies to spend on social and environmental welfare, making India perhaps one of the very few countries in the world to have such a requirement embedded in a corporate law. As per law the expenditure incurred towards CSR) under Companies Act, 2013, is eligible for deduction as per section 80G[39] of the Income-tax Act, 1961, if the conditions mentioned therein are satisfied.Section 37 sub-section (1) provides that any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession. The High Court of Gujarat, in *Pr. CIT* v. *Gujarat Narmada Valley Fertilizer and Chemicals Ltd.,*[40] had occasion to deal with general principles applicable for deduction as business expenditure under section 37(1).[41] It has listed the six conditions for deductions, *viz.*

37 [2020] 422 ITR 468(ALL).

38 [2020] 422 ITR 528 (Mad).

39 This section provides for deduction in respect of donations to certain funds, charitable institutions.

40 [2020] 422 ITR 164 (Guj).

41 As regards to expl. 2 to s. 37 (1) barring deduction of amount incurred in discharging Corporate Social Responsibility, this section which does not appear to have any justification in law was not questioned as regards vires but the expenditure incurred by the assesse was found deductible in the light of its social obligation towards the society because of its responsibility as a polluting company compensating the damage caused by pollution as a social obligation for the undertaking.

i. The expenditure should not be covered under the specific sections, *i.e.,* sections 30 to 36;
ii. The expenditure should not be of capital nature.
iii. The expenditure should be incurred during the previous year.
iv. The expenditure should not be of personal nature.
v. The expenditure should have been incurred wholly or exclusively for the purpose of the business or profession.
vi. The business should have commenced.

The above principles have been elicited from 55 cases, which have been discussed by the high court. In summary, in order that a deduction may be admissible under section 37(1), the connection established between the expenditure and the object of such expenditure should be one of business at the time the expenditure was incurred. The high court pointed out to some change in law in explanation 2 to section 37(1) with effect from April 1, 2015, apart from the previous under section 135 of the Companies Act, 2013.

Incentive deduction under section 80-IB meant for housing was sought to be availed for a housing project. It was found in *Bashyam constructions P. Ltd v. Deputy CIT.,*[42] that what is contemplated for relief is development and not mere building. A developer of a housing project need to be the owner, so that the relief under section 80-IB(10) was allowed in first appeal on the inference that the assessee was a developer, but was reversed by the tribunal The high court found the order of the tribunal to be untenable because the project was one of joint venture agreement sponsored by the assessee as a developer along with the builder with mutual rights and obligations inextricably linked. it is under the circumstances, the deduction allowed in first appeal, through reversed by the tribunal, was found by the high court to be clear case of housing project meriting deduction under section 80-IB(10); the court brought out a clear distinction between development and mere building add dismissed the tribunal order as erroneous, in first appeal. The high court found that the denial by the tribunal did rise a substantial question of law, so as to justify its interference.

The SSC company commands its business to manufacturing and exporting biological agent (enzymes) during the financial year 1999- 2000. The claim under section 80JJA was disallowed by the assessing officer on his impression that it is available only for 5 years, while it is allowable for 8 years. The tribunal noticed that the first year of business was a matter of record. It was, therefore, found that, relief was available with reference to the records. Is in this context that it was found that assesssee was in the fifth year of business under section 80JJA and deduction, therefore, was allowed by the tribunal and upheld by the high court in *Pr. CIT* v. *Maps Enzyumes Ltd.*[43]

42 [2020] 422 ITR 346 (Mad).
43 [2020] 422 ITR 554 (Guj).

XIV AMALGAMATION

Losses of amalgamating company is deductible, subject to the satisfaction of the requirement under section 72(2) read with section 72A. Before enactment of section 72A, it was admissible for carry-forward and set off under Sick Industrial Companies (Special Provisions) Act, 1985. Where amalgamation is approved by the Central Board of Direct Taxes required under section 72A as a part of sanction of rehabilitation scheme, the requirement of section 72A should be understood to have been satisfied Where this right to carry forward and set-off of carried-forward loss in the light of section 72A had been overlooked by the assessing officer, it is open to the commissioner to exercise his powers under section 263 and set right the matter as was done in this case in CIT v. *Lakshmi Machine Works Ltd.,*[44] which pointed out that the sanction of the Board for scheme of amalgamation met the requirement of section 72A, so that the commissioner's order under section 263 revising the order of assessment to be in accord with this law under section 72A as was found in this case of amalgamation of two companies in pursuance of a rehabilitation scheme.

XV CONCLUSION

The Companies Amendment Act, 2020 amended the Companies Act, 2013 with the important objectives of improving the ease of doing business in India, de-criminalizing various minor offences and regulating producer companies, amongst other aspects. The Amendment Act of 2020 has the potential to promote foreign investment by facilitating the ease of doing business. Certainly, the decriminalization of certain offences would help in protecting investors against criminal liability for minor non-complianceswhich will result in increase of foreign investment to boost India's economy. The other various measureslike the constitution of appellate tribunal and the introduction of producer companies would provide for swifter redressal of grievances inIndia also be beneficial for agriculture, handlooms, handicrafts, and other related industries. Overall, the Amendment Act of 2020 ensured greater accountability and strengthened corporate governance norms and compliances in the corporate sector.

44 [2020] 422 ITR 235 (Mad).