

**BHUBANESWAR BRANCH OF
EASTERN INDIA REGIONAL COUNCIL OF**

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

e-newsletter/04/2021-22

NEWSLETTER

APRIL 2021



ICAI BHAWAN

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BHUBANESWAR-751012**

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Newsletter can be downloaded from the
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Dear Members;

Warm greetings!

Believe, everything in your personal and professional life is good. As we are witnessing, the COVID is not over and its back. The situations like this are going to be challenging and demands high degree of discipline from us. I am sure we are going to sustain this phase also and will show resilience in whatever we are going to do. In the meantime, we are also realigning ourselves to make our learning system virtually again.

Thank you.

CA. Bisworanjan Sutar
Chairman



MANAGING COMMITTEE MEMBERS OF BHUBANESWAR BRANCH OF EIRC OF ICAI (2021-22)



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Chairman



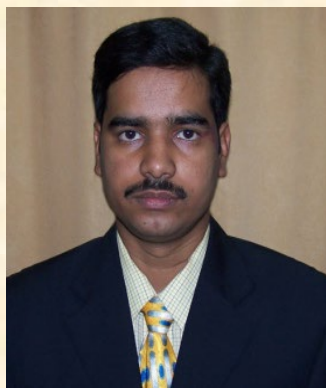
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Members Area of Interest

Definition of “Undertaking” under Section 180(1)(a) of the Companies Act, 2013 leaves much to be desired.

Section 180(1) (a) in the Companies Act, 2013(hereinafter referred to as “The Act”) which corresponds to Section 293(1)(a) of the predecessor Act of 1956 imposes certain fetters on the powers of the board in respect of the sale, lease or otherwise, the disposal of an undertaking of a company or where the company owns more than one undertaking, of the whole or substantially the whole of any such undertakings. The Section is intended to be an improvement over the predecessor clause in that the Explanation thereunder contains the definition of an “undertaking” which in terms of application has only a restricted usage being intended only for the purposes of the said clause. Section 293(1)(a) did not define the term “Undertaking” and the determination of the term was therefore left to the meaning adduced to the term by the Judiciary. The Judiciary has had occasion to provide myriad interpretations on the concept of “Undertaking” which we shall examine as we proceed along in this exposition.

Purpose of an Explanation in the Statute

An Explanation is at times appended to a Section in the Statute to explain the meaning of the words contained in the Section.(*S.Sundaram Pillai v Pattabhiraman*(1985)(I SCC at pages 611, 613).The meaning to be given to an Explanation must depend upon its terms and as the Court observed in *Krishna Ayyangar v Nattaperumal Pillai*(ILR 43 Mad.500) “no theory of its purpose can be entertained unless it is to be inferred from the language used”.The principles of statutory interpretation further provide that if the language of the Explanation shows a purpose and a construction consistent with that purpose can be reasonably placed upon it, that construction will be preferred as against any other construction which does not fit in with the description of the avowed purpose as observed by the Supreme Court in *Bengal Immunity Co. Ltd v state of Bihar* (AIR 1955 SC 661).

We shall examine the appropriateness of the definition of “Undertaking” as given in the Explanation in the light of the foregoing observations.

The Explanation under Section 180(1)(a) is reproduced below for the facility of understanding as under:

Quote

“Explanation-For the purposes of this clause-

i)“undertaking” shall mean an undertaking in which the investment of the company exceeds twenty per cent of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates twenty per cent of the total income of the company during the previous financial year;

ii)the expression “substantially the whole of the undertaking “ in any financial year shall mean twenty per cent or more of the value of the undertaking as per the audited balance sheet of the preceding financial year.”

Unquote



A plain reading of the above reveals the obvious limitations in the definition. Undertaking is again meant simplistically to be an Undertaking without any endeavor towards widening the amplitude of the term.. All that the definition does is to provide a quantitative yardstick by stipulating that where the investment in the undertaking accounts for a value in excess of twenty per cent of the networth of the company based on the last audited financial statement or which has generated twenty per cent or more of the total income of the company in the preceding financial year, it would be an undertaking. Therefore a vanilla sale of assets exceeding the value band stipulated above which does not tantamount to sale of “undertaking” will not fall within the ambit of approval of the shareholders under the Section.

The expression ‘substantially the whole of the undertaking’ comes into play where the company has more than one undertaking and the value of the undertaking in this instance has to exceed twenty per cent or more of the value of the undertaking as per the financials of the preceding financial year.

Thus despite the fact that the term has been defined, it suffers from the inherent limitation of not amplifying the nuances of the expression “Undertaking”. Therefore one has to firstly ascertain whether the bundle of assets/asset sold/disposed qualifies as an “Undertaking” and if it does, one will have to consider the value band prescribed and if the thresholds prescribed are breached there would be application of the Section triggering off the need to seek the mandate of shareholders by special resolution.

We shall therefore look at the repository of judgments available on the subject to find the true meaning of the term “Undertaking”.

Despite the fact that a definition to the term does exist as stated above, we have to necessarily disregard the definition for the purpose of interpretation due to its inherent limitations .

“Undertaking” as explained by the legal lexicon

As the definition given by the Statute provides hardly any insight except for a quantitative measure , we have to fall back on the definition of the term as per the Legal Lexicon as the Legislature must have construed the expression in its ordinary sense or as used in common parlance.

As per the Webster Dictionary, it refers to “anything undertaken, any business, work or business project which one engages in or attempts; an enterprise”.

The Black’s Dictionary explains the term to denote “all the assets of the company past, present and future and is a mortgageable interest being commonly charged by the debentures of the company”.

The term has also been defined as one which is used in the sense of an enterprise which can be owned and transferred.

Undertaking –as defined by the Judiciary

Myriad interpretations have been provided to the term by the Judiciary.

The observations made by A.N.RAY,J. in *Rustom Cavasjee Cooper v UOI*(1970)40 Com Cases 325)(Mum) are poignant. His Lordship pointed out that “an Undertaking refers to a business unit or enterprise in which a company may be engaged as a gainful occupation. For example, each one of the several factories or manufacturing plants of a company will be considered an undertaking from the business point of view. It is



productive organism ,so to speak ,and signifies a going concern engaged in the production, distribution etc. of goods or services , sometimes it means also the entire business or organization of the company.”

An undertaking has been held to mean “an activity of a man engaged in, with a view to earn profit” (*Bank of Maharashtra Ltd v Official Liquidator*(AIR 1969 Mys. 280 at page 291)in the context of section 293(1) (a) of the old Act.

The Supreme Court had occasion to refer to an undertaking as an enterprise engaged in production , sale or control of goods etc.(*Carew &Co. v UOI*)(AIR 1975 SC 2260).

An enterprise which is analogous to trade

The supreme Court in *Secretary, Madras Gymkhana Club Employees’ Union v Management of the Gymkhana Club*(AIR 1965 SC 54)added a new dimension to the term by describing it as any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade.

Even a solitary transaction may be considered as an undertaking

In *Balabhadra Rajguru Mahapatra v State*(AIR 1965 Ori.25)the Court held that the act of storage would come within the ambit of the definition even if it relates to a solitary transaction.

Undertaking need not necessarily refer to a tangible piece of property

It is an erroneous misconception to assume that an undertaking refers to some tangible piece of property. As the Mysore HC clarified in *Yallamma Cotton Woolen and silk Mills Co.Ltd .,Re.*(1970)40 Com Cases 466) “an undertaking was not in its real meaning , anything which may be described as a tangible piece of property like land, machinery or equipment .An undertaking within the provisions of the Act was an activity which in commercial or business parlance meant an activity engaged in with a view to earn profit.” The above judgment was approved by the division bench of the same Court in *International Cotton corporation P Ltd v Bank of Maharashtra* (1970)40 Com Cases 154)

An undertaking is a “going concern”

A.N.Ray J made an important observation in *Rustom Cavasjee Cooper v Union of India*(1970)40 Com Cases 325)(Mum.) by referring to an Undertaking as a “going concern” .He stated that an undertaking was “ an amalgamation of all ingredients of property and was not capable of being dismembered”.

Undertaking of the company is different from the company

The Calcutta HC noted in the case of *Hall and Anderson Ltd v UOI* (2005)125 Com Cases 97)that the undertaking of the company was different from the company itself. The brief facts in the case were as under:

The company’s undertaking had been sold and the sale deed had been executed by the directors but without proper authorization. A shareholder moved an injunction restraining the company from alienating the property. The Court held that as the consent of the shareholders had not been taken under section 293 of the old Act, the transaction could not be saved by the doctrine of indoor management and hence the sale deed was void.

It is pertinent to note that in the above case, it was never in dispute that the undertaking of the company was proposed to be disposed of. The transaction suffered



only from want of compliance with the requisite internal procedure to be followed for the purpose.

Common thread that runs through is that an undertaking refers to an activity and not to any specie of assets alone

Based on the above views of the Judiciary on the issue, the common thread that emerges is that the disposal of an undertaking is much more than the mere disposal of assets/ a *sale simpliciter*. It refers actually to the disposal of the activity which yields to the company revenue, an activity which is carried on for the purpose of gain and the cessation of which puts an end to the possibility of sustained earnings from the said activity in future. A productive organism is given away through the process of disposal of the undertaking.

Where the disposal of the subject assets have been held not to culminate in the disposal of the undertaking

It would now be interesting to examine cases where the court has adjudicated that the disposal of assets cannot be considered as amounting to sale of an undertaking.

In *Pramod Kumar Mittal v Andhra Steel Corporation Ltd* (1985)58 Com Cases 772(Cal.) one of the units of the company which had remained closed for over five years was sought to be sold. The Court held that this could not be construed as sale of undertaking with the argument adduced being that there was no disposal of a productive organism.

A similar situation cropped in the case of *P.S. Offshore Inter Land Services Pvt Ltd v Bombay Offshore Suppliers & Services Ltd* (1992)75 Com Cases 583 where out of the three vessels held by the company, one vessel which had been lying idle was proposed to be sold. The question was whether there was sale of undertaking. Applying the ratio in *Pramod Kumar Mittal (supra)* it was argued that considering the fact that the subject asset was idle, there was no sale of undertaking warranting intervention of the shareholders under Section 293. This argument did not cut much ice with the learned Judge who observed that the Act has made no distinction between a closed undertaking and a running undertaking. He observed that once a unit had been identified as an undertaking, it remained an undertaking, no matter whether it was in action or in suspension.

Sale of company's shareholding including controlling interest

A significant decision was delivered by the Bombay HC in the case of *Brooke Bond India Ltd v U.B. Limited* (1994)79 Com Cases 346(Bom.) involving the sale of the company's shares-controlling interest at that. The Court held the view that the transfer of controlling interest cannot be equated to the sale of any part of the "undertaking" so as to fall within the ambit of Section 293(1)(a) of the previous Act. The court noted that notwithstanding the fact that both in the "agreement" and in the plaint, there has been use of the expression like sale of "food business" of the seller to the purchaser and there has been reference to the seller's "food business" carried on through its subsidiaries, the agreement merely contemplated sale of the controlling interest in the company.

In a similar case sale of shares held as investments in a manufacturing company would not amount to sale of undertaking. (*Shoe Specialities Ltd v Tracstar Investment Limited*, (88 Comp Cas 471)(Mad.).)



A word of caution is considered necessary at this juncture while applying the above ratios in the context of the present Act. It is pertinent to note that as the present Act lays down a value proposition in determining whether there is a sale of undertaking under Section 180(1)(a), the Courts cannot be oblivious to the fact that it would be necessary to determine the value of consideration receivable upon disposal considering that this is now a benchmark for determining whether there is sale of undertaking. If the consideration received upon the disposal of shares were in excess of twenty percent of the company's net worth, the balance of justice may well have tilted in favour of the conclusion that in as much as the prescribed value band has been breached, there has been sale of an undertaking.

Where Company's business is to acquire immovable properties for sale

Where the company is engaged only in the business of buying immovable properties for the purpose of resale, the sale of immovable properties by the company would not amount to sale of undertaking and the Managing director could with the authority of the Board dispose of such properties without shareholder approval. This was the decision in *Ashok Kumar v Shingal Land and Finance P Ltd* (82 Comp Cas 430(Del.)).

Merger of Subsidiaries into holding company

Where under a scheme of Arrangement which is subjected to the due process of approval as provided in the Act, the businesses of the subsidiary companies are merged into the business of the holding company, there would be no specific need to seek the approval of the members under Section 180(1)(a) of the Act.

Conclusion

The above discussion conclusively proves that notwithstanding the insertion of the definition of the term "undertaking" in the statute, it has by no means taken away the requirement of firstly ascertaining whether there is indeed sale of an undertaking based on the postulates laid down in Jurisprudence articulated above. What constitutes an "undertaking" or "substantially the whole of the undertaking" continues to remain a vexed question to which clarity can be introduced only through the application of the plethora of judicial pronouncements on the subject. The introduction of the definition of "undertaking" in the Act does not by any means, obliterate the grey areas which still surround the concept which we have broached above.

Ramaswami Kalidas



Forthcoming Events for the Month of May 2021

a. Members

1. VCM on Recent Developments in GST on 1st May, 2021
2. VCM on TDS-Practical Aspects and way forward on 16th May, 2021.
3. VCM on Impact of the Pandemic on Indian Economy and Measures taken by RBI and Finance Ministry, Govt of India on 19th May, 2021
4. VCM on Business Process Reengineering on 23rd May, 2021
5. VCM on Bank Concurrent Audit during COVID-19 on 28th May, 2021
6. VCM on Audit in SAP Environment on 29th May, 2021

b. Students

1. AICITSS- Advanced Information Technology
2. ICITSS- Information Technology.
3. ICITSS- Orientation Course
4. Foundation Coaching Classes



ON THE LIGHTER SIDE OF LIFE

What's the difference between an accountant and a lawyer?

The accountant knows he is boring.

Source : Anonymous

What does an accountant say when you ask him the time?

It's 9.18 am and 12 seconds; no wait - 13 seconds, no wait - 14 seconds, no wait.....

Source : Anonymous

Glimpses of Events







THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA BHUBANESWAR BRANCH OF EIRC

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
BHUBANESWAR BRANCH (EIRC)

Invites you to the Wellness Series

Dr. Kanhu Panda

UTKAL HOSPITAL

Plot No.C/3, Niladri Vihar,
Near Budha Park, Chandrasekharpur,
Bhubaneswar-751021

programme
open for both
Member and
non members

Topic:
Pediatric care during COVID times

Time:
May 25, 2021 11:00 AM (Tuesday)

Meeting ID: 912 7153 7823
Passcode: 193789

Tele Consultation Services available

6370704001/4002

Dr. Kanhu Panda

MD (Pediatrics) Post Doctoral Training in PICU
Consultant Pediatrics & Neonatology

Please join with your family members and friends.

Regards
TEAM MC, ICAI, Bhubaneswar

MEDIA COVERAGE

Wednesday, 29 September 2021

Online Car Valuation

Digital India Kendra - Apply

HOME • STATE EDITIONS • BHUBANESWAR

ICAI, BBSR celebrates Women's Day

Wednesday, 10 March 2021 | PMS | BHUBANESWAR

SHARE

The Institute of Chartered Accountants of India (ICAI) Bhubaneswar Branch celebrated the International Women's Day on Monday.

Chief speaker Dr Sanghamitra Pati, Director, Regional Medical Research Center (RMRC) Bhubaneswar dwelt on the role of women in every field internationally.

Mo College Chairman Susmita Bagchi spoke about the recent activities of women which are in no way less important than those of men.

ICAI Bhubaneswar Branch chairman Biswornjan Sutar, CA Ranjan Kumar Prusty, CA Ravi Kumar Patwa, CA Sunil Kumar Sahoo and branch secretary Janhavi Deo also spoke about importance of International Women's Day.

TRENDING NEWS

Fumio Kishida wins Japan's ruling party presidential election

Biden adviser headed to Egypt as Israel-Hamas tensions rise

Japan to lift all coronavirus emergency steps nationwide

North Korea fires short-range missile to sea in latest test

STATE EDITIONS

SIT to probe charges against IAS officer of facilitating conversion

29 September 2021 | PMS | Lucknow