

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH, KOLKATA

Company Appeal No.600/KB/2017

In the matter of Section 252 of the Companies Act, 2013

And

In the matter of:

M/s. A.P. Trans Private Limited, having its registered office at C-26,
Palashpalli, Bhubaneswar Khorda, Orissa-751020.

And

Mr. Asit Kumar Pradhan s/o Balakrishna Pradhan and resident of C/17,
Pallashpalli, BDA Complex, Bhubaneswar – 751020, Odisha.

..... Appellants

-Vs-

The Registrar of Companies, Cuttack, 3rd floor, Corporate Bhawan, Plot No.
9(P), Cuttack – 753014, Orissa..

..... Respondent

Judgement delivered on: 23.02.2018

CORAM:

Shri Jinan K.R., Hon'ble Member (J)

For the Petitioner:

Sd

1. Mr. Siddhartha Murarka, Pr. C.S.
2. Ms. Abhijit Nagee, Pr. C.S.

ORDER

The instant appeal has been preferred by M/s A.P. Trans Private Limited (the company) and one Member-cum-Director of the company, seeking restoration of name of the company in the register of companies, under sub-section (3) of section 252 of the Companies Act, 2013 (the Act). The name of the company has been struck off by the Registrar of Companies, Odisha (ROC, Odisha) vide his Notice dated 07.07.2017 issued pursuant to sub-section (5) of section 248 of the Companies Act, 2013 read with Rule 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016. The appellant No.1 is the private company limited by shares and its name remained struck off the register of companies and the Petitioner No.2 (DIN01012185) claims to be a Director-cum-shareholder holding 9000 equity shares of Rs.10/- each, being 90% of the paid-up share capital as on date of strike off the name of appellant No.1. The Registrar of Companies, Odisha has been arrayed as Respondent in the appeal.

2. Rule 87A of the National Company Tribunal Rules, 2016 (NCLT Rules, 2016) stipulates filing of an appeal under sub-section (1) and (2) of section 252 of the Companies Act, 2013 for restoration of the name of company, in the prescribed format and the manner of accompanied by such

documents / information and the filing fee. The instant appeal has been filed in terms of the said Rule.

3. A.P. Trans Private Limited was incorporated in the State of Odisha on 26.12.2011, having its registered office at C-26, Palashpalli, Bhubaneswar, Khorda, Odisha-751020 which falls within the jurisdiction of this Tribunal.

4. The brief facts leading to the present appeal are that the company, the Appellant No.1 was incorporated on 26.12.2011 under the provisions of the Companies Act, 1956, as a private company limited by shares. The company has been registered with the Registrar of Companies, Orissa, having its registered office at Bhubaneswar Khorda, Odisha. Its authorised share capital is Rs.10,00,000/- divided into 1,00,000 equity shares of Rs.10/- each and the issued, subscribed and paid-up capital is Rs.1,00,000/- divided into 10,000 equity shares of Rs.10/- each. The company has four Directors out of which, two are holding 10,000 shares. The shareholders are Shri Asit Kumar Pradhan (Appellant No.2) is holding 9000 shares and Shri Ajit Kumar Pradhan is holding 1000 shares in the company (Appellant No.1).

5 The Registrar of Companies. initiated proceedings under section 248 of the Companies Act, 2013 for striking off the name of the company of the register maintained by the Registrar of Companies. The Appellant Company was asked to submit its representation along with copies of the relevant documents within thirty days from the date of receipt of the notice issued under sub-section (1) and (2) of section 248 of the Act. Immediately on receiving the aforesaid notice, a meeting of the Board of Directors of the

company was duly called and convened to take necessary steps and authorise the Directors to submit the documents with the Registrar of Companies but by the time all the documents \ could be collated and filed, the status of the company was marked as "strike off". It has also convened its Annual General Meetings regularly whereat the shareholders approved duly audited Financial Statements of the company and all the assets of the company remained intact and it never became defunct. Therefore, it cannot be concluded that the company is not carrying on its business or operations for two years within the meaning of section 248 of the Companies Act, 2013.

6 There was negligence on part of the company's accountant who filed Financial Statements and Annual Return for the financial year ended 31.03.2012 but failed to file the same thereafter. Due to business and financial constraints, the company could not obtain professional support to make the necessary compliances of filing its financial statements and annual returns with the Registrar of Companies. The company had applied for obtaining "Dormant Status" from the Registrar of Companies, Cuttack on 25.-5.2017 and the same was granted by the Registrar on 02.6.2017. However, The Registrar of Companies, Odisha i.e., the Respondent herein, struck off the company's name from the register due to defaults in statutory compliances, namely, non-filing of Financial Statements and Annual Returns.

7. The accounts of the company have been audited every year and ready to submit with respondent and for the effect of struck off the company, the directors cannot act as directors in any other company for a period of five years from the date of struck off the company under section 164(2). Section 248 of the Companies Act was notified with effect from 26.12.2016 and the

company was sent notice by the respondent on 16.03.2017, hence, the present petition is within the limitation period stipulated by section 252(3) of the Companies Act, 2013 i.e. 20 years. For the ends of justice, the present petition may be allowed, since the company is carrying on its business and operation. In the event of revival of the company and restoration of the name of the company in the register maintained by the respondent, the petitioner Company shall file (a) certified true copy of the order of the Hon'ble Tribunal and allowing restoration of the name of the company to the register maintained by the respondent; and (b) all outstanding statutory documents i.e. the financial statement & annual returns for the pending years along with the filing fees and the additional fee, as applicable on the date of actual filing. Unless the present application is allowed, and the name of the company is not restored on the register maintained by the Registrar of Companies, Cuttack, the petitioner as well as its shareholders shall suffer irreparable loss and hardship and will be highly prejudiced.

5. In support of the contentions that the company is active and running since its incorporation, the petitioners have annexed to the appeal the Financial Statements along with Directors' Reports and Auditors' Reports for the financial years ended on 31.03.2013 to 31.03.2017, amongst other documents.

6. As per directions of this Tribunal vide order dated 24.11.2017, the notice was issued to the Regional Director, Eastern Region, Kolkata as also to the Registrar of Companies, Odisha on 1.12.2017. The appellants were

also directed to serve a copy of the petition on the Regional Director, Eastern Region and the Registrar of Companies, Odisha. The petitioners were also directed to file an affidavit to show that the company is an ongoing concern and not a shell company.

70 The Registrar of Companies, Odisha (ROC,Odisha) has filed his report dated 13.11.2017 on 17.11.2017. In his said report, the ROC,Odisha has submitted that:

- a) Since the above named company was not filing its statutory returns like Balance Sheets and Annual Returns for the financial year ended 31.03.2013 and for the subsequent years also, the Registrar having reasonable cause to believe that the above named company is not carrying on any business or operations for a period immediately preceding last two financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013 and issued notice to the company but no reply was received by his office. Subsequently, his office published the Notice in the Official Gazette and Newspaper for the information of the general public regarding strike off the said company. Finally, after the expiry of the time mentioned in the above notice the Registrar of Companies struck off its name from his register and published the same in the Official Gazette and the company stood dissolved on and from 21.06.2017

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- b) Further, his office being the respondent herein had duly served the statutory notices required under section 248 of the Companies Act, 2013 to the company as mentioned in the foregoing paragraph before striking off its name.
- c) In the meantime, the company has applied for obtaining "Dormant Status" on 25.05.2017 and the same was granted by his office on 02.06.2017 after processing and publishing in the Official Gazette during the period from March, 2017 to April, 2017 though the company failed to furnish its reply or make any prayer in response to his office notice under section 284 of the Companies Act, 2014 as a result of which, his office after complying with certain official process thereafter proceeded with striking off the name of the company for the simple reason that it was not practically possible for his office to keep a watch on the latest status regarding the filing position of the company on a regular basis.
- d) However, as per the undertaking made by the company in its application / petition the name may be considered on its merits based on documentary evidence placed by the appellants in support of the submissions made therein

10.1 Further, ROC, Odisha has stated that this Tribunal may consider the application / petition preferred under section 252 of the Companies Act, 2013 on its own merits and if allowed to be revived, a direction may be issued upon the appellant to file all the Statutory Returns in MCA Portal with normal and additional fees within 30 days from the date of order of revival failing which, if this office may be directed to strike off the

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name of the company again without providing any further notice to the appellants.

8) The appellant has also filed an affidavit dated 05.12.2017, stating that the company is an ongoing concern and that it is not a shell company. By an order of this Tribunal passed on 19.01.2018, the appellant were also given an opportunity to file a rejoinder to the report of ROC, Odisha. The appellant has also filed a rejoinder affidavit dated 01.02.2018 stating, inter alia, that:

- a) the Respondent has struck off the name of the appellant company from its register, despite the appellant company having successfully obtained "Dormant Company" on 02.06.2017 by the good office of the Respondent. Hence, the appellant company is entitled to get its name restored on the register maintained by the Respondent without imposition of any cost because there is no fault on part of the petitioner company.
- b) the name of the appellant company has been struck off by the Respondent erroneously. The Respondent has admitted its inadvertent human error and has graciously submitted the subject matter to the jurisdiction, direction and wisdom of this Hon'ble Tribunal.
- c) on revival of the company and restoration of the name of the company in the register maintained by the Respondent, the petitioner company shall file all outstanding statutory documents i.e. the financial statement and annual returns for the pending years along with the

filing fees and the additional fee, as applicable on the date of actual filing within 30 days from the date of order of revival.

- d) unless the present application is allowed, and the name of the company is not restored on the register of companies maintained by the Registrar of Companies, Cuttack, the petitioner as well as its shareholders shall suffer irreparable loss and hardship and will be high prejudiced.

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~~10.~~ The instant appeal came up for final hearing on 15.02.2018 when the Ld. Pr. CS. appearing for the appellants while reiterating the pleadings and the affidavits filed in support thereof, has prayed for an order in terms of prayer of the appeal.

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~~11.~~ Heard the Ld. Pr. C.S. and perused the records. It appears from records that the appellant No.1 company was incorporated in the State of Odisha on 26.12.2011 and it had filed its latest Balance Sheet as at 31.03.2012 (laid and adopted at the Annual General Meeting on 27.09.2012) and thereafter, it defaulted in filing the financial statements and annual returns being the statutory returns which are mandatorily required to be filed within the stipulated time under the Companies Act, 1956/2013 and the rules notified thereunder. It is an admitted position. The respondent (ROC, Odisha) having noticed such defaults in filing statutory returns, issued notice to the company under sub-section (1) of section 248 of the Companies Act, 2013 to the company enquiring as to whether the company was carrying on

any business or was in operation, but no response was received from the company. Subsequently, the respondent issued Public Notice on 16.03.2017 in pursuance of sub-section (1) and sub-section(4) of the section 248 of Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, asking the petitioner company, amongst other companies also, to show cause as to why the name of the company should not be struck off from the register of the companies and dissolve the company unless a cause is shown to the contrary, within thirty days from the date of the notice.

¹⁴ The reason that triggered the ROC, Odisha to issue the public notice, was that he had a reasonable cause to believe that the company was not carrying on any business operation for a period of two immediately preceding financial years also not it had made any application within such period for obtaining the status of dormant company. Therefore, the respondent issued further public notice dated 03.04.2017 reiterating the same points as mentioned in the Notice dated 16.03.2017 referred to supra.

¹⁵ Finally, the respondent issued public notice dated 07.07.2017 under sub-section (5) of section 248 of the Companies Act, 2012 and Rule 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 striking off the name of the petitioner company on 21.06.2017 and the company stands dissolved on that date. The name of the company has been struck off from the register of companies on 07.07.2017 and the instant appeal filed on 02.11.2017. Therefore, this appeal is within

time as prescribed under sub-section (3) of section 252 of the Act and the Petitioner Company and one Member-cum-Director preferred the instant appeal for restoration of name of the struck off company.

13. It would be relevant to quote the provision of sub-section (3) of section 252 of the Companies Act, 2013 which reads thus:

"If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by the company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248 may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company to be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, be by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies."

14. The aforesaid provisions of law stipulate the basic requirement for the appellant company to establish with evidences that the company was, in fact, carrying on business or in operation at the time of dissolving the corporate entity by striking off the name of the company.

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15 The Respondent has stated in his report dated 13.11.2017 referred to supra, that the petitioner company had applied for obtaining "Dormant Status" from the ROC, Odisha, on 25.05.2017 and the respondent granted the Dormant Status of the company on 02.06.2017. However, the name of the company has been struck off on 21.06.2017.

16 Ld. Pr. CS submits that when the ROC allowed appellant's application for obtaining the status of a dormant company striking off the name of the appellant's company is illegal. However, he was unsuccessful to point out any provisions of the Companies Act, 2013 (In short the Act) so as to hold that ROC has no power to strike off the name of a Dormant Company.

20 As per section 455(1) of the Act if a company has no significant accounting transaction, or an inactive company may voluntarily make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

21 As per section 455 (4) of the Act, a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.

22 In the case in hand the dormant status was not obtained by the company at its instance under sub section (1) of section 455 of the Act. So also it was not granted by the ROC sue moto under sub section (4) of section 455 of the Act. Dormant status was granted when an application submitted by the appellant in reply to Sub-section (1) and sub-section (4) of section 248 notice issued by the ROC. That notice was issued when the ROC was not in receipt ^{ob} returns as per sub-section (1) of
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section 248 of the Act. Thus it is clear in the case in hand that the dormant status has been sanctioned by the ROC on the basis of an application submitted by the appellants when the company was asked to submit its reply or the documents if any with in a period of 30 days from the date of notice. It is pertinent to note here that they applied for dormant status without submitting the documents asked to produce by them in answering the notice.

23 A reading of section 248 and 455 of the Act, it is clear that ROC has power to issue notice to change status of the Company from Active to Dormant or strike off of Companies after complying provisions under section 248 of the Act. The appellant company has contended that it has convened its AGM regularly where as the shareholders approved duly audited financial statements of the company and all the assets of the company remained intact and it never become defunct. Therefore, it cannot be concluded that the company is not carrying on its business or operations for ^{two} few years with in the meaning of section 248 of the Act, submitted by the Ld.CS for the appellant. If it is true then how can it apply for getting the dormant status. No valid explanation forthcoming. So also appellant has no case that it has filed application for changing the status to active. Thus no doubt there is no illegality or infirmity in the action of the ROC in the case in hand.

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16. The Master Data of appellant No.1 company shows that it has not filed financial statements and annual returns since the financial year ended 31.03.2013 on wards; it was not practically possible for ROC, Odisha to keep a watch on financial status of the company on regular basis and as a result, the ROC, Odisha, after following the due procedure, has struck off the name

of the company on 21.06.2017 vide notice dated 07.07.2017 published in the Official Gazette. On the other hand, the company did not approach the ROC, Odisha to re-activate its status of the company after following due procedure, whereas the petitioners have taken a plea that it remained functional since its incorporation till date but no statutory documents are available to the ROC, Odisha to know such functional status of the company.

27. As regards filing of the statutory documents for the year ended on 31.03.2013 onwards with the office of the respondent, the petitioners have taken a plea that the company could not obtain professional support to make necessary compliance of filing its financial statements and annual returns with the Registrar of Companies and that there was also negligence on the part of the company accountant who filed the Financial Statements and Annual Return for the financial year ended on 31.03.2012 but failed to file the returns thereafter. These explanations do not hold much water and constitute cogent grounds for non-compliance of statutory requirements. This is a serious lapse on the part of the petitioner company and its Directors / Officers. The directors being officers of the company instead of ensuring timely statutory compliance cannot shrug off their duties and responsibilities to other officials which cannot be permissible in law. The company is a separate legal persona and its Directors are in a fiduciary position vis-à-vis the company and the Directors must exercise their power for the benefit of the company. The primary responsibility for ensuring that proper returns and statutory documents are filed within the stipulated time line, as mandated by

the statute and the rules notified there under, remains with the management of the corporate entity.

~~18.~~ In this context, the findings of Hon'ble High Court of Delhi in the matter of Mace Platronics (Pvt.) Ltd.-Vs-Registrar of Companies (2010) 104 SCL 277 (Dec) wherein it was held that:

“When the name of the company was struck off after following the prescribed procedure for non-filing of statutory records, even though the contentions of the company that the officials entrusted with responsibility of filing documents had failed to do so cannot be accepted, yet since the company was a running company and the application had been filed in time, the court had power to restore the name of the company.”

~~19.~~ The appellants have also averred that the company has remained functional since its incorporation till date; all the assets of the company remained intact and it never became defunct; it has also convened its Annual General Meetings regularly whereat the shareholders approved duly audited financial statements of the company and that it cannot be concluded that it is not carrying on the business or operations for the two years within the meaning of section 248 of the Companies Act, 2013. In support of these contentions, the petitioners have placed Financial Statements, Directors Reports and Auditors' Reports of the company (being Annexure-9 of the appeal).

20. Financial highlights as revealed from the Annual Report together with the audited Financial Accounts of the company are indicated here under:

Financial Year	Revenue from Operation (Rs)	Expenditure incurred (Rs.)	Profit / (Loss) for the period (After tax,) (Rs)
31.03.2013	350,720,.00	391,400.00	40,680.00
31.03.2014	935,280.00	951,011.50	15,731.50
31.03.2015	NIL	32,220.00	32,220.00
31.03.2016	NIL	14,322.00	14,322.50
31.03.2017	NIL	6,328.00	6,328.00

20.1 During the year ended 31.03.2013 and 31.03.2014, the company earned revenue from its operation, but no revenue posted during the subsequent years, as reflected in the financial accounts mentioned supra. The Directors' Reports attached with the above mentioned Financial Statements also stated that the company could not utilize its capacity and has not done any work during the years under report. It further revealed from the Financial Statements for the year ended 31.03.2017 that the general reserves are shown as Rs.99,170.00 against paid-up capital Rs.100,000.00. The Cash and Cash Equivalents (Note-7) shown under the head "Current Assets in the balance sheet as at 31.03.2017 are as under:

Karnataka Bank Ltd.	-	Rs. 142,676.00
Allahabad Bank	-	Rs. 18,872.00
Cash in hand	-	Rs 110,260.00
		Rs 271,808.00

20.2 It further appears that the Financial Statements as on 31.03.2013, 31.03.2014, 31.03.2015, 31.03.2016 and 31.03.2017 have been audited on 31.08.2013, 31.08.2014, 31.08.2015, 31.08.2016 and 27.05.2017

respectively. However, copies of IT returns or bank statements not produced to prove payment of income tax and that it is operating its accounts.

29. In the light of the above discussion and the legal provisions as mentioned supra, it would not be reasonable for the Registrar of Companies, Odisha (the respondent) to assume that the appellant company was non-functional and defunct corporate entity which needs to be dissolved by striking off the name of the company from its register of companies. Consequently, the appeal is liable to be allowed subject to payment of cost.

30 The contention that due to business and financial constraints, the company could not obtain professional support to make necessary compliance of filing its financial statements and annual returns for the financial year ended 31.03.2012, and that there was also negligence on the part of the company accountant who filed the financial statements and annual returns for the financial year ended on 31.03.2012 but failed to file the returns thereafter seems to be unbelievable and unacceptable. Failure to file statutory returns for more than four years only give rise a legitimate inference that it was sleeping over its statutory obligations without due care and caution. However, being found that the company deserves to be restored, the lapses for non-filing of annual returns in time can be countered by imposing cost. Awarding a cost Rs. 75,000/- in the peculiar nature and circumstances of this case is found reasonable.

31 In the result, by exercising the powers conferred on this Tribunal under Section 252 of the Companies Act, 2013, this appeal is allowed upon the following directions:

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- a) The Registrar of Companies, the respondent herein, is ordered to restore the original status of the Petitioner Company, as if the name of the company has not been struck off from the register of Companies with resultant and consequential actions like changing status of Company from 'Strike Off' to "Active"; to activate DIN Nos. of the applicants etc.
- b) The appellants company is directed to file all pending statutory document(s) including Annual Accounts and Annual returns for the financial years 2012-2013, 2013-2014, 2014-2015, 2015-2016 and 2016-2017 along with prescribed fees/additional fee/fine as decided by the Registrar of Companies within 30 days from the date on which its name is restored on the Register of Companies by the Registrar of Companies, Odisha;
- c) The Company's representative, who has filed the Company application is directed to personally ensure compliance of this order;
- d) The appellants are also directed to file an affidavit with the concerned Registrar of Companies to the effect that during the intervening period, the appellants company was not used as means to transact any tainted money during the period of demonetization;
- e) The restoration of the Company's name is also subject to the payment of cost of Rs. 75,000/- (Rupees Seventy Five Thousand only) through online payment in www.mca.gov.in under miscellaneous fee by mentioning particulars as "payment of cost for revival of company pursuant to orders of NCLT in CA No. 600/KB/2017";

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- f) The petitioner is permitted to deliver a certified copy of this order with the Registrar of Companies within thirty days of the receipt of this Order;
- g) On such delivery and after duly complying with above directions, the Registrar of Companies, Odisha is directed to, on his Office name and seal, publish the order in the Official Gazette;
- h) The impugned action of striking off of the name of the Company will not come in the way of the Registrar of Companies, Odisha to take appropriate actions in accordance with law, for any other violations/offences, if any, committed by the applicant company prior or during the striking off of the company.

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43. Urgent photostat certified copy of this Order, if applied for, be supplied to the parties upon compliance of all the requisite formalities.

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(Jinān K. R.)

MEMBER(Judicial)