

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) No. 405 of 2018**

[Arising out of Order dated 13<sup>th</sup> March, 2018 passed by the National Company Law Tribunal, Single Bench, New Delhi in Appeal No. 256/2017]

**IN THE MATTER OF:**

**1. Pr. Commissioner of Income Tax, Delhi - 6**

Having its office at  
Room No. 418, C. R. Buildings,  
I. P. Estate, New Delhi - 110002.

**...Appellant**

**Vs**

**1. Registrar of Companies, Delhi**

Having his office at:  
A/4<sup>th</sup> Floor, IFCI Tower,  
61, Nehru Place, New Delhi - 110019.

**2. Hem Prakash Sharma,**

Ex-Director, Nexus Marketing Pvt. Ltd.,  
R/o D-276, Ram Lila Park,  
Ganga Vihar, Delhi - 110094.

**3. Jitendra Sharma,**

Ex-Director, Nexus Marketing Pvt. Ltd.,  
R/o dB-34, GN 4,  
Brampuri, Delhi - 110053.

**....Respondents**

**Present:**

**For Appellant:** Mr. Deepak Anand, Jt. Standing Counsel.

**For Respondents:** Mr. P. S. Singh, Sr. Panel Counsel for ROC, Delhi.

## **J U D G M E N T**

### **BANSI LAL BHAT, J.**

This appeal has been preferred by 'Pr. Commissioner of Income Tax, Delhi – 6' (hereinafter referred to as the 'Revenue') against order dated 13<sup>th</sup> March, 2018 passed by the National Company Law Tribunal, Single Bench, New Delhi in Appeal No. 256/2017 by virtue whereof appeal preferred against order dated 29<sup>th</sup> August, 2011 passed by the Registrar of Companies, Delhi striking off the name of 'M/s Nexus Marketing Pvt. Ltd.' (for short the 'Company') has been dismissed taking into consideration the fact that no demand for tax was in place at the time of striking off the Company and one of the erstwhile Directors namely Mr. Hem Prakash Sharma undertook to settle the tax demand as may be raised by the Revenue in relation to the Company. The Revenue, styling itself as a creditor, seeks reversal of the order passed in appeal by the Tribunal on certain grounds to which we shall advert to hereinafter.

2. The undisputed facts underlying the issue raised in this appeal may briefly be noticed. The Company was incorporated on 20<sup>th</sup> February, 2007 under Companies Act, 1956 (hereinafter referred to as the 'Act') with its registered office situated at Dilshad Garden, Delhi. Respondents No. 2 and 3 respectively named Mr. Hem Prakash Sharma and Mr. Jitendra Sharma were the last Directors of the Company. On 18<sup>th</sup> July, 2011, the Company applied for striking off its name under 'Fast Track Exit Scheme, 2011',

which was processed by the Respondent No. 1 – Registrar of Companies, Delhi (for short ‘ROC’) in terms of guidelines issued by the Ministry of Corporate Affairs vide Circular No. 36/2011 dated 7<sup>th</sup> June, 2011. ROC issued notice to the Company as contemplated under Section 560(3) of the Act through MCA Portal on 21<sup>st</sup> July, 2011 copy whereof forms Annexure-I to Report-cum-Affidavit filed by ROC. Copy of the said notice is also said to have been forwarded to the Revenue for seeking objections, if any. Since, no objections were received by ROC from any stakeholder within the prescribed period of 30 days, name of the Company was struck off, notice whereof was published through MCA Portal on 29<sup>th</sup> August, 2011. Copies thereof are also stated to have been sent to Manager, Government of India Press, Faridabad for publication in the ‘Gazette of India’ and to concerned Income Tax Officer. Copy of notice forms Annexure-II to the Report-cum-Affidavit of ROC. However, ROC did not produce the original record on the ground that the same being older than eight years was not traceable/ readily available.

3. The Revenue, while assailing the impugned order passed by the Tribunal in its capacity as the Appellate Authority, seeks restoration of the Company to its original number in the Register of ROC primarily on the ground that the Tribunal landed in error in dismissing the appeal preferred by the Revenue by holding that the Revenue was yet to quantify the demand and that even the estimate of tax that may be due had not been disclosed anywhere in the appeal, thus the Revenue did not fall in the category of ‘Creditor’ under Section 252(3) of the Companies Act, 2013 and hence could not have filed the appeal. It is submitted that the amount of income

escaping assessment being Rs.6,04,280/- was specifically disclosed in the appeal memo. It is further submitted that the Company, despite having taxable income, failed to abide by the mandatory requirement of filing its return of income or loss for the previous year. It is further submitted that under the FTE Guidelines Circular no benefit was admissible to the Company on account of its pending dues towards the Revenue. It is submitted that the Company made misrepresentation before ROC in regard to furnishing of return of income and payment of Tax. It is further submitted that the Company was operating at the relevant time and has received income from undisclosed sources. However, the Revenue was not made privy to the proceedings before the ROC and the application of company for striking off was approved without proper inquiry. It is submitted that the Company and its Directors are trying to escape their tax liability, moreso as one of the erstwhile Directors, despite making an undertaking before the Tribunal did not comply with the Tax demand in relation to the Company. It is during the pendency of appeal proceedings before the Tribunal that an assessment order dated 28<sup>th</sup> December, 2017 is stated to have been passed ascertaining tax liability of the struck off Company at Rs.10,87,680/-, thereby bringing the Revenue within the definition of 'Creditor'.

4. Heard learned counsel for the parties and perused the records.
5. Guidelines for Fast Track Exit Mode (FTE) for Defunct Companies under Section 560 of the Act issued vide General Circular No. 36/2011 by

the Ministry of Corporate Affairs and implemented w.e.f. 3<sup>rd</sup> July, 2011 provided for fast track exit by a defunct company for getting its name struck off from the Register of Companies. For these Guidelines a 'defunct company' meant any company having Nil asset and liability and not commenced any business activity or operation since its incorporation or not carrying on any business activity for one year prior to making of an application under FTE. Such company having active status or identified as 'dormant' became entitled to apply for getting its name struck off from the Register of Companies. Under the guidelines, the decision of ROC in respect of striking off the name of company was treated as final. A cursory look at the Guidelines would reveal that a company, inter-alia, having dues towards Income Tax would not come within the purview of FTE. Procedure for being observed by ROC in dealing with applications under FTE was also laid down in the Guidelines which envisaged giving a 30 days' notice to the company by email as also putting the names of applicants on the MCA Portal giving 30 days' time to the stakeholders to raise any objection which included the Income Tax Department. Under these Guidelines, it was immediately after passing of the notice period and on being satisfied that the case was in order that ROC was required to strike off the name of the company from its Register and send notice thereof for publication in the official Gazette.

6. In the instant case, the Report-cum-Affidavit filed by ROC and supported by Annexures - I and II satisfactorily establishes that the procedure laid down for striking off the name of Company from Register of Companies has been observed in letter and spirit. In the face of the material

on record corroborated by contemporary record, no exception can be taken as regards compliance of the procedural aspect laid down in the Guidelines governing FTE of the Company. Though, in terms of the Guidelines, decision of the ROC in respect of striking off the name of Company from its Register is final, it is open to this Appellate Tribunal to examine whether the fundamental principles of jurisprudence have been observed in compliance. Whether the Company resorted to FTE with malafide intention of defrauding the Creditors would be a consideration having a bearing on the application of FTE Guidelines for defunct companies but before dwelling upon the question of Revenue being a Creditor qua the Company on the material date, it would be of primary importance to find whether the Company was 'defunct company' within the meaning of FTE Guidelines. Nil asset and liability was a sine-qua-non for a company to fall within the ambit of a 'defunct company'. Non-commencement of business activity/ non-operation since incorporation or non-operation for last one year prior to filing of application for extension of FTE were the further requirements under the Guidelines. It was therefore incumbent upon the Revenue, in the first instance to lay proof before the Tribunal or even before this Appellate Tribunal that the Company was possessed of assets besides having liabilities. Unfortunately, the Revenue has not even made any feeble attempt at disclosing any details of the assets, movable and immovable, that the Company possessed and liability, if any, on the material date. Liability to pay Income Tax would necessarily depend on assets besides trade and business activity culminating in profit or loss. The proof in regard to

possession of assets by the Company and owing of any liabilities by it as also in regard to factum of any income from legitimate sources assessable to Income Tax being abysmally absent, no fault can be found in regard to striking off the Company by ROC under FTE which has been duly notified in the 'Gazette of India'. Plea in this regard emanating from the Revenue is without substance and cannot be countenanced. Same is true about the plea of Revenue being a 'Creditor' within the meaning of Section 252(3) of the Companies Act, 2013, when admittedly it had not raised any demand or passed any assessment order prior to passing of the order of striking off the Company from the Register of Companies by ROC.

7. In so far as the undertaking given by Mr. Hem Prakash Sharma (Respondent No. 2), one of the erstwhile Directors of the Company qua the Tax demand subsequently raised by Revenue in terms of Assessment Order dated 28<sup>th</sup> December, 2017 during pendency of appeal proceedings before the Tribunal is concerned, same being a subsequent event and an issue not amenable to Appellate Jurisdiction across the ambit of this appeal, it would be open to the Revenue to approach the Tribunal in regard to breach, if any, of such undertaking violating the orders of the Tribunal. However, same cannot be a ground justifying restoration of the Company's name in the Register of ROC.

8. Yet another aspect cannot be overlooked while parting with this judgment. Striking off the Company which was a Private Company, from the Register of Companies, indisputably does not absolve its erstwhile

Directors who are liable as provided under Section 179 of the Income Tax Act, 1961 to pay the amount of Tax leviable in respect of income of any previous year. Why, in presence of such mechanism within the legal framework available to Revenue, insistence is on restoration of Company without laying any proof of its being possessed of any assets and liabilities and without any evidence of the Company being in operation, is a question that can be best answered, though has not been answered by the Revenue. We refrain from making any comment on this question lest the same prejudices the Revenue.

9. For the foregoing reasons, we are not inclined to interfere with the impugned order, which does not appear to be legally infirm or unsustainable. The appeal is dismissed leaving the Revenue to pursue appropriate legal remedy in the light of observations in this judgment.

There shall be no orders as to costs.

[Justice Bansi Lal Bhat]  
Member (Judicial)

[Balvinder Singh]  
Member (Technical)

**NEW DELHI**

**20 August, 2019**

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