IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)
(through web-based video conferencing)

CP No.69/BB/2021
U/s140(5) of the Companies Act, 2013

IN THE MATTER OF:

Union of India,
Represented by Secretary,
Ministry of Corporate Affairs
Through Registrar of Companies, Karnataka
KendriyaSadan, II Floor- E-wing,
Koramangala, Bengaluru -560034 ...Petitioner

Versus

1. **CA. Ramaiah Nataraja,**
   Proprietor of M/s. Nataraja & Co. Chartered Accountants,
   No. 319, I Floor, JBK Complex, No. 405, Avenue Road,
   Bengaluru -560002 ...Respondent No.1

2. **The Institute of Chartered Accountants of India**
ICAI Bhawan, Indraprastha Marg,
Post Box No.7100, New Delhi-110002 ...Respondent No.2
Koramangla, Bengaluru,

Order delivered on: 28th June, 2024

Coram: Hon'ble Shri. K. Biswal, Member (Judicial)
Hon'ble Shri.Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioners : Shri Kumar. M.N
For the Respondent No.1: Shri Saji P. John

O R D E R

Per: K. *Biswal (Member Judicial)*

1. This instant application is filed on 26.08.2021 under Section 140 of the Companies Act, 2013 by the Union of India authorised by Ministry of Corporate Affairs and represented by the Registrar of Company, Karnataka against the Respondent No.1 CA. Ramaiah Nataraja seeking following reliefs:
   a) The Respondent No.1 shall not be eligible to be appointed as a statutory auditor of any company for a period of five years from the date of the order by this Hon'ble Tribnal.
   b) The Respondent No.2 to effect the order to be passed by this Hon'ble Tribunal, against respondent No.1 under section 140(5) of the Companies Act, 2013 and to submit compliance report to this Hon'ble Tribunal.
   c) Pass any other order(s) as deemed fit and proper under the circumstances by the Hon'ble Tribunal.

2. The Petitioner has made the following averments in the petition:
   i. That Shri Ramaian Nataraja i.e. Respondent No.1 is a chartered accountant in terms of Section 2(1)(b) of the Indian Chartered Accountants Act, 1949 and is practicing in the name and style of Nataraja & Co. Chartered Accountants, a proprietary concern. Respondent No.1 was appointed as the first auditor of M/s Super Royal Holiday India Private Limited under Section 224 of the Companies Act, 1956 on 5.01.2012. The R-1 submitted audit reports dt.13.09.2012, 20.09.2013 and 21.08.2014 for the financial years 2011-2012, 2012-2013 and 2013-2014, respectively.
   ii. On 30.09.2014, R-1 was appointed as the Statutory Auditor for M/s Super Royal Holidays India Private Limited (company now under liquidation, hereinafter referred to as the "said Company")

for the period of 5 years from 2014-2019 in compliance of Section 139 of the Companies Act, 2013. The R-1 submitted audit reports of the said Company dt.24.05.2015, 6.09.2016, 04.08.2017, 23.08.2018 for the financial years 2014-2015, 2015-2016, 2016-2017 and 2017-2018, respectively.

iii. The Ministry of Corporate Affairs on receipt of information from banks has noted that, certain companies deposited Rs.25 crores or above into the Bank account and almost same amount have been withdrawn from their bank accounts, in an exceptional manner, post demonization. M/s Super Royal Holiday India Private Limited deposited huge amount and withdrew similar amount into/out of the bank account, held with Axis Bank during the demonetization period. The Ministry of Corporate Affairs vide Order No.03/312/2016-CL-I, dt.15.11.2017 ordered investigation of M/s Super Royal Holiday India Private Limited. On 20.11.2017, the Regional Director, South Eastern Region, Hyderabad, appointed inspectors namely Mrs. V. SantoshiJagirdar (then DROC in O/o ROC, Karnataka) and Shri S.N. Tiwari (then DD in O/o ROC, Karmataka) and Shri S.N. Tiwari (then DD in O/o RD(SER)) for investigating the affairs of M/s Super Royal Holiday India Private Limited, under Section 216, read with Section 210 (1) (c) of the Companies Act, 2013. The inspectors investigated the affairs of the said company covering 3 financial years, i.e., 2014-2015, 2015-2016 and 2016-2017 and submitted their inspection report to the Regional Director, South Eastern Region, Hyderabad on 28.02.2018, thereafter forwarded to the Ministry of Corporate Affairs.

iv. During the investigation, various facts were uncovered which indicated that, the affairs of the said Company have been conducted in a fraudulent manner prejudicial to the public interest, as the Company collected deposits from the general public as membership fee for the value of each of Rs.11,000/- Rs, 22,000 and Rs. 33, 000/- for providing alleged trip services over a

period of three years. As on 30.11.2017, the Company had enrolled 1,98,410 members in the scheme. At the end of the financial year 2017-18, the Company had shown Rs.145.29 crores as Revenue from services/membership fee, which is nothing but amount collected from the investors/subscribers. Out of the total expenses of Rs.135.91 crores shown for the year 2017-18, a mammoth amount of Rs.117.03 crores has been paid as commission and achievers award alone, to its members/canvassing agents which constituted 86% of the entire expenses incurred by the company and 80.54% of the total membership fee collected during the Financial year 2017-2018. In the previous year i.e.2016-2017, the company paid a commission of Rs.31.06 crores and Rs.2.10 crores as Achievers Award out of turnover of Rs.45.61 crore. The Company neither refunded the advance/membership fee taken within one year nor has provided the services within one year. Instead, the company accounted the entire amount collected as revenue from operations, though no basic accounting principle allows such treatment nor any liability was created in the books of account against the amount collected, even though no services were rendered. Therefore, the membership fee collected is nothing but a pure deposit.

v. The Ministry of Corporate Affairs after perusing the said investigation report on 21.05.2018 directed the Regional Director, South Eastern Region, Hyderabad, to take action in respect of the violations/matters reported in the investigation report dt.28.02.2018. Respondent No.1 submitted audit reports of the said Company for the financial year 2017-2018. On 12.10.2018 inspectors, issued a notice to R-1, calling upon him to attend the office on 23.10.2018 for investigation procedure in respect of the affairs of the said Company. Thereafter, on 23.10.2018, the inspectors issued a notice to R-1 calling upon him to furnish explanation on certain queries raised by the inspectors.

Respondent No.1 vide letter dt.29.10.2018, submitted clarifications to the notice dt.23.10.2018.

vi. On 31.12.2018, Regional Director, South Eastern Region, Hyderabad, submitted Supplementary Investigation Report-I, dt.28.12.2018, to the Ministry of Corporate Affairs, wherein it was concluded, that the R-1 committed violations in regard to deposits of Specified Bank Notes (SBNs) into company's bank account during demonetization period, as per the notification dt.30.03.2017 and also failed to perform his duty by not reporting the incidence of fraud in his audit report of the said company to the Central Government.

vii. R-1 filed ADT-3 to the ROC, on 14.01.2019 notifying his resignation as statutory auditor of M/s Super Royal Holiday India Private Limited effective from 23.08.2018.

viii. On 6.03.2019, the Petitioner filed CP.No.47/BB/2019, in this tribunal praying for restraining the said Company from withdrawing transferring and utilizing of funds or closure of accounts, and also for freezing bank accounts under sections 221, 241, 242, 246 and 339 of the Companies Act, 2013 until the main petition is decided. On 7.03.2019 this tribunal passed an Interim Order restraining the said Company from withdrawing transferring and utilizing funds or closure of the accounts until the main petition is decided.

ix. On 11.04.2019 the MCA directed the ROC, South Easter Region, Hyderabad, to examine applicability of Section 140(5) of the Companies Act, 2013. Thereafter the inspectors submitted supplementary investigation report-II dt.14.08.2019, which was forwarded to the MCA by the Regional Director on 14.08.2019, reporting that respondent No.1 is a witness to the fraudulent activities of the company during his tenure and failed to report the fraud to the Central Government as mandated under Section 143(2) of the Companies Act, 2013, and colluded with the company by allowing them to perpetuate the fraudulent activities

and therefore, recommended for action under Section 140(5) of Companies Act, 2013 in addition to prosecution for violation of Section 143 read with Section 147 of the Companies Act, 2013.

x. In view of the findings and serious issues raised by the inspectors in the investigation reports, MCA vide letter dt.28.08.2019, directed the Regional Director, South Eastern Region Hyderabad, to move a petition for winding up of M/s Super Royal Holiday India Private Limited under Section 271(1)(c) of the Companies Act, 2013 before this Tribunal and to appoint the Official Liquidator to take control of the affairs of the said company and to take action against the Statutory auditor i.e. Respondent No.1 for violation of Section 140(5) of the Companies Act, 2013, in addition to prosecution for violation of Section 143 read with Section 146 of the Companies Act, 2013. On 21.11.2019, Petitioner filed a petition numbered as 2013/BB/2019 under Section 272(1) read with Sections 272(3), 271(C) and 273 (1) of the Companies Act, 2013 praying for winding up of M/s Super Royal Holiday India Private Limited before this tribunal.

xi. The ROC, Karnataka issued show-cause notice dt.02.01.2020 to R-1 at his office address calling for explanation within 15 days from the date of receipt of the said show-cause notice, as to why action should not be taken against R-1 under Section 140(5) of the Companies Act, 2013. R-1 vide reply dt.16.01.2020 did not specifically advert to the compliance of Section 143 of the Companies Act, 2013 as a statutory auditor of the said company and also to specific points notified in the show-cause notice and requested to withdraw the show-cause notice. The petitioner considered the reply submitted and found it to be unsatisfactory.

xii. On 23.04.2020, this tribunal passed the order for winding up through the Official Liquidator in company petition 203/BB/2019 and 47/BB/2019, filed by petitioner under Sections 271, 272, read with Section 272 of the Companies Act, 2013 and Sections 221, 241, 242, 246, and 339 of the Companies Act, 2013

respectively. The liquidation of the said Company is in process as on today.

xiii. Due to severe Covid-19 pandemic, the MCA directed to stop penal action till September, 2020. This petition is now being filed before this tribunal praying for necessary orders, debarring R-1 from being appointed as statutory auditor of any company for the period of 5 years, from the date of order of this tribunal.

3. The Learned Counsel for the Respondent No.1 i.e. C.A. Ramaiah Nataraja has filed the statement of objections vide diary no.1603 on 18.04.2022 whereby he contends that he has already resigned from the post of Auditor with effect from 23.08.2018 and the requisite Form to this effect was filed by the said Company on 14.01.2019. Thus, in light of the decision taken by R-1, the petition under Section 140(5) is not maintainable. Additionally, he contends that as per the proviso to Section 140(5) which reads as follows:

"*Provided further that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under Section 447*."

In this regard, R-1 states that the Proviso presupposes an Order to be passed under Section 140(5) i.e., the entailing Provision. In other words only if there is an Order of Removal of an Auditor under Section 140(5), then only in the light of the 1st order, second proviso would become effective and operative.

4. The Respondent states that the said Company under liquidation by virtue of the order passed by this Hon'ble Tribunal is not arrayed as a party being represented by the Official Liquidator. Secondly, the order of winding up is challenged by the said Company vide an appeal (CA (AT) No. 89 &90 of 2020 before the Hon'ble NCLAT and pleadings are

completed in that matter and the case is getting transferred to NCLAT, Chennai Bench. The Respondent states that this material fact has been suppressed by the petitioner. Further the petitioner has not furnished the reply dt.16.01.2020 issued by the first respondent to show cause Notice dt.2.01.2020, notice issued by the petitioner dt.1.01.2021 and the reply dt.28.01.2021 issued by the Respondent.

5. R-1 humbly submits that he had taken at most care in discharging his auditing duties and in no place has he failed in his duties. R-1 has not noticed any fraudulent activities taken by the said Company and the respondent had audited and verified the financial statement which gives true and fair view of the accounts up to the FY 2017-2018.

6. R-1 states that the said company is carrying on business under Hospitality Sector conducting tours to different locations with food and accommodation and the company had collected such membership fees with the intention to provide the above said services and the same was non-refundable or there was no scope to repay/provide interest or profit on such fees. The same cannot be termed as deposits under the provisions of Section 76 and 76A of the Companies Act, 2013. Further, the collection of Membership fee cannot be considered as fraud and since the explanation was reasonable and satisfactory, reporting u/s 143(12) of the Companies Act, 2013 was not made.

7. It is submitted that the members of the company who availed recommended or referred their friends to join the tour program conducted by the company, had a predetermined formula under which the commission to such persons after deducting the TDS as prescribed under the Income Tax Act were paid. The Company has all the data like PAN No, names and addresses including their Bank particulars and the said commission. This cannot be considered as rotation or diversion of amount and also not fraud.

8. It is submitted that the said Company is a going concern and had accounted the membership fee collected as Income and the said revenue has been utilized for Tour expenses as and when it is required on a regular daily basis as and when tour operations used to take place. The company has created a charge/liability for the future tour services to the tune of Rs.3.77 crores and Rs.8.80 crores for the FY 2016-17 and 2017-18 respectively.

9. It is submitted that on the perusal of the Accounts, the payments were made to known members of the company. During the Respondent's audit period, the said company had honoured every commitment to the members who subscribed for the tour programmes and had no legal complaints against the company and thus no fraud had taken place. Hence, reporting under Section 143 of the Companies Act does not arise.

10. It is submitted that the Company had made a net profit of Rs. 2.91 crores corresponding to Revenue of Rs.45.61 crores which works out to 6.38% of profit of FY 2016-17. Under Income Tax provisions pursuant to Section 44AD net profit at 6% as a bench mark percentage is well accepted. During the year 2017-18 net profit of the Company is Rs.17.53 crores corresponding to Revenue of Rs.153.44 crores works out to 11.42%. It can be observed that the Company has achieved higher rate of net profit at 11.42% compared to previous year figure of Rs.6.38% which clearly shows company had achieved higher income corresponding to increase in turnover.

11. It is submitted that the amount so collected was not considered as deposit since the company was not liable to repay or refund such amounts or there was any interest or profit hence the membership fee and service charges collected cannot be considered as a deposit. Accordingly, membership fees so collected are considered as revenue of the company. On the other hand, the company has also made provisions for future tour programmes of Rs.3.77 crores for the FY 2017-17 and

Rs.8.80 crores for the year FY 2017-18 under the short term provisions of Liabilities in Balance Sheet. Further the company had maintained its Books of Accounts in Computer systems from the date of incorporation. All the receipts and expenses of the company were well supported with vouchers along with bills/invoices/expenditure details.

12. It is submitted that the company had paid commission to the members who have introduced new members to the tour programmes of the company. There was no cash transaction being made to any person and the company was having all the details of such persons to whom the commission was paid. Further such commission was paid after deducting TDS as prescribed under the Income Tax provisions and Form 16A has been issued to such members and the same particulars has been uploaded to Income Tax website under 26AS for cross verification as well. Upon verification of Books & Accounts, it was seen that the said company fulfilled all tour programmes as committed.

13. It is submitted that during FY 2016-17 it was noticed that there was a Civil Case filed against the Company and the same has been reported in the Audit Report. The said civil case filed had been challenged by the company and got a favourable order. Thereby the respondent had adhered to CARO 2016, report part of the Audit proceedings.

14. The R-1 humbly submits that the proceedings under Section 140 (5) of the Companies Act, 2013 is more penal in nature. As such the relevant provision of the CrPC is attracted. Thus the burden of proof under Section 103 of the Evidence Act lies on the shoulder of the petitioner. It is submitted that the Petition is not initiated under Section 447 of the Companies Act, 2013 nor any relief under Section 447 of the Act is sought for. Hence, the same is not specifically averred. The said provision is not applicable in the present matter. Thus, the respondent states that the instant petition is not maintainable in law and on facts and the same is liable to be dismissed.

15. We have heard the submissions of both the parties and have gone through the documents on record filed by both the parties. The Petitioner has filed the present petition under Section 140(5) of the Companies Act, 2013 as the application has been made by the Central Government.

16. The Petitioner has placed on record the Investigation Report dt.28.02.2018 of M/s Super Royal Holiday India Pvt. Ltd. submitted by the inspectors under Section 210 (1)(c) and 216 of the Companies Act, 2013. The Investigation report states that the ROC, Bangalore received Investor complaint from Sh. Jayachandra Shetty inter alia alleging about illegal money circulation activities etc. The complaint was taken up with the company and in reply dt.18.12.2017 the company denied the allegations and informed that a similar complaint was lodged and a crime No.94 of 2015 was registered u/s 3, 4 & 5 of Price Chits & Money Circulation Schemes (Banning) Act, 1978 and section 66(a) if Information Technology Act, 2000. Consequently, the Bank Accounts of the Company maintained at HDFC Bank and Axis Bank were frozen and the properties of the company were attacked. Subsequently, the Bank Accounts of the company were de-freezed vide order dt.23.04.2015 & 09.08.2016 by the Additional Chief Metropolitan Magistrate. Thereafter, by further order dt.29.02.2016 the properties of the companies were also released on certain terms and conditions. The said case is now pending on the file of Hon'ble Court.

17. It is observed that the MCA after examination of the investigation report vide its letter dt.21.05.2018 inter alia directed the Regional Director, South Easter Region Hyderabad to: "Re-examine the compliance of Section 143 of the Companies Act, 2013." Subsequently, the R-1/Auditor submitted audit reports of the said Company for the financial year 2017-18 dt.23.08.2018. The issues pertaining to the auditor's report were taken up and the same is perused hereunder along with the reply of the auditor:

i. As per the said Company's financial statement as on 31.03.2017, the Specified Bank Notes (SBNs) and Cash Deposits were to the tune of Rs.1.70 crores i.e. Rs.21.57 lakhs SBNs + Rs.1.49 crores Non-Specified Bank Notes, in the Axis Bank and HDFC Bank. However, it was noted that a sum of Rs.2,34,61,046/- was deposited in HDFC Bank Account and a sum of Rs.4,16,01,370/- was deposited in Axis Bank Account amounting to Rs.6,50,62,416/-. Therefore, upon verification with the banks it was found out that the cash deposits totalled up to Rs.1.50 crores for a period of 8.11.2016 to 30.12.2016.

The Auditor/R-1 has replied to the above allegations and stated that the cash deposits of Rs.1.50 crores is a part of financial statements as on 31.03.2017 certified on 04.08.2017 and are the total deposit of the said Company i.e. Cash NEFT transfers and Cheques with HDFC Bank and Axis Bank. With regards to the SBNs of Rs.21,57,000/- and Non-SBN's of Rs.1,48,94,300/- totalling to Rs.1,70,51,300/-, separate certificate issued on 24.11.2017 showing SBNs and Non SBNs for a period of 9.11.2016 to 31.12.2016. Further, deposit of Rs.6,50,62,416 crores is not only cash but also NEFT transfers and cheque deposits by the Company which is higher than Rs.1.50 crores as noted by the MCA. The R-1/Auditor has stated that the financial statements taken by the MCA does not give fair view of the affairs of the said Company and that the MCA has relied on wrong figures.

ii. Secondly, the investigation report has pointed out that the certificate issued by Axis Bank for A/c no.912020045477922, Rs.19.07 lakhs was deposited as SBN in Axis Bank alone. Whereas the R-1/Auditor has reported as per Balance Sheet on 31.03.2017 that, the company has made deposit of Rs.21.57 lakhs during demonetization period in the current account of the company in Axis Bank and HDFC Bank together which is not correct to that

extent, as the total amount deposited in HDFC as per Bank statement is Rs.6.12 crores which is more than the deposits in Axis Bank.

The Auditor in response to the above has stated that the amount deposited in the Axis Bank to the tune of Rs.19.07 lakhs is correct. As per the certificate SBN's of Rs.21.57 lakhs, the difference of Rs.2.50 lakhs relates to SBN's deposited at HDFC Bank, a letter to this effect is enclosed. Therefore, the total cash deposit tallies with the certificate issued. Hence the observation of Rs.21.57 lakhs during demonetization period is resolved. The Auditor further stated that arriving at Rs.6.12 crores is not ascertainable and sought advice regarding the same.

iii. Thirdly, the said company collected deposits to the tune of Rs.45.61 crores in the year 2016-2017 in the form of membership fee and service charges, paid commission of Rs.31.06 crores to its members/agents. Around 73% of the revenue earned was returned to agents which are nothing but rotation/diversion of amount giving scope for fraud. The same was not reported by R-1.

The Auditor/R-1 in his reply has stated that the said Company collects membership fees from prospective travellers as non-refundable/non-returnable i.e. No interest or dividend, hence it does not fall in line with deposits. Entire membership fee has been considered as income for the year and offered for Tax, hence not considered to be a "Deposit" as applicable under Section 73, 76 and 76A of the Companies Act, 2013. This is the reason why the same is not report in the financial statements. Further, when members decide to travel, they again pay service charge and the entire tour expenditure is charged to trip expenditure. Trip expenditure incurred during the year is Rs.6.30 crores as against the service charge collected to the tune of Rs.2.19 crore, the

difference expenditure has to be met from membership fee collected. Hence, commission has to be paid to the members who recommend their own relatives and friends. The commission paid to the members by NEFT transfer is after deducting TDS as applicable and such payments are made to approximately 20,000 members across India. Hence the conclusion that revenue earned was returned to agents is nothing but rotation/diversion of amounts/units is not valid and calling it fraud is incorrect.

18. In the supplementary investigation report dt.28.12.2018, it is observed that: with regards to point (i) since the said company has credits to the tune of Rs.10.32 crores during demonetization period, hence the Auditor is liable under section 143(2) read with section 147 of the Companies Act, 2013; with respect to point (ii), the explanation of the auditor is accepted; and with regards to point no. (iii) the amount collected by the company as membership fee amounts to "Advances collected for providing services under Rule 2(1)(c)(xii)(a) of the Companies (Acceptance of Deposits) Rules, 2014. The said advances shall be appropriated against provisions of services within 365 days from the date of acceptance of such advance but the company has neither refunded nor provided the services within one year from the date of receipt of the said money. Hence the auditor is liable under section 143(15) of the Companies Act as he failed to perform his duty as a statutory auditor by not reporting the said fraudulent activities of the said company and diversion of revenue of the company.

19. So far as the contentions raised by the Petitioner in the Supplementary investigation report dt.28.12.2018 concerns, @Page 273-274 the Inspector has made comments on the reply of the Respondent/Auditor. The inspector states that "*the auditor in his report dt.4.08.2017 at Note No.14 and 15 has reported that during the period of 9.11.2016 to 30.12.2016, the company has deposited Rs.2,34,61,046/- at HDFC Bank and Rs.4,16,01,370/- at Axis Bank totalling to*

Rs.6,50,62,416/- and according to the information and explanation given to us, the above deposits were done by the members of the company towards membership fee. They have deposited the cash directly to the company's current accounts as per the direction of the company." Whereas the said auditor at Note No.24 to the financial statement as at 31.03.2017 has certified that during the demonetization period i.e. from 9.11.2016 to 30.12.2016, a total cash deposits of Rs.1,70,51,300/- was done in both Banks which includes SBN and Non-SBNs. As per the inspector the two statements are contradictory to the Banks statements. Further, the fact that the company has transacted Rs.6,50,62,416/- during the demonetization period is not correct as the company has credits to the tune of Rs.10.32 crores during the demonetization period. However, it is asserted that as per the reply by the Auditor dt.29.10.2018 to the Investigation report, he has unequivocally stated that Note 14 and Note 24 are different note where Note 14 is a part of Financial Statement as at 31.03.2017 certified on 04.08.2017 and Note 24 a separate certificate was issued on 24.11.2017 showing SBNs and non-SBNs for the period from 09.11.2016- 31.12.2016.

20. It is trite to mention that the auditor by giving distinct date of issue for the two cash deposits have tried to mislead the court as the deposit (SBNs & Non-SBNs and Cash Deposits) are recorded for the financial year 2016-2017 which comes to the sum total of Rs. 6,50,62,416/- as total deposits including cash, NEFT, Cheques etc., including SBNs and Non-SBNs cash deposits in both HDFC Bank and Axis Bank. However, as per the statement of the Banks, the total amount credited in the company is of Rs. 10.32 crores. The difference between the two amounts is unaccounted and not explained and reasoned by the Respondent-1/Auditor. Therefore, this Tribunal finds merit in the contention raised by the Petitioner and the reply of the Respondent No.1 is untenable in law without any evidentiary support.

21. In so far as the contention of the Inspector pertaining to the amounts collected by the company under the garb of membership fee for providing trip services amounts to Advances collected for (Acceptance of Deposits) Rules, 2014 is concerned, it is noted as per Rule 2 (c) (xii) (a) of the 2014 Rules exempts any advance received for supply of goods or services against appropriation is done with 365 days from the definition of "deposit". The text of the rule is reproduced below:

> *"xii) any amount received in the course of, or for the purposes of, the business of the company:*
>
> > *(a) as an advance for the supply of goods or provision of services accounted for in any manner whatsoever provided that such advance is appropriated against supply of goods or provision of services within a period of three hundred and sixty five days from the date of acceptance of such advance."*

22. In so far as the appropriation of advance is concerned, it is observed that the advance received by the company has to be allocated or appropriated against identified or specified goods or services within 365 days of acceptance. It is not necessary for the company to actually deliver the goods or services within 365 days. This means that a company may actually supply goods/materials/services ordered at its convenience as long as the advance received by it is set aside for such goods or services within 365 days. In such a scenario the advance received would not be treated as deposit. The same was held in the case of *M/S Banwari Lal Arora and Sons v. S.R. Foils & Hygiene Private Limited CP No.49/2021* by the Hon'ble NCLT Delhi vide order dt.19.05.2023. Additionally, the Hon'ble Corresponding Delhi Bench vide the same order also noted that *"it is a trite law that an advance given for a particular purpose cannot be treated as deposits. A mere monetary advance given without any purpose but intended to be refunded with or without interest, would still be a deposit. However, if money is received as advance against any purpose, it is an advance and not a deposit. Only advances which are received without any purpose will amount to deposit."*

23. Now coming to the merits of the instant case, the membership fee taken by the company was non-refundable and non returnable and was considered as income for the particular year and offered for tax. Further, when members decide to travel they again pay as service charge and the entire tour expenditure is charged to trip expenditure. It also observed that the trip expenditure for a particular year amounted to Rs.6.30 crores as against the service charges collected to the tune of Rs.2.19 crores and the difference expenditure has to be met from membership fee collected. It is also noted that the amount collected by the company in the garb of membership fee does not have to do with anything related to the expenditure incurred during the tour and only the amount over and above the service fee which is taken from the members before the tour is incurred to meet the additional cost of the tour. In fact it is also observed that 73% of the total amount created from the generation of membership fee is reverted back to the members and the company only utilizes 23% of the total membership fee amount. Therefore, the same falls under the category of deposit as the membership fee is not utilized for providing any goods or services and is in fact remitted to the same accounts/members without any interest.

24. So far as the constitutionality of Section 140(5) of the Companies Act, 2013 is in issue, it is trite to mention the Hon'ble Supreme Court's decision in the case of *Union of India v. Deloitte Haskins and Sells LLP and another (2023 SCC Online SC 557)* wherein the Apex Court has unequivocally held that the "*application/proceedings under section 140(5) of the Act, 2013 is held to be maintainable even after the resignation of the concerned auditors and now the NCLT therefore to pass a final order on such application after holding enquiry in accordance with law and thereafter on the basis of such final order, further consequences as provided under the second proviso to section 140(5) shall follow. However it is made clear that we have not expressed anything on merits on the allegations against the concerned auditors.....for the NCLT/Tribunal to*

pass a final order on the application....under section 140(5) of the Act, 2013."

25. From the above discussion, this Tribunal is of the considered opinion that the Respondent No.1/Auditor has not performed his duties as a statutory auditor under Section 143 in a diligent manner and has committed fraud along with the company by not reporting the discrepancies of the company to the statutory bodies. The auditor has failed to inquire about the fraudulent functioning of the said company which is against the prudent business practice. Therefore, we are in line with the outcome of the investigation conducted by the Central Government and therefore hold that as per Section 143(5) of the Companies Act, 2013, the Respondent No.1 shall not be eligible to be appointed as a statutory auditor of any company for a period of five years from the date of the order by this Tribunal.

26. Therefore, **CP No. 69/BB.2021 is disposed of**.

-Sd/-
MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

-Sd/-
K.BISWAL
MEMBER (JUDICIAL)