

## Regulatory alert: NCLT order approving scheme of arrangement does not absolve the requirement of obtaining statutorily required permissions - Madras HC

Issued on: 23 July 2019



## Summary

The Madras High Court (HC), in the recent case of Dalmia Power Limited<sup>1</sup>, held that the order of the NCLT on a scheme of arrangement does not bind statutory authorities to waive any statutory requirements. Thus, the HC held that the respondents are required to comply with the statutory procedure of filing a condonation application if the scheme requires filing revised returns beyond the due date.

## Background

- Dalmia Power Limited and Dalmia Cement (Bharat) Limited (hereinafter referred to as companies or respondents), entered into separate schemes of amalgamation (Scheme), with the appointed date as 1 January 2015. The Scheme was approved by the National Company Law Tribunal (NCLT) in October 2017 and May 2018 respectively.
- Both the companies revised their tax return for Assessment Year (AY) 2015-16 and 2016-17 in November 2018, ie after the statutory due date for filing revised return. The Scheme provided an enabling clause for the revision of return even beyond the specified statutory time limit.
- The tax department treated the revised return as invalid on the grounds that the condonation of delay was not sought from the Central Board of Direct Taxes (CBDT)<sup>2</sup>.
- The respondents challenged the above position of the tax department. The single judge bench<sup>3</sup> of the Madras HC ruled in favour of the respondents, and directed the tax authorities to complete assessment in respect of AY 2015-16 and AY 2016-17 within

12 weeks from the date of receipt of order on the basis of revised returns of the companies.

- The tax department filed a writ appeal against the said order. The issue under consideration was whether the department is bound to accept the revised returns without insisting on filing the statutorily required condonation application.

## Contention of the tax department

- **NCLT order not binding on statutory authorities:** The tax department contended that the NCLT order specifies that the Scheme is binding on shareholders, creditors and employees, and does not bind statutory authorities.
- **NCLT order required compliance with laws:** The tax department highlighted that the NCLT order specified that necessary permissions should be obtained and compliances should be satisfied. Thus, the tax department contended that the procedures prescribed in the Income Tax Act relating to filing of the belated return should be complied with.

---

<sup>1</sup> ACIT v Dalmia Power Limited, Dalmia Cement (Bharat) Limited W.A.(MD) Nos.566 to 569 of 2019

<sup>2</sup> under section 119(2)(b) of the Act read with CBDT Circular 9 of 2015

<sup>3</sup> W.P. (MD) Nos. 25314, 25315, 25317 & 25318 of 2018

## Contention of the respondents

- **No right to subsequent objection:** The respondents contended that no objection was raised by the tax department pursuant to the notice served on it<sup>4</sup>. Hence, the respondents argued that the tax department could not raise any objection subsequently.
- **Scheme acquires statutory force post sanction:** The respondents argued that the Scheme acquires statutory force upon being sanctioned by the court and hence, is binding on statutory authorities.
- **Section 119(2)(b) confers administrative powers to tax authorities:** The respondents argued that the said section requires a condonation application where the revised return contains omissions or errors. However, once a scheme has been approved by the NCLT, which is a quasi-judicial body, there is no requirement to submit condonation for delay application to the administrative authority.

## High court's decision

The question to be answered in this case required the HC to analyse a larger question, as to whether the scheme of arrangement is binding on statutory authorities and, if so, in what manner and to what extent.

- **NCLT exercises supervisory jurisdiction and not appellate jurisdiction:** The HC, referring to a Supreme Court ruling in the case of Hindustan Lever<sup>5</sup>, held that the NCLT only examines whether the scheme is broadly fair and reasonable and not in violation of any public policy or law; it does not examine the scheme minutely with a tooth comb.

- **Scheme is binding on shareholders/creditors and employees:** The scheme is binding on all shareholders and/or creditors (including dissenters) because they approve the scheme at specially-convened meetings. The scheme is binding on employees if it provides that employees would be absorbed on terms that are not inferior to the existing terms.
- **Scheme not binding on statutory authorities if prescribed statutory procedures and compliances not met:** The statutory authorities, which are notified under section 230(5) of Companies Act, 2013, are bound to consider the revised returns etc. filed pursuant to the Scheme, provided the same are filed in accordance with the prescribed statutory procedure. The statutory authorities are not bound to give effect to all the enabling clauses of the Scheme by waiving statutory requirement under the relevant law.
- **Procedure for filing revised return after the due date should be followed:** The HC ruled in favour of the tax department and held that the companies are required to comply with the procedure of filing a revised return beyond the due date.

---

<sup>4</sup> under section 230(5) of the Companies Act, 2013

<sup>5</sup> Hindustan Lever Employees Union vs Hindustan Lever Ltd [1995] 1 SCC 49 (SC)

---

## Our comments

The ruling reiterates an important principle that enabling clauses in a scheme of arrangement does not absolve compliance requirements prescribed under the tax law or any other statute. By necessary implication, it is thus imperative to ensure that all necessary approvals/permissions are in place to ensure compliance with legal procedures and mitigate litigation on this account.

## Contact us

To know more, please visit [www.grantthornton.in](http://www.grantthornton.in) or contact any of our offices as mentioned below:

<b>NEW DELHI</b> National Office Outer Circle L 41 Connaught Circus, New Delhi 110001 T +91 11 4278 7070	<b>NEW DELHI</b> 6th floor, Worldmark 2, Aerocity, New Delhi – 110037 T +91 11 4952 7400	<b>AHMEDABAD</b> 7th Floor, Heritage Chambers, Nr. Azad Society, Nehru Nagar, Ahmedabad - 380015	<b>BENGALURU</b> 5th Floor, 65/2, Block A, Bagmane Tridib, Bagmane Tech Park, C V Raman Nagar, Bengaluru – 560093 T +91 80 4243 0700	<b>CHANDIGARH</b> B-406A, 4th Floor, L&T Elante office Industrial area, Phase-I, Chandigarh 160002 T +91 172 4338 000
<b>CHENNAI</b> 7th Floor, Prestige Polygon 471, Anna Salai, Teynampet Chennai - 600 018 T +91 44 4294 0000	<b>DEHRADUN</b> Suite 2211, Michigan Avenue, Doon Express Business Park, Saharanpur Road, Dehradun – 248002 T +91 135 264 6500	<b>GURGAON</b> 21st Floor DLF Square, Jacaranda Marg, DLF Phase II, Gurgaon 122002 T +91 124 462 8000	<b>HYDERABAD</b> 7th Floor, Block III White House, Kundan Bagh, Begumpet Hyderabad 500016 T +91 40 6630 8200	<b>KOCHI</b> 7th Floor, Modayil Centre Point, Warriam road junction, M.G. Road, Kochi 682016 T +91 484 406 4541
<b>KOLKATA</b> 10C Hungerford Street 5th Floor, Kolkata 700017 T +91 33 4050 8000	<b>MUMBAI</b> 16th Floor, Tower III, Indiabulls Finance Centre SB Marg, Elphinstone (W) Mumbai 400013 T +91 22 6626 2600	<b>MUMBAI</b> 9th Floor, Classic Pentagon, Nr. Bisleri, Western Express Highway, Andheri (E) Mumbai 400099 T +91 22 6176 7800	<b>NOIDA</b> Plot No. 19A, 7th Floor Sector – 16A, Noida 201301 T +91 120 4855 901	<b>PUNE</b> 3rd Floor, Unit No 309 to 312, West Wing, Nyati Unitree Nagar Road, Yerwada Pune - 411006 T +91 20 6744 8800

For more information or for any queries, write to us at [contact@in.gt.com](mailto:contact@in.gt.com)



Follow us @GrantThorntonIN



**Grant Thornton**

An instinct for growth™

© 2019 Grant Thornton India LLP. All rights reserved.

"Grant Thornton in India" means Grant Thornton India LLP, a member firm within Grant Thornton International Ltd, and those legal entities which are its related parties as defined by the Companies Act, 2013.

Grant Thornton India LLP is registered with limited liability with identity number AAA-7677 and has its registered office at L-41 Connaught Circus, New Delhi, 110001.

References to Grant Thornton are to Grant Thornton International Ltd (Grant Thornton International) or its member firms. Grant Thornton International and the member firms are not a worldwide partnership. Services are delivered independently by the member firms.