

# Dispute Resolution Hotline

February 04, 2015

## CORPORATE CRIMINAL LIABILITY: PRINCIPLES OF ATTRIBUTION AND VICARIOUS LIABILITY CLARIFIED

- A three judge bench of the Supreme Court holds that the principle of *alter ego* can only be applied to impute the intent of the person who controls the affairs of the company to that of the company;
- Principle of *alter ego* cannot be applied in the reverse direction to make the directors of the company liable for an offence committed by the company;
- Vicarious liability of the directors on account of an offence by the company cannot be imputed automatically in the absence of a statutory mandate.

### INTRODUCTION

The Supreme Court recently in *Sunil Bharti Mittal v. Central Bureau of Investigation ("CBI") and Others*<sup>1</sup> has held that the principle of *alter ego* can only be applied to make the company liable for an act committed by a person or group of persons who control the affairs of the company as they represent the *alter ego* of the company; however it cannot be applied in reverse direction to make the directors of the company liable for an offence committed by the company. The Supreme Court has clarified that the application of the principle of vicarious liability to make the directors of the company liable for an offence committed by the company can only be done if the statute provides for it. While doing so, the Court has set aside the order of the Special Court wherein the Special Court had issued summons to the directors of the companies by stating that they represent the *alter ego* of the companies.

### BACKGROUND AND FACTUAL MATRIX

As per the directions of the Supreme Court in *Centre for Public Interest Litigation and Ors v. Union of India and Ors*<sup>2</sup> dated December 16, 2010, CBI conducted investigation into various irregularities in grant of licenses and allocation of spectrum in the 2G band and filed a charge-sheet before the Special Judge. CBI named Mr. Shyamal Ghosh and three companies namely M/s Bharti Cellular Limited, M/s Hutchison Max Telecom (P) Limited and M/s Sterling Cellular Limited as the accused persons in respect of offences under Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 and allied offences.

The Special Judge *vide* an order dated March 19, 2013 directed that the summons be issued to the three companies. At the same time, the Special Judge also directed that the summons be issued to (i) Mr. Sunil Bharti Mittal (Chairman cum Managing Director of Bharti Cellular Limited), (ii) Mr. Asim Ghosh (Managing Director of Hutchison Max Telecom (P) Limited) and (iii) Mr. Ravi Ruia (Director – Chairman of Sterling Cellular Ltd.). The Special Judge held that in light of the capacity in which these directors acted, they can be considered as the persons controlling the affairs of the company and the directing mind and will of the respective companies. The learned Special Judge observed that these persons can be considered to be the *alter ego* of their respective companies and the acts of the companies are to be attributed and imputed to them. This order for issuance of summons passed by the learned Special Judge was challenged in the Supreme Court.

### ISSUES

1. Whether the principle of attribution/*alter ego* can be applied to make the directors of the company liable for an offence committed by the company?
2. When can a director/person in charge of the affairs of the company be prosecuted for an offence committed by the company?

### JUDGMENT AND JUDICIAL REASONING

The three judge bench of the Supreme Court speaking through AK Sikri J struck down the summons issued by the Special Court and held that the Special Court had erroneously applied the doctrine of *alter ego* to implicate the directors of the companies for offences committed by the companies.

The Supreme Court relied on its decision in *Iridium India Telecom v. Motorola Incorporated and Others ("Iridium")*<sup>3</sup> wherein the court had dealt with the question of whether a company could be prosecuted for an offence which requires *mens rea* i.e. guilty mind. In the *Iridium* case, it was held that the companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the *mens rea* for the commission of criminal offences. The criminal intent of the *alter ego* of the company/body corporate i.e. the persons or group of persons in control of the affairs of the company or who guide the business of the company, would be imputed to the corporation.<sup>4</sup> However, the Court noted here that the principal is applied to

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impute criminal intention to the company on account of criminal intention of its alter ego and not the other way round. The Court thus held that the principle of attribution cannot be applied in the reverse scenario to make the directors liable for offences committed by the company.

The Court thereafter observes that in the following circumstances a director/person in charge of the affairs of the company can also be prosecuted, along with the company as an accused:

1. If there is sufficient evidence of his active role coupled with criminal intent;
2. Where the statute specifically imposes liability.

On the first aspect, the court held that the Special Judge has not satisfied himself that sufficient incriminating material was present on record to proceed against the directors. The Court however left it open for the Special Judge to examine the material on record to ascertain if sufficient incriminating material exists to proceed against the directors.

With reference to the second aspect, the court notes that it is a cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides for it. Therefore, when the company is the offender, vicarious liability of the directors cannot be imputed automatically in the absence of any statutory provision to that effect.

## ANALYSIS

The Court relied upon the decision of the House of Lords in *Tesco Supermarkets Limited v. Nattrass*<sup>5</sup> ("**Tesco**"), wherein it was held that the person whose *mens rea* is to be attributed must be the directing mind and will of the company. Interestingly, the Privy Council in a subsequent judgment in *Meridian Global Funds Management Asia Limited v. Securities Commission*<sup>6</sup> ("**Meridian**") has expanded the rule laid down in *Tesco* by holding that, "*the company builds upon the primary rules of attribution by using general rules of which are equally available to all natural persons, namely, the principles of agency*" thereby making the rules of attribution a more flexible one to be decided on a case to case basis.

The decision of *Tesco* has been referred by the earlier division bench decisions of the Supreme Court in *J.K. Industries Limited and Others v. Chief Inspector of Factories and Boilers and Others*<sup>7</sup> and *P.C. Agarwala v. Payment of Wages Inspector, MP and Others*<sup>8</sup> wherein it has been held that in the context of vicarious liability under strict liability statutes, a person in charge would be deemed to be responsible for the acts of the company. Thus, the decision of the three judge bench of the Supreme Court has clearly brought some clarity on the principles of attribution and vicarious liability in the context of corporate criminal liability *vis-à-vis* strict liability under a statute.

Also, it will be interesting to see whether the government can sustain the complaint only against the three companies, in the absence of the offence being made out against a person or body of persons in control of its affairs, more particularly when such offence requires *mens rea*.

— Satish Padhi, Ashish Kabra & Vyapak Desai

You can direct your queries or comments to the authors

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<sup>1</sup> Criminal Appeal No. 35 of 2015 (arising out of Special Leave Petition (Crl.) No. 3161 of 2013)

<sup>2</sup> (2012) 3 SCC 1.

<sup>3</sup> (2011) 1 SCC 74

<sup>4</sup> Ibid, para 59.

<sup>5</sup> [1972] AC 153

<sup>6</sup> [1995] UKPC 5

<sup>7</sup> (1996) 6 SCC 665

<sup>8</sup> (2005) 8 SCC 104

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