A DIRECTOR GENERAL OF INCOME TAX (ADMN.) & ANR.

v.

M/S. GTC INDUSTRIES LTD. & ANR.

(Civil Appeal No. 5038 of 2016)

B MAY 12, 2016

[A.K. SIKRI AND R.K. AGRAWAL, JJ.]

Sick Industrial Companies (Special Provisions) Act, 1985 – ss. 18(5) and 22(1) – Respondent-company declared a sick company C *by Board of Industrial and Financial Reconstruction (BIFR) – Scheme for reconstruction/rehabilitation sanctioned – Certain income tax reliefs including the relief 'to consider waiving of interest and penalty' kept under the Scheme – Rehabilitation period was for eight years from 31.3.2003 to 31.3.2011 – In the year 2007, the company was discharged from the purview of the Act as it ceased to* D *be a sick undertaking on its net worth turning positive – Thereupon, Revenue made demand for its outstanding dues – In the meantime the company had sold its property in Mumbai to third parties for developing the same – The company filed application before the BIFR seeking stay of coercive action proposed to be taken by the* E *Revenue – BIFR directed the revenue not to take any coercive action – Order of BIFR upheld by appellate authority – Writ petition by Revenue challenging the order – During pendency of the writ petition, company filed application seeking extension of rehabilitation period by another one year – Extension denied by BIFR and further upheld by appellate authority – Writ petition against* F *the order dismissed as withdrawn – Thereafter, writ petition of the Revenue was dismissed – On appeal by Revenue, held: Revenue had the right to recover arrears of income tax after 2007 (when the company ceased to be a sick company) and in any case after the rehabilitation scheme expired – The quantum of the dues for which* G *the Revenue had raised the demand, were correct – The question, as to whether it was permissible for the Revenue to include interest and penalty in view of the income tax reliefs granted in the scheme, not decided in the present appeal – Parties permitted to approach BIFR to seek clarification as to whether it was mandatory or recommendatory to waive interest and penalty.*

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Disposing of the appeal, the Court A

HELD: 1.The Sanctioned Rehabilitation Scheme has outlived its life which came to an end on 31st March, 2011. Application for extension of the Scheme filed before the Board of Industrial and Financial Reconstruction, was dismissed. The Appellate Authority had upheld this order of the Board. Moreover, B way back in the year 2007, the net worth of the Company had turned positive and it was no more a sick Company. Thus, the Revenue had right to recover arrears of income tax after 2007 and in any case after 31.03.2011 when the Scheme expired. [Paras 20 and 24] [1021-B-D] C

2. The plea of the respondent-Company was that the demand of Rs. 761.35 crores on account of income tax dues as made by the Revenue was not correct and that the Revenue had included even those demands, where the Company had succeeded and the appeals filed by the Department were pending. It has been clarified by the Revenue that the disputed amount has not been D included and only that amount which was payable as per the order of CIT (Appeal), is included. [Paras 26 and 29] [1023-C, H; 1024-A-B]

3. The question as to whether it was permissible for the Department to include the interest and penalty in its demand, is E not being decided in the present appeal. The parties are permitted to approach the Board, seeking clarification as to what was meant by the words 'to consider' (as it occurred in the Rehabilitation Scheme) i.e., whether the Board meant that it was mandatory on the part of the Revenue to waive the interest and penalty F or it was only recommendatory and, therefore, it was upto to the Department to agree or not to agree to the said request. The jurisdiction of the Board, whenever such application is filed, would be limited to the aforesaid aspect alone. [Paras 31 and 32] [1024-G-H; 1025-A] G

4. The Income Tax Department shall be entitled to take steps for attachment of the properties of the Company, including the property at Mumbai, as per the provisions of the Income Tax Act and shall be entitled to sell the same. If there are any secured creditors in respect of these properties, such attachment and sale shall be subject to the rights of those creditors. Out of the H

proceeds, the Principal amount of tax due to the Income Tax Department and even the admitted excise dues shall be paid to the Revenue. [Para 33] [1025-B-C]

5. As regards intervention application filed by the Companies who had entered into MOU in respect of the property of the respondent-company, once it is found that such an agreement was in violation of the Rehabilitation Scheme, the arrangement with the aforesaid interveners entered into by the Company loses its legal force and no right would accrue to these interveners on the basis of the said agreements. [Para 34] [1025-E]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5038 of 2016.

From the Judgment and Order dated 16.08.2011 of the High Court of Delhi at New Delhi in WP (C) No. 1875 of 2011.

Maninder Singh, ASG, Sanjay Sen, C. A. Sundram, Shyam Diwan, Dr. A. M. Singhvi, Parag Tripathi, Sr. Advs., S. A. Haseeb, Ms. Sadhna Sandhu, Mrs. Anil Katiyar, Mrs. Shally Bhasin, Rudreshwar Singh, Apoorve Karol, Vaibhav Tyagi, Kaushik Poddhar, Ms. Sujatha Shirolkar, Mahesh Aggarwal, Ankur Saigal, Abhinav Agrawal, E. C. Agrawala, Gagan Gupta, Ajay K. Jain, Akshat Kumar, A. Mukherjee, Advs. for the appearing parties.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. Leave granted.

2. Respondent No. 1 (hereinafter referred to as the 'Company'), namely, M/s GTC Industries Ltd. became sick Company sometime in the year 1997 as its net worth had eroded. As per the requirements of Section 15 of The Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the 'SICA'), it filed reference before the Board of Industrial and Financial Reconstruction (hereinafter referred to as the 'Board') which was admitted and registered as Case No.17/1997. The Board conducted enquiry into the working of Company to determine whether it had become a sick industrial company and in the process appointed the Managing Director, State Bank of India (MA) (RCB), Mumbai as the Operating Agency (OA) to enquire into and make a report with respect to certain matters which was specified in the orders passed by the Board in this behalf. The Board, on the completion of the enquiry, satisfied itself that Company had become a sick industrial company. A Draft Rehabilitation Scheme (DRS) was prepared by the

OA which was submitted to the Board and the Board circulated the said Scheme vide its order dated 14.01.2000. In this DRS, following income tax reliefs were proposed:

(a)To exempt from the applicability of the provisions of Section 41(1) of the Income Tax Act, 1961 and to allow carry forward of unabsorbed losses and allowances beyond eight years.

(b)To lift attachment order imposed by Income Tax Department against immovable and movable properties including Debtors and Bank Accounts. Thereafter, not to attach any property including movable properties of the company during the rehabilitation period.

(c)To grant stay against demand raised by Department but are in dispute before various appellate authorities/Courts.

(d)To waive interest and penalty, if any, imposed and not to levy such interest and penalties during the rehabilitation period.

(e)To exempt GTC from Capital Gain on sale of surplus land and/or sale of industrial sheds proposed for development on surplus land at Marol.

(f) To exempt from TDS against payments to be received by the company.

Objection was filed by the appellant against the DRS on 23.03.2001. During hearing dated 29.03.2001, the representative of the appellant stated that the appellant had no objection if the reliefs and concessions sought were not directed to be given but kept for the consideration of the Income Tax Department.

3. The Scheme of reconstruction/rehabilitation which was submitted by the OA, after consultation with all the stakeholders and creditors as per the requirement of law, was approved and sanctioned by the Board (hereinafter referred to as the 'SS-02') vide order dated 16.02.2002. It may be mentioned here that after the DRS was circulated and before it could be sanctioned, the income tax demand of Rs.366 crores was intimated by the Income Tax Department (appellant herein) to OA on 01.08.2001. While sanctioning the Scheme on 16.12.2002, the following income tax reliefs were kept in the Scheme:

"(a) To consider exemption from the applicability of the provisions of Sections 41(1), 115JB, 43-B and 72(3) of the Income Tax Act,

A 1961 and to allow carry forward of Unabsorbed Losses and allowances beyond eight years.

(b) To consider waiving interest and penalty, if any, imposed and not to levy such interest and penalties during the rehabilitation period.

B (c) To consider exempting GTC from Capital Gain on sale of surplus land and/or sale of industrial sheds proposed for development on surplus land at Marol and/or sale of any other surplus assets.

(d) To consider exempting GTC from TDS against payments to C be received by the company."

Besides this, under the head 'General Terms and Conditions' in Para 10(k) of the Rehabilitation Scheme, the Board directed with regard to the income tax dues as under:

D "10(k): The Income Tax Department would lift the attachment orders imposed by them against immovable and movable properties of GTC including debtors and bank accounts and thereafter not to attach any property including movable properties of the company during the rehabilitation period without prior consent of BIFR. The recovery proceedings against demands raised by Income Tax E Department against disputed liabilities shall remain suspended and refunds due to company, if any, would not be adjusted against such demands."

4. The said relief was not envisaged under the head reliefs and concessions asked from CBDT in Para 9(Q) and such direction was F given under the head General Terms and Conditions, without consent of the appellants required under Section 19(2) of SICA. Further, in Para 6(t) of the Sanctioned Rehabilitation Scheme (SS-02), the Board referred to the assumptions of the projected profitability Statement at Annexure II of the SS-02. The assumptions of profitability, to be considered part G of the Sanctioned Scheme, included *inter alia* the following:

(i) The sales would comprise of own manufacture of cigarettes and cigarettes purchased from convertors.

(ii) That the in-house capacity utilization would be in the range of 54% to 75%.

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Further, as per the projected profitability statement, the projected sales comprised of cigarettes only, and that as per the projected fund flow statement, there was to be no decrease in the fixed assets. It was further laid down in para 10(f) under the head 'General Terms and Conditions' that "the company would not undertake any major modernization/diversification program/ capital expenditure except normal capital expenditure during the period of implementation of the rehabilitation scheme without specific prior permission of the MA/BIFR."

Besides this, Board further directed the Promoters in para 9 (S)(b) of the Sanctioned Rehabilitation Scheme "to meet any shortfall in the cash flow projections or any contingency not conceived in the Scheme. In this regard, promoters may raise moneys by way of development of industrial estate and sale thereof of surplus land available at Marol, Mumbai or sale/development of any other surplus assets."

5. Having regard to the aforesaid provisions in the Scheme with its imprimatur by the Board, the Revenue could not and did not resort to any action by way of attachment of movable or immovable assets of the company.

6. The cut-off date in the Scheme was 31.12.1998 and the rehabilitation period of eight years was prescribed therein. However, later on the cut-off date in the Scheme was changed from 31.12.1998 to 31.03.2003 by the Board and the eight years period provided for rehabilitation was to be reckoned from 31.03.2003. In this way, the Scheme was to lapse on 31.03.2011.

7. When this Scheme was still in operation, the Revenue filed petition under Section 22(1) of SICA seeking permission to recover the outstanding dues of Rs. 426.37 crores which were raised after the date of Sanctioned Scheme. On this petition, the Board passed order dated 29.03.2006 directing the Revenue to release a sum of Rs. 4.28 crores which was withheld by the Revenue and further directed the Income Tax Department to expedite the settlement of the disputed demands. It was also observed that in the event of crystallization of the disputed demand of the Revenue and in case of shortfall of funds thereof for repayment by the company, company/promoters would bring the requisite amount of interest free unsecured loan and/or would raise the necessary fund by way of disposal of the company's surplus assets as envisaged in paragraph S of the SS-02. It also directed that the company would settle/

A pay the income tax dues, if any, which would become payable after sanction/implementation of SS-02 i.e. w.e.f. 01.04.2003 onwards in the normal course and neither the Company nor its promoters would be entitled for any protection under SICA for delay/non-payment of such dues.

B 8. When the position stood thus, on 29.06.2007 the Company submitted before the Board that its net-worth became positive on 31.03.2007 and sought de-registration from SICA/Board. The Board, passed order dated 29.06.2007 holding that since net-worth of the company had turned positive as on 31.03.2007, it has seized to be a sick industrial undertaking within the meaning of Section 3(1)(O) of SICA
C and discharged the company from the purview of SICA. Operative part of the direction in the said order read as under:

"(i) The SBI is hereby relieved from the responsibility as the MA.

(ii) The unimplemented provision(s) of the SS-02 for the unexpired
D period of the Scheme and also the unimplemented provisions of the subsequent order(s) issued by the Board in this regard, if any, would continue to be implemented by the concerned agencies and their implementation would be monitored by the company.

(iii) The 'Special Director', appointed by the BIFR on the
E company's Board of Directors (BOD), if any, would stand discharged with immediate effect.

(iv) The company would complete necessary formalities with the 'Registrar of Companies' (ROC), as may be required."

9. As per the Revenue, as on 20.01.2010, there were outstanding
F dues and income tax amounting to Rs. 761.35 crores and the demand thereof was sent to the Company for payment and it was also mentioned that coercive action may be taken to recover the said amount. Such a demand was made on the premise that the net-worth of the company had turned positive and it has ceased to be a sick company. Therefore,
G having lost the status of a sick company, it was not entitled to the protection under provisions of SICA.

10. Within few days of this demand, the Revenue found from the reports in print media that the company had sold its Vile Parle Property in Mumbai for a sum of Rs.591 crores. In order to verify this sale transaction, a specific survey under Section 133(A) of the Income Tax
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Act was conducted from which it was gathered that the Company had entered into a Memorandum of Understanding (MOU) with M/s. Sheth Developers Pvt. Ltd. and Suraksha Reality Ltd. for developing the said property. This MOU prescribed that on execution of agreement for development, the assessee Company would receive a total consideration of Rs.542.70 crores out of which the assessee Company had already received advance consideration of Rs.60 crores at the time of signing the MOU. Further, the company had also entered into an agreement for development of assessee's land at Hyderabad for construction of Ashoka Golden Mall and Multiplex. The company had not passed on the possession of Vile Parle as development agreement was not signed. Thus, the company had, by this time, converted almost all the immovable properties owned by it as business assets into stock-in-trade and almost all properties were put on sale. The tentative cost of sale of all these properties would be between Rs. 700 crores to Rs. 1000 crores approximately.

11.On coming to know of the aforesaid information, concerned Tax Recovery Officer of the Revenue demanded tax and penalty of remaining Assessment Years was also served vide letter dated 12.03.2010. On receiving the said letter dated 12.03.2010, the Company filed M.A. bearing No. 200/2010 before the Board seeking stay of any coercive action proposed to be taken by the Revenue. This application was contested by the Revenue, *inter alia,* on the ground that since the company had been discharged from SICA vide order dated 29.06.2007, the Board had no jurisdiction left over implementation of the Scheme and the company could no longer enjoy protection under Section 22(1) of SICA. On this application, order dated 09.04.2010 was passed by the Board directing the Revenue not to take any coercive action against the company. It was also directed that the unimplemented provisions of SS-02, particularly, paragraph 10-k thereof, should be implemented by DIT(R).

12. This order of the Board was challenged by the Revenue by filing appeal before the Appellate Authority for Industrial and Financial Reconstruction (hereinafter referred to as the 'AAIFR'). In this appeal, interim order dated 03.06.2010 was passed directing both the parties to maintain status quo. According to the Revenue, despite the aforesaid order, the Company invited online forward auction for the land situated in Marol Industrial Area which forced the Revenue to file MA No.448/

A 2010 before the Appellate Authority on 24.08.2010. In this application, the Appellate Authority passed the order suspending the proposed online e-auction. The appeal was ultimately decided by the Appellate Authority on 31.01.2011. With other connected appeals, *inter alia,* ordering that Income Tax Department could not have initiated any coercive action for recovery of its dues against the Company since the unimplemented provisions of the sanctioned rehabilitation scheme for the unexpired period of the scheme are still under implementation.

13. This order was challenged by the Revenue by filing the Writ Petition (C) No. 1875/2011 in the High Court of Delhi. While the aforesaid writ petition was pending certain other developments took place. Some dues of Central Excise Authority were also payable by the company. The Company had written few letters to the Central Excise Authorities, in the year 2010, stating that their manufacturing operation has become unviable because of fixed overheads and consequently a decision was taken to restructure business by entering into reality business. The company also had filed Misc. Application No. 114/2011 with a prayer to extend the duration of rehabilitation period (originally fixed for eight years) by another one year. Due to the delay caused in implementation of the said Scheme because of the coercive measures taken against the company by the Revenue this application was decided by the Board on 31.03.2011. The Board by a detailed order recorded a specific finding, based on material produced before it, that the Tax Departments could not be held responsible for any delay in the implementation of the Scheme. It also held that once the Company had been discharged under SICA on its net-worth turning positive in the year 2007, provisions of Section 18(5) were not applicable and, therefore, any major modification by way of extension of time, was not permissible.

14. Against the aforesaid order of the Board, the Company filed an appeal before the Appellate Authority. This appeal was, however, dismissed by the Appellate Authority vide orders dated 29/30.06.2011 holding that the Company was not entitled to get the period of rehabilitation scheme extended. It specifically affirmed the finding of the Board that the Company had violated the sanctioned scheme and that no modification of the Scheme was possible.

15. The aforesaid order of the Board was by majority of 2:1. Whereas two members were of the opinion that the order of the Board did not require any interference and gave their detailed reasoning in

support of the said view, the Chairman of the Board, who was retiring on the same day, observed that he had no time to write a detailed order but expressed his view that this case should be remanded back to the Board for an enquiry to be conducted regarding the violation of clause 10(f)(b) of the Sanctioned Scheme by the Company entering into an agreement for transfer/development of their property at Ville Parle. According to the Chairman, as per para 9(5)(b) of the sanctioned Scheme, there was a provision for sale or development of any other surplus asset and the plea of the Company regarding extension of time needed a detailed enquiry by the Board. Notwithstanding these observations of the Chairman, who was the dissenting member, majority view was that the appeal was bereft of any merit and the order of the Board did not suffer from any legal error and on this basis majority had dismissed the appeal. Obviously the effect was that the appeal of the Company stood dismissed.

16. Knowing the aforesaid consequence fully well and conscious of the same viz. the decision of the Appellate Authority had gone against it, the Company challenged the order of the Appellate Authority by filing Writ Petition No. 4614 of 2011. This writ petition was, however, dismissed as 'withdrawn' on 05.07.2011 and the High Court gave two months' time for the clearance of the manufactured stock of goods and payment of excise duty on those goods. The order was silent about income tax dues. The reason for which withdrawal was sought is contained in the following portion of the said order of the High Court.

> "We have heard learned counsel for the parties. Learned senior counsel for the petitioner, on instructions, states that he would like to withdraw the writ petition and the application to pursue the course suggested by the majority view of the AAIFR vide order dated 29.06.2001 for seeking modification of the Scheme by approaching the BIFR."

With the withdrawal of the writ petition, order of the Board, as affirmed by the Appellate Authority, attained finality.

17. As noticed above, at that time, Writ Petition No. 1875 of 2011 filed by the Revenue was pending in the High Court. This petition was filed against the order of the Appellate Authority restraining the Revenue from taking coercive action against the Company for recovery of its dues on the ground that unimplemented provision of the Sanctioned Rehabilitation Scheme for the unexpired period of the Scheme was still

A under implementation. This reason was no more in existence in view of the aforesaid orders passed by the Board as well as Appellate Authority refusing to give extension to the Company in respect of the sanctioned Scheme. The purport and effect of those orders, clearly, was that the Scheme had come to an end and was no more in operation. The Revenue, thus, filed detailed rejoinder affidavit in Writ Petition No. 1875 of 2011 B bringing the aforesaid development on record in the said writ petition.

18. Notwithstanding the aforesaid background, in the writ petition preferred by the Revenue, High Court has passed impugned orders dated 16.08.2011 dismissing the writ petition with the observations that the appropriate remedy for the petitioner is to move the Board for lifting of C the bar under Section 22 of SICA. It is a very brief order and the entire reasoning on which the said order is based can be found in the following discussion by the High Court.

> "The violation alleged by the petitioners is broadly that respondent no. 1 has been indulging in sale of assets without defraying the D income tax liabilities in consonance with paragraph 9S(b) of the sanctioned scheme. It is the learned counsel's say that the Department had not taken, in past, coercive action for recovery of huge amounts of income tax dues in accordance with the provisions of paragraph 10(k) of the sanctioned scheme. It is E submitted that this course of action of sale of assets to satisfy the scaled down claim of the petitioners in terms of the scheme is not permissible. It is the say of the Department that since it is a scheme of revival, respondent no. 1 ought not be allowed to sell the assets without paying the dues to the Department.
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> F In our considered view, the impugned orders cannot be faulted, which are, predicated on the factual position at that stage of time. If the grievance is, as is now sought to be urged before us; the appropriate remedy for the petitioner is to move the BIFR for lifting of the bar under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 by articulating before the said forum G the factum of alleged violation of the sanctioned scheme.

19. What follows from the above is that the High Court was convinced by the reason that the question as to whether the Company had indulged in sale of assets unauthorisedly and in violation of para 9(5)(b) which is yet to be taken by the Board. The High Court also H

proceeded on a palpably wrong presumption that the sanctioned Scheme was still under operation and, therefore, bar under Section 22 of the SICA applied. For this reason, it directed that the only remedy left for the Revenue was to approach the Board for lifting of the bar under Section 22 of the SICA. From the facts and events noted above, this premise and assumptions are clearly erroneous and contrary to record.

20. In the first instance, it is to be seen that the Scheme had already expired on 31.03.2011. Application for extension of the Scheme was filed before the Board which was dismissed. The reason given by the Company seeking extension was that the implementation of the Scheme was delayed because of the coercive tactics which the Revenue had adopted against the Company. This claim was found to be hollow and incorrect. The Appellate Authority had upheld this order of the Board, albeit by a majority of 2:1. Thus, no Scheme was in operation. Another significant aspect which is to be kept in mind is that way back in the year 2007, the net worth of the Company had turned positive and it was no more a sick Company. Thus, the Revenue had right to recover arrears of income tax after 2007 and in any case after 31.03.2011 when the Scheme expired.

21. It may be pertinent to mention at this stage that the Company has approached the Board, after withdrawal of its Writ Petition No. 4614 of 2011 on the ground that while withdrawing this petition the High Court had permitted the Company to seek recourse to the Board in view of the observations of the majority opinion of the Appellate Authority. Even this is erroneous.

22. The Appellate Authority dismissed the appeal on merits. In the course of discussion on various aspects and arguments that were raised before the Appellate Authority, the Appellate Authority noted that the Company had taken steps to close a unit which was rehabilitated under the Sanctioned Scheme and to sell the property thereof without obtaining the prior approval of the Board. It further observed that when those steps were taken, jurisdiction of the Board over the Company continued under Section 18(9) and Section 18(12) of SICA. In the opinion of the Appellate Authority, since the Company had availed itself of and was continuously availing the beneficial measures of SS-02, which included rehabilitation measures for the Mumbai unit, it was obligatory on the part of the Company to seek and obtain the prior permission of the Board to close the Mumbai unit, shift its plant and machinery to the Vadodara

A and engage in reality business. Thus, while rejecting the argument of the Company that there was no violation of the Scheme in dismantling the Ville Parle Unit and selling its land and building, the Appellate Authority took the view that it had altered the essential ingredients of the SS-02 as a result of which that Scheme stood mutilated and, therefore, seeking extension of such Scheme was untenable. While discussing this aspect, the Appellate Authority, repelling the argument, also remarked as under:

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> "12. The only option available to the company was to seek modification of the scheme under Section 18(5) of SICA which had to be considered through appropriate procedure prescribed under SICA for seeking fresh commitments from the concerned parties, as required."

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By these remarks the Appellate Authority only pointed out the breach committed by the company in not taking prior permission and nowhere permitted the company to resort to the same even now as that opportunity was already lost.

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23. It is the aforesaid remarks, advantage whereof was taken by the Company when orders dated 5th July, 2011 were passed in Writ Petition No. 4614 of 2011. Though, the petition was withdrawn, the counsel for the Company made the statement that the Company would like to pursue the course 'suggested' by the majority view of the Appellate Authority in its order dated 29th June, 2001 for seeking modification of the Scheme by approaching the Board. No such suggestion or permission at all was given. It is stated at the cost of repetition that the aforesaid observations were made while dealing with the particular argument of the Company. That did not mean that the aforesaid observations gave the Company any liberty to approach the Board even at this juncture. The filing of such application by the Company before the Board seeking modification is, therefore, totally untenable move on the part of the Company. Such an application is not maintainable in law.

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24. When the matter is considered in this hue, keeping in mind the aforesaid backdrop, the impugned order passed by the High Court in the writ petition that was preferred by the Revenue, is manifestly wrong and unsustainable. For the reasons stated above, we are of the view that the Sanctioned Scheme (SS-02) has outlived its life which came to an end on 31st March, 2011. the Revenue is, thus, entitled to recover its dues.

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25. The next question is about the quantum of dues that the Revenue has to recover from the Company.

26. We may mention at this stage that during the course of arguments, learned senior counsel appearing for the Company stated that the Company was ready to settle the dues of the Revenue and for this purpose it was agreeable for the sale of its Ville Parle land under the directions of this Court. It was also agreed that the said sale may be carried out by the monitoring agency, i.e., Canara Bank. The learned senior counsel, however, vehemently questioned the amount claimed by the Revenue in this behalf as it was submitted that the demand of Rs. 761.35 crores on account of income tax dues as made by the Revenue was not correct. On this aspect both the sides made their detailed submissions.

27. By affidavit dated 02.05.2016 filed by Ms. Anita Sinha, Additional Director General (Recovery) C.B.D.T., following dues are claimed:

"a. Principal amount of tax	Rs.81.66 crores
b. Principal amount of Penalties	Rs.83.29 crores
c. Interest u/s. 220(2) till 30.04.2016	Rs.487.50 crores
Total	Rs.652.45 crores"

28. This is the revised figure given on 02.05.2016. As pointed out above, in the special leave petition filed by the Revenue, a demand for sum of Rs. 761.35 crores was made.

29. On the other hand, it is the say of the Company that the demands were reduced at an amount of Rs. 52.53 crores by April, 2012 itself. It was submitted that in the reply filed by the Revenue to I.A. 6 of 2014 filed by the Company, the latest position of tax demand and status of appeals was mentioned. The Revenue had stated the outstanding of Rs. 635.96 crores (principal amount of tax and penalty Rs. 164.96 crores + interest upto June, 2015 @ 471.01 crores). Referring to the details in the said chart, as per which the demand was calculated by the Revenue in respect of different Assessment Years, an endeavour was made by the learned senior counsel for the Company to show that even those demands were included where the Company had succeeded and the

A appeals filed by the Department were pending before the Income Tax Appellate Tribunal. It was, however, clarified by Mr. Maninder Singh, learned ASG appearing for the Revenue that no doubt appeals have been filed by the Revenue which are pending before the ITAT, but the disputed amount has not been included and only that amount which was B payable as per the order of CIT (Appeal), is included.

30. Another important submission, which needs consideration, advanced by Mr. Sundaram, learned senior counsel appearing for the Company was that in the Scheme which was approved by the Board, Income Tax Department had agreed to waive interest and penalty and, therefore, it was not permissible for the Department to include the interest C and penalty. The particular clause in the Scheme as sanctioned by the Board reads as under:

> "Q. Central Government
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> CBDT/Income Tax
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> D .....
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> (b) **to consider** waiving interest and penalty, if any imposed and not to levy such interest and penalties during the rehabilitation period."

E 31. It was argued that the words 'to consider' are to be treated as mandate. It was submitted that the expression 'to consider' in similar Schemes approved by the Board has been interpreted by various Division Benches of High Courts to mean that the relief granted is mandatory and not merely recommendatory. Reference was made to the judgment of Delhi High Court in ***Union of India*** v. ***CIMMCO Ltd. & Ors.***, bearing F W.P.(C) No. 626 of 2014 and that of Madras High Court in ***Commissioner Income Tax-I, Chennai*** v. ***M/s. Tube Investments of India Ltd.-I, Chennai***, bearing Tax Case (Appeal) Nos. 519 and 521 of 2005.

32. We are not deciding this issue in the present appeal and permit G the parties to approach the Board seeking clarification as to what was meant by the words 'to consider' i.e., whether the Board meant that it was mandatory on the part of the Revenue to waive the interest and penalty or it was only recommendatory and, therefore, it was upto to the Department to agree or not to agree to the said request. The jurisdiction of the Board, whenever such application is filed, would be limited to the H

aforesaid aspect alone and the Board shall decide the issue within the period of two months. Otherwise, we make it clear that as the Scheme has lapsed no further proceedings of any nature are to be entertained by the Board including the application for modification filed by the Company and pending before the Board.

33.The Income Tax Department shall be entitled to take steps for attachment of the properties of the Company, including Ville Parle land as per the provisions of the Income Tax Act and shall be entitled to sell the same. If there are any secured creditors in respect of these properties, such attachment and sale shall be subject to the rights of those creditors. Out of the proceeds, the Principal amount of tax due to the Income Tax Department and even the admitted excise dues shall be paid to the Revenue. Insofar as payment of interest and penalty is concerned, that would be dependent upon the decision which the Board would give.

34. Before parting with, we may point out that M/s. Sheth Developers Private Limited and Suraksha Realty Limited have filed applications to intervene in the matter as they submit that in respect of Ville Parle Land, MOU was entered into by the Company with them. However, once it is found that such an agreement was in violation of the Scheme, the arrangement with the aforesaid interveners entered into by the Company loses its legal force and no right would accrue to these interveners on the basis of the said agreements. We, thus, dismiss the plea raised by the intervener.

35. Appeal stands allowed and disposed of on the terms indicated above.

Kalpana K. Tripathy

Appeal disposed of.