

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 98 of 2019

[Arising out of Order dated 8th March, 2019 passed by the National Company Law Tribunal, Bengaluru Bench in CP(CAA)No.59/BB/2018 and CP(CAA)No.45/BB/2018]

IN THE MATTER OF:

Ad2Pro Global Creative Solutions Private Limited

80, (old no. 2/3), Hulkul Ascent,
2nd Cross, Lavelle Road,
Bengaluru – 560 001.

**...Appellant/
Transferee Company**

Vs

**1. Regional Director, (SER),
Ministry of Corporate Affairs**

3rd Floor, Corporate Bhawan,
Bandlagunda, Nagole, Tattiannaram Village,
Hayat Nagar, Mandal, Ranga Reddy District,
Hyderabad, Telengana - 500068.

**2. Registrar of companies,
Ministry of Corporate Affairs**

2nd Floor, E Wing, Kendriya Sadan,
Koramangala, Bengaluru-34.

**3. Designated Nodal Officer, Income Tax
Department (for Karnataka State)**

Pr. CCIT, Karnataka and Goa,
CR Building No. 1, Queens Road,
Bengaluru – 560 001.

4. Pr. Commissioner of Income Tax - I

5th Floor, BMTC Building, 80 Feet Road, 6th Block,
Kormangala, Bengaluru – 560 095.

**5. Official Liquidator, Bengaluru,
Ministry of Corporate Affairs,
High Court of Karnataka,
Corporate Bhavan, No.26-27,
12th Floor, Raheja Towers, M.G. Road.,
Bengaluru.**

**6. Regional Director, Reserve Bank of India,
10/3/8, Nrupathunga Road,
Bengaluru, Karnataka – 560 001.**

....Respondents

With

Company Appeal (AT) No. 99 of 2019

[Arising out of Order dated 8th March, 2019 passed by the National Company Law Tribunal, Bengaluru Bench in CP(CAA)No.59/BB/2018 and CP(CAA)No.45/BB/2018]

IN THE MATTER OF:

Ad2Pro Media Solutions Private Limited
2nd Floor, No. 10,
Bannerghatta Road,
Bengaluru – 560 078.

**...Appellant/
Transferor Company**

Vs

**1. Regional Director, (SER),
Ministry of Corporate Affairs**
3rd Floor, Corporate Bhawan,
Bandlagunda, Nagole, Tattiannaram Village,
Hayat Nagar, Mandal, Ranga Reddy District,
Hyderabad, Telengana - 500068.

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12th Floor, Raheja Towers, M.G. Road.,
Bengaluru.

6. Regional Director, Reserve Bank of India,

10/3/8, Nrupathunga Road,
Bengaluru, Karnataka – 560 001.

....Respondents

Present:

For Appellant: Mr. Abhinav Vashisht, Sr. Advocate with Ms. Priya Singh, Ms. Akshita Sachdeva, Mr. Nishant Singh, Mr. Sandeep Grover, Ms. Vaishnavi Rao, Mr. Nikhil Bhat and Mr. Kshitij Parashar, Advocates.

For Respondents: Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Piyush Goyal, Advocates for Income Tax Department.

J U D G M E N T

BANSI LAL BHAT, J.

This batch of two appeals is limited to a condition in the order dated 8th March, 2019 passed by National Company Law Tribunal, Bengaluru Bench, Bengaluru (hereinafter referred to as 'the Tribunal') by virtue whereof the Tribunal while allowing the Company Petitions bearing Nos. 45/BB/2018 and 59/BB/2018 approved the scheme of arrangement filed by the Transferor Company (Ad2Pro Media Solutions Pvt. Ltd.) and Transferee Company (Ad2Pro Global Creative Solutions Pvt. Ltd.) subject to imposition of certain conditions, one of which relevant for the purposes of disposal of these appeals and in regard to which the Appellants are aggrieved being that the scheme of arrangement can only be given effect to subject to the Transferor Company paying the entire tax liability allegedly outstanding to the tune of Rs.18,13,24,680/- to the Income Tax Department and Rs.86,81,439/- to the concerned Service Tax Authorities. The issue raised in these appeals is whether the Tribunal could impose a condition to make payment of alleged tax liabilities when the same are disputed by the Company before the concerned authorities and make it a precondition to sanctioning of the scheme of amalgamation, more so, when no such demand has been made by the concerned/ relevant authorities and no objection has been raised before the Tribunal. The further issue for consideration raised

in these appeals is whether the Tribunal could direct the Transferor Company to make payment of alleged tax despite an express undertaking by the Transferee Company to make such payment on behalf of Transferor Company if found due and payable after adjudication.

2. The relevant condition in the impugned order to which exception has been taken by the Appellants may be reproduced as under:-

“(10) b. In case of Income Tax, a sum of Rs.19,88,24,680/- is due for the financial year 2010-11 to 2016-17 and amount deposited in protest is only Rs.1,75,00,000/- and presently is pending before the Commissioner of Income Tax Appeals. The Transferor Company is directed to pay the entire outstanding dues, i.e., Rs.18,13,24,680/- (An Amount of Rs.1,75,00,000 which was paid in protest is subtracted from the original amount, Rs.19,88,24,680/-) to the Commissioner of Income Tax Appeals-1, Bangalore and Service Tax outstanding amount of Rs.86,81,439/- to the competent Authorities. The appropriate refund amount as may be, on finality, can be transferred to the Transferee Company.”

3. Learned counsel for the Appellants submitted that the demand as raised by the Income Tax and Service Tax Authorities has not yet crystallized, same being challenged by the Transferor Company before the

competent Appellate Tribunals where the adjudication is underway. It is further submitted that the demand emanating from the Income Tax Authorities initially at Rs.19,88,24,680/- was subsequently reduced to Rs.12,65,95,403/- by the Deputy Commissioner of Income Tax vide order dated 5th March, 2019. Subsequently, it was further reduced to Rs.10,66,37,594/- by the same authority. The Transferor Company has filed an appeal qua the said demand before Income Tax Appellate Tribunal (ITAT), Bengaluru which has stayed the demands raised by the Income Tax Authorities for the assessment year 2011-2012 to 2017-2018 subject to the Transferor Company depositing an amount of Rs.50,00,000/-, which has been deposited. Appellants claim to have issued notice to Income Tax Department in the proceedings under Section 230 (5) of the Companies Act, 2013 (for short 'the Act') before the Tribunal, in response whereof NOC dated 24th September, 2018 was issued by the Income Tax Department but the same was not placed on the record of the Tribunal within the statutory period. The Appellants claim to have obtained copy thereof through RTI application and submitted the same before this Appellate Tribunal which states that the Respondent No. 4 (Principal Commissioner of Income Tax – I) had no objection to the sanction of scheme but requested to make provision for any future demands that may be raised by the Income Tax Department. It is pointed out that the NOC aforesaid was issued much after the original demand of Rs.19,88,24,680/- was raised by Respondent No. 4.

4. According to Appellants, it had provided an undertaking to the Tribunal that whenever the Income Tax and Service Tax demands become crystallized, the Transferee Company shall payoff the same to the concerned authorities. The Transferor Company has also reiterated this fact before this Appellate Tribunal. Reference is made to clause 12.7 of the Scheme of Arrangement which provides that post amalgamation all tax assessment proceedings and appeals shall be continued with the Transferee Company and all or any dues payable shall be paid by the Transferee Company. The Transferee Company has undertaken to satisfy any and all demands raised by the Tax authorities as would be determined in the proceedings. It is submitted that the Transferor Company did not refuse to comply with the demands raised by Respondent No. 3 (Designated Nodal Officer, Income Tax Department, Karnataka) and Respondent No.4 (Principal Commissioner of Income Tax – I) and in fact it made payments in terms of the order of the Tribunal dated 3rd May, 2019.

5. In their reply affidavit Respondent Nos. 3 and 4 pleaded that there are outstanding tax dues against the Transferor Company as per following details:-

i. Office of DCIT, Circle 1(1)(1), Bangalore

<i>Ad2Pro Media Solutions Pvt. Ltd. (PAN – AAFCA9418A)</i>			
AY	Demand	Payment	Balance
<i>2012-13</i>	<i>Nil</i>		

2013-14	6,22,800	6,22,800	0
2016-17	5,36,67,417	15,00,000	5,21,67,417

On an application made before Pr. CIT, Bengaluru I an installment scheme has been granted on 5th March, 2019 to make payment of 20% of the demand in installments of Rs.15 Lakhs by the 15th of each month.

ii. Office of DCIT, Circle 1(1), International Taxation, Bangalore

Sl. No.	AY	Demand	Payment	Balance
1	2011-12	66,75,757	17,04,309	49,71,448
2	2012-13	66,99,818	17,10,452	49,89,366
3	2013-14	1,08,11,545	27,60,168	80,51,366
4	2014-15	1,78,66,117	44,38,186	1,34,27,931
5	2015-16	1,89,62,686	47,10,590	1,42,52,096
6	2016-17	1,64,93,981	42,10,884	1,22,83,097
7	2017-18	2,91,27,688	67,92,929	2,23,34,759
Total				8,03,10,074

It is submitted that pending income tax dues against the Transferor Company is Rs.8,03,10,074/-. The demand is likely to arise in scrutiny proceedings as against the Transferor Company.

6. Heard learned counsel for the parties and perused the record. It is well settled by a catena of Rulings that while sanctioning a scheme of arrangement the right of Tax Authorities remains intact to initiate

appropriate proceedings regarding recovery of any tax. The Tax Authorities concern is in regard to recovery of the outstanding tax dues and in the event of a scheme of arrangement/merger/amalgamation the Tax Authorities right to recover the outstanding tax dues must remain intact. Once a scheme has been sanctioned by a Tribunal in accordance with law, as admittedly in the instant case it is and the same goes unassailed, nothing precludes the Tax Authorities from recovering its legitimate and recoverable outstanding tax dues from the Transferor or the Transferee Company, as provided in the scheme. Where in a given case the liability has arisen or would arise or the demand would be raised against the Transferor Company for the relevant period after due scrutiny, assessment, review or determination through a due judicial process and the Transferee Company undertakes to make payment of all outstanding tax dues as determined in the aforesaid manner, the scheme cannot be refused and has to be allowed. Reference can be made to the judgment rendered by the *Hon'ble High Court of Delhi in Company Petition No. 597/2014 reported in 2016 SCC Online Del 1135, para 45* whereof which is relevant for our purposes is reproduced as under:-

“45. In response to the aforesaid objections, the transferee company in the affidavit dated 7th November, 2015 of Mr. Rajesh Bhatia, authorized signatory of the transferee company, has undertaken that in case of any liability, which may be legally assessed and payable by the transferor companies to the Income Tax Department,

the same shall be paid by the transferee company. They further undertake that none of the provisions of the Scheme, shall prejudice the income tax dues and the income tax department shall be free to recover the said tax, if any, from the transferee company. The undertaking given by the transferee company is accepted and it shall remain bound by the same. In view of the aforesaid, the objection raised by the Regional Director stands satisfied.”

7. In the instant case, Appellants have assailed the impugned order approving the Scheme of Arrangement manifesting in amalgamation of the Transferor Company with the Transferee Company approved and sanctioned by the Tribunal in terms of provisions of Section 230 and Section 232 of the Act to the limited extent of condition 10(b) in the impugned order in terms whereof the Transferor Company has been directed to pay the entire dues i.e. Rs.18,13,24,680/- to the Commissioner of Income Tax Appeals I, Bengaluru and Service Tax amount of Rs.86,81,439/- to the competent authorities. It emerges from the impugned order that the approval of the Scheme is subject to compliance of various conditions including the condition of which the Appellants are aggrieved. Appellants have not taken exception in so far as other conditions, to which the approval of Scheme has been subjected to, are concerned. The amalgamation of the Transferor Company with the Transferee Company was to be effective from 1st February, 2018 in terms of the impugned order. However, it is submitted

that the approved Scheme of Arrangement cannot be made effective till such time as the Transferor Company makes payment of the outstanding dues to the Income Tax and Service Tax Authorities in terms of the condition in the order impugned in this appeal. Though the Appellant's claim is that the outstanding tax liability in regard to income tax dues has been reduced to Rs.8,03,10,076/- , according to Respondents 3 and 4 pending income tax dues against the Transferor Company are Rs.8,03,10,074/-. This is besides the demand position in regard to balance of Rs.5,21,67,417/- emanating from DCIT, Circle 1(1)(1), Bengaluru. It appears that Respondent No. 4 has issued a No Objection Certificate (NOC) dated 24th September, 2018 raising no objection to the sanction of the Scheme, however, seeking to protect its legitimate interests by raising future demands as warranted. It is not disputed that in terms of affidavits sworn on 18th December, 2018 and 19th December, 2018 and filed before the Tribunal, the Transferee Company has undertaken to make payments in regard to the demand raised by the Income Tax and Service Tax Authorities **upon the same becoming crystallized.** The Transferor Company too has reiterated the same before the Tribunal. This is forthcoming from the record of the Tribunal to which reference has been made in the memos of appeals. Our attention has also been invited to clause 12.7 of the approved Scheme of Arrangement which eloquently states that post amalgamation all the tax assessment proceedings and appeals shall be continued with the Transferee Company and all or any dues payable in accordance with law shall be paid by the Transferee

Company. Admittedly, proceedings are pending in appeal before ITAT and depending upon the outcome of such proceedings, the Transferee Company has undertaken to satisfy all demands emanating from and raised by the competent tax authorities. The Scheme having been approved and sanctioned and the same being in consonance with law, no fault can be found with the Transferee's undertaking to satisfy all demands raised by the tax authorities as finally determined by due process. The Appellants are justified in maintaining that the tax liabilities would be satisfied by the Transferee as determined by the competent forum seised of the matter in accordance with the approved Scheme which admittedly does not come in conflict with any express provision of the Companies Act, 2013. The legitimate interests of the concerned Tax Authorities have been lawfully protected and their right to recover the tax dues as determined by ITAT or any other competent forum as the case may be, remains intact.

8. In view of the foregoing discussion while the Scheme of Arrangement approved by the Tribunal remains intact, condition 10(b) cannot be sustained and the same requires modification in line with the observations made hereinabove. The aforesaid condition is recast as under:-

10(b). As regards Income Tax liability, the Transferee Company shall pay the Income Tax dues of Rs.8,03,10,074/- lying outstanding against the Transferor Company as per outstanding demand

position of Income Tax with DCIT, Circle (1) (1), International Taxation Bengaluru for assessment years 2011-12 to 2017-18 or such amount as may be determined by the ITAT, Bengaluru besides the balance outstanding tax liability of Rs.5,21,67,417/- for assessment years 2012-13 to 2016-17 in terms of the arrangement/installment scheme sanctioned by Pr.CIT, Bengaluru - I. The Transferee Company shall also be liable to pay any additional amount found due upon scrutiny of return pertaining to AY 2017-18 in respect whereof demand may be raised by the concerned Income Tax Authority together with interest, if any, leviable thereon. The Transferee Company shall also be liable to pay Service Tax outstanding amount of Rs.86,81,439/- to the competent authorities.

Compliance in regard to the outstanding Income Tax liability of Rs.8,03,10,074/- shall not be treated as a condition precedent for implementation of approved Scheme of Arrangement and such compliance shall be subject to determination of liability by the ITAT, Bengaluru in appeal proceedings. Pending conclusion of appeal

proceedings the approved Scheme of Arrangement shall be implemented without insisting upon compliance of demands raised for the aforesaid period subject to any interim directions given by ITAT in this regard.

9. The appeals are allowed in the aforesaid terms. A copy of this Judgment be sent to the Tribunal for incorporating the modification in terms of this judgment in the Scheme of Arrangement approved by the Tribunal vide the impugned order and for taking appropriate follow up action. Appellants shall be at liberty to seek necessary modification in the approved scheme before the Tribunal in conformity with this Judgment and to render the Scheme workable. There shall be no order as to costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Technical)

NEW DELHI

25th September, 2019

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