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Moody's, Whistleblower Agree To End Tax Avoidance Suit

By James Nani

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Moody's Corp., its subsidiaries and a whistleblower have agreed to end a New York state court suit accusing the credit rating agency of using its captive insurance company to dodge taxes, putting to bed a yearslong case.

Moody's and Aniruddha Banerjee, a former employee, on Wednesday voluntarily discontinued the suit, in which Banerjee alleged he was fired in retaliation after raising concerns that the company's captive insurance company, Moody's Assurance Co. Inc., had the sole purpose of tax avoidance. In their stipulation filed with the New York Supreme Court, the parties said the case and all its claims were dismissed with prejudice, and they will each pay their own costs. The case was in the discovery phase.

It wasn't clear what the terms of ending the case were or if any money was paid by any parties in the case. There was no admittance of wrongdoing and no details filed about the reason for the discontinuance.

Counsel for Banerjee did not offer comment on the case Friday. Moody's and its counsel didn't respond to requests for comment.

The end of the case came after years of litigation. In the complaint filed under seal in 2012, Banerjee contended that he was fired after questioning whether MAC was restructured with Marsh & McLennan Cos.'s help in 2009 to hold "sham" insurance policies in violation of New York's False Claims Act.

The whistleblower had claimed that while captive insurance companies are in-house insurers created specifically to cover risks of a parent company, the insurance policies MAC held are all shams. MAC knowingly misused it to receive and funnel money through the captive insurance company's tax-advantageous structure so its parent company and related affiliates could avoid paying regular corporate taxes on the funds, Banerjee said.

In December 2016, New York Judge James E. D'Auguste **largely denied a bid** by Moody's and its subsidiaries to toss the whistleblower's suit, finding the allegations of a sham arrangement were sufficiently supported. The judge noted that captives are subject to taxes "only on premiums at incredibly attractive low rates," and that in 2009, the applicable tax law was amended to exclude an overcapitalized captive insurance company from being taxed at the favorable rate. Judge D'Auguste also found Banerjee's allegation that MAC was formed for the sole purpose of tax avoidance convincing and allowed the case to move forward.

Moody's and its affiliates had argued, in asking the lower court to dismiss the case, that MAC's license to operate as a captive negates the elements of an FCA violation. However, Judge D'Auguste said, MAC's license "is only one of the factors to consider in determining whether a captive's arrangement with related companies constitutes insurance in the commonly accepted sense."

Moody's also cited settlement agreements with state and city tax authorities as grounds to bar the claims, but Judge D'Auguste had found that the consent forms they referenced "could hardly be considered a 'settlement agreement.'"

The decision was then appealed by both parties to the state Supreme Court's Appellate Division, which **ruled** in August 2018 that Moody's and Marsh must face the whistleblower claim. The case continued to proceed at the trial court, where the parties filed the stipulation to end the case.

Tax attorney Timothy P. Noonan of Hodgson Russ LLP, who didn't work on the case, told Law360 that the case stood out because the whistleblower had moved forward with the case without the government.

"In general, the case is interesting because it was the first New York False Claims Act tax case that a New York appellate court has allowed to go forward, even though the attorney general's office declined to intervene," Noonan said.

Aniruddha Banerjee is represented by David E. Kovel and Karen M. Lerner of Kirby McInerney LLP and John A. Beranbaum of Beranbaum Menken LLP.

Marsh USA Inc. and Marsh Management Services Inc. were represented by Christopher J. St. Jeanos of Wilkie Farr & Gallagher.

Moody's is represented by Benjamin Walker of Sullivan & Cromwell LLP.

The case is State of New York ex rel. Aniruddha Banerjee v. Moody's Corp. et al., case number 103997/2012, in the Supreme Court of the State of New York, New York County.

--Additional reporting by Natalie Olivo and Paul Williams. Editing by Neil Cohen.