

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI**  
**BENCH - II**  
**IB-403/ND/2019**

**IN THE MATTER OF:**

**UNIEXCEL LIMITED**  
**OMC Chambers, Wickhams Cay 1,**  
**Road Town, Tortola,**  
**British Virgin Islands.**

**...Applicant**

**VERSUS**

**UNIEXCEL DEVELOPERS PVT. LTD.**  
**Registered Office:**  
**414A, D-Mall,**  
**Netaji Subhash Place,**  
**Pitampura,**  
**New Delhi - 110034.**

**...Respondent**

**Order Delivered on:25.07.2019**

**CORAM:**

**MS. INA MALHOTRA, MEMBER(JUDICIAL)**

**DR. V. K. SUBBURAJ, MEMBER (TECHNICAL)**


PRESENT - Bhuvan Gugnani, Mythili Srinivasamurthy, Aditya Shrotriya,  
Advocates for the Applicant  
Saurabh Kalia, Zinneha Mehta, Palash Aggarwal, Advocates for  
Respondent



## ORDER

### Per Dr. V. K. Subburaj (Member Technical)

1. This is an application filed by Uniexcel Limited (“Applicant”) invoking the provision of Section 7 of Insolvency and Bankruptcy Code, 2016 (“the Code”) against Uniexcel Developers Pvt. Ltd. (“Respondent”) for initiating Corporate Insolvency Resolution Process (“CIRP”) of the Respondent.
  
2. The Applicant has averred as follows:
  - a. The Respondent Company was set up with the object to set up a project in the information technology sector on a plot of land allotted by the NOIDA authority.
  - b. The Applicant herein remitted a sum of US\$ 124,000 on 05.05.2008 and US\$ 142,000 on 22.09.2008, to the Respondent for issue of shares in favour of the Applicant.
  - c. It was agreed between the parties that one Suresh Kumar shall be one of the directors of the Respondent and accordingly, he was appointed as a director on 18.01.2008.
  - d. The allotment of shares was put on hold on the request of the Applicant since an unforeseen dispute on the project land was raised by NOIDA authority which came to be the subject matter of a petition pending before the Hon’ble High Court of Judicature at Allahabad.
  - e. The dispute with NOIDA authority remained pending for several years as a result of which the project lost its appeal. Consequently,



vide letter dated 27.04.2015, a request was made by Suresh Kumar Chauhan for refund of the share application money. Suresh Chauhan also resigned from the Board of Directors of the Respondent vide communication dated 27.04.2015.

- f. A letter dated 27.04.2015 was addressed to the Board of Directors of the Respondent wherein it was pointed out that Ajit Kumar Gupta, director of Respondent had agreed to, subject to Reserve Bank of India approval, refund the amount of share application money being reflected in the balance sheet of the Respondent as on 31.03.2015. A No Objection certificate was also issued by the Respondent vide letter dated 27.04.2015 addressed to Suresh Kumar Chauhan.
- g. Once again, a request for refund of money was made by the Applicant herein vide letter dated 03.07.2015. the Respondent has miserably failed to refund the share application money as aforestated.

3. The Respondent in its reply has opposed the application on the following grounds:

- a. The alleged claim is barred by limitation in as much as the Applicant itself has stated that the alleged share application money was given in the year 2008-2009 and last alleged correspondence with respect to the refund of said share application was made on 03.07.2015. the

present application has been filed only on 13.02.2019 i.e. after lapse of about 3.5 years from the date of last alleged default.

- b. The said money was remitted to the Respondent for the issuance of shares and not for any other purpose. Due to the fact that share application was not refunded the very substance of the transaction does not automatically change and converts this particular transaction to a loan. The delay in issuing shares cannot result in re-characterization of sum as loan which has commercial effect of the borrowing. Also, as per the definition of financial debt in Section 5(8) of the Code it means debt along with interest which is disbursed against consideration for time value of money. In view of the definition it is clear the money was not disbursed against consideration for time value of money, but as consideration for issuing shares. Therefore, the said share application money even if in form of deemed deposits cannot be considered as financial debt.
- c. An amount of Rs.1,14,02,640/- was received by the Respondent from the Applicant through FDI on account of share application money for issue/allotment of shares in favour of Suresh Chauhan in the year 2008-2009. Thereafter, on request of the Applicant, the said allotment of shares were put on hold. Further, vide letter dated 27.04.2015, a request was received by Suresh Chauhan to refund the share application money which was received by the Respondent from the Applicant.

- d. Based on the request received from Suresh Chauhan, the Respondent forwarded the said request to concerned bank official in the month of June, 2015. Vide email dated 25.06.2015, the HDFC Bank informed the Respondent that as per RBI guidelines, refund should be sought by the person who remitted the money and not by a third party i.e. Suresh Chauhan. The Respondent wrote an email dated 02.07.2015 to the Applicant and stated that since the share application money has been received from the Applicant, the refund must also be sought by the Applicant. Thereafter, no email was received from the Applicant.
- e. Further, vide email dated 12.10.2015, the Respondent once again sent a reminder letter to the Applicant, however, no response was received from the Applicant. Therefore, due to non-availability of documents from the Applicant and Suresh Chauhan, the said refund could not be initiated with concerned bank.
- f. Further, it is denied that the Respondent has received any letter dated 03.07.2015 from the Applicant requesting refund of the money. Further, despite a reminder email dated 12.10.2015 from the Respondent, no response was received from the Applicant.

4. The Applicant in its rejoinder has contended as follows:

- a. The claim is not barred by limitation. The Respondent's balance sheet for the year 2014-2015 shows the amount of Rs.1,14,02,640



under the head "Share Application Money (Allotment Pending)". In the balance sheet for the year 2015-2016, the same amount has been shown under the head "Other Current Liabilities". The fact that the Respondent has acknowledged and reflected the said debt in the balance sheet for the years 2014-2015 and 2015-2016 makes it clear that the limitation should be calculated from 31.03.2016.

- b. Section 42(6) of the Companies Act, 2013 provides that the allotment of shares has to be made within 60 days, failing which the amount has to be returned within 15 days and beyond a period of 15 days, the amount has to be refunded with an interest @ 12% per annum. Thus, the debt owed by the Respondent is a financial debt.
- c. It is denied that the refund has not been initiated because of non-availability of documents from the Applicant. The Applicant in response to the email dated 02.07.2015 submitted a request with the Respondent duly typed on its letter head, handed over in person at the office of the Respondent.

5. We have perused the documents and heard the arguments of both sides. The issue to be decided for adjudicating on the present application is as follows:

- a. Whether the Applicant's claim is barred by limitation?

- b. Whether the share application money can be categorized as financial debt?
  - c. Whether there is a default on behalf of the Respondent in payment of the amount claimed?
6. With regard to the issue of limitation raised by the Respondent it is sufficient to say that the balance sheet of the Respondent for 2015-16 reflects the amount claimed by the Applicant under the head 'Other Liabilities', which amounts to a written acknowledgment of the liability by the Respondent extending the limitation period. This means that the limitation period will be calculated from 31.03.2016 and the present application was filed before the expiry of three years from such date. Thus, the application is not barred by limitation.
7. It is important to see what is meant by financial debt to decide whether share application money can be treated as financial debt. Section 5(8) of the Code defines financial debt as follows:

*“(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes– (a) money borrowed against the payment of interest; (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent; (c) any amount raised pursuant to any note purchase facility or*



*the issue of bonds, notes, debentures, loan stock or any similar instrument; (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed; (e) receivables sold or discounted other than any receivables sold on non-recourse basis; (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; 2 [Explanation. - For the purposes of this sub-clause, - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);] (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account; (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, 1 Ins. by Act No. 26 of 2018, sec. 3 (w.e.f. 6-6-2018). 2 Ins. by Act No. 26 of 2018, sec. 3 (w.e.f. 6-6-2018). 8*

8



*documentary letter of credit or any other instrument issued by a bank or financial institution; (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;”*

8. The Hon'ble Appellate Tribunal in *Nikhil Mehta & Sons vs. AMR Infrastructure Ltd.* approved the following description of a financial debt:

*“17. The first question arises for consideration is as to who is a 'Financial Creditor'. Learned Adjudicating Authority, for determination of the aforesaid issue examined the definition provided in Section 5(7) and 5(8) and in the impugned judgment rightly observed:*

*“12...Therefore the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses. A Financial Creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in*



*a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money..."*

9. To understand the nature of transaction involving a share application money it is necessary to look at Companies Act, 2013 ("the Act") and its relevant rules. Section 42(6) of the Act and the Companies (Acceptance of Deposits) Rules, 2014 ("Deposit Rules") lay down the treatment of share application money. The relevant parts of the Act and the Deposit Rules are stated hereunder:

*"42.*

*\*\*\**

*(6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within*



*fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day: Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than— (a) for adjustment against allotment of securities; or (b) for the repayment of monies where the company is unable to allot securities.”*

*“(1) In these rules, unless the context otherwise requires, (c) "deposit" includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include- (vii) any amount received and held pursuant to an offer made in accordance with the provisions of the Act towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, so long as such amount is appropriated only against the amount due on allotment of the securities applied for;*

*Explanation.- For the purposes of this sub-clause, it is hereby clarified that-*



*(a) Without prejudice to any other liability or action, if the securities for which application money or advance for such securities was received cannot be allotted within sixty days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within fifteen days from the date of completion of sixty days, such amount shall be treated as a deposit under these rules.*

*2[Provided that unless otherwise required under the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules or regulations made thereunder to allot any share, stock, bond, or debenture within a specified period, if a company receives any amount by way of subscriptions to any shares, stock, bonds or debentures before the 1st April, 2014 and disclosed in the balance sheet for the financial year ending on or before the 31st March, 2014 against which the allotment is pending on the 31st March, 2015, the company shall, by the 1st June 2015, either return such amounts to the persons from whom these were received or allot shares, stock, bonds or debentures or comply with these rules.]*



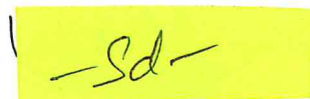
*(b) any adjustment of the amount for any other purpose shall not be treated as refund.”*

10. It is clear from a reading of Section 42 of the Act and the Deposit Rules that if the shares are not allotted within 60 days of the receipt of the money the share application money has to be refunded and if the refund does not take place within 15 days from the expiry of the 60 days' time limit, then the share application money will be treated as a deposit. On the non-allotment of shares, after the expiry of the time limit of 75 (60+15) days the share application money will be a deposit advanced to the company, which has to be returned by the company at the rate of 12% per annum from the expiry of the 60<sup>th</sup> day. The person applying for the shares will get compensation for the time value of the share application money given by him to the company, which makes the money advanced a financial debt to be repaid by the company. Thus, the Respondent's plea that the nature of the money given will not change into a loan does not stand as the Act itself allows such recategorization. In the present case the money was transmitted in 2008 and the allotment has not been made till date, thus, the money transmitted is a deposit and can be treated as a financial debt.

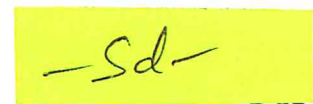
11. However, the third issue cannot be answered in favour of the Applicant as a perusal of the documents show that the Respondent has been ready



to refund the money after it receives the required letter from the Applicant. Although the Applicant has placed on record a letter dated 03.07.2015 signed by the Applicant's representative, there is nothing to show that the said letter was actually delivered to the Respondent. Even if it was delivered by hand as claimed by the Applicant, there should have been an acknowledgment of receipt by the Applicant on the copy of the letter. In the absence of anything to show that the delivery was actually made and that the Applicant has fulfilled all its formalities, it cannot be said that it is the Respondent's fault that the refund of the money has not been made. Allowing this application in such circumstances would amount to allowing the Applicant to take the benefit of its own wrong. Since the Respondent is willing to refund the money even now provided the procedure as prescribed by RBI is followed, the Applicant is hereby directed to fulfil the formalities to get the refund, within three months from the date of this order. If the Respondent fails to refund the money, the Applicant has the liberty to revive this application. Thus, the application is dismissed, with liberty to the Applicant to revive the application if the refund is not made even after the Applicant complies with the required formalities.



**Dr. V.K. SUBBURAJ**  
**Member (TECHNICAL)**



**INA MALHOTRA**  
**Member (JUDICIAL)**

T