

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 624 of 2020

IN THE MATTER OF:

Om Prakash Agrawal
Liquidator-S.Kumars Nationwide Limited

B2, 5th Floor, Marathon Next Gen,
 Off G.K.Marg, Lower Parel,
 Mumbai – 400 013

...Appellant

Vs.

1.Chief Commissioner of Income Tax (TDS)

6th Floor, Room No.644
 Aaykarbhavan, M.K.Road,
 Mumbai – 400 200

Also At:

10th Floor, KG Mittal Ayurvedic Prachar Sanstha building,
 Murrine Drive, Charni Road (West),
 Mumbai- 400 002

2.UPL Limited

UPL House, 610 B/2,
 Bandra Village, Off Western Express Highway,
 Bandra – East, Mumbai 400 051
 Maharashtra, India

...Respondents

Present: -

For Appellant: Mr. KanishkKhetan, Advocate
Mr. Anil Goel (PCA)

For Respondent: Mr. Suresh Kumar, Advocate for R-1.

J U D G M E N T

Jarat Kumar Jain, J:

The Appellant Liquidator has filed this Appeal against the order dated 11.06.2020 passed by the Adjudicating Authority (National Company Law Tribunal) Principal Bench, New Delhi. Whereby the Adjudicating Authority

declined to issue direction to successful bidder (Respondent No. 2 herein) and the Income Tax Authority (Respondent No. 1 herein) not to deduct 1 % TDS from the sale consideration.

2. The Liquidator filed an Application before the Adjudicating Authority for direction against the successful bidder (Respondent No.2) in auction held for sale of assets of the Corporate Debtor and, Income Tax Authority (Respondent No. 1) not to deduct 1 % TDS from the sale consideration Rs. 43 Crores on the premise that Income Tax dues can be recovered by the department as per waterfall mechanism set out under Section 53 of Insolvency and Bankruptcy Code (In Brief 'Code'). The provision of deduction of TDS u/s 194-IA, Income Tax Act, 1961 (in brief "IT Act") is inconsistent with Section 53 (1) (e) of the Code and by virtue of Section 238 of Code, Section 53 of Code has over-riding effect.

3. Learned Adjudicating Authority held that the deduction of Tax at source under Section 194-IA of the IT Act does not mean assessment and raising demand for collection of Tax by the Department. Collection of Tax will arise only after passing orders under the IT Act subsequent to filing of Income Tax Return by the assessee. Thus, the deduction of TDS does not tantamount to payment of Government dues in priority to other creditors because it is not a Tax demand for realization of Tax dues. It is the duty of the purchaser to credit TDS to the Income Tax Department. Therefore, dismissed the Application.

4. Being aggrieved with this order, the Appellant has filed this Appeal.

5. Learned PCA representing the Appellant submitted that Section 53 of the Code, postulate the distribution of assets to the Creditors without

deduction of the TDS. It is clear that deduction of TDS runs counter to the scheme and mandate of Section 53 of the Code. Disbursement of Government dues is covered under Section 53 (1) (e) of the Code and the deduction of prior TDS most certainly tinkers with waterfall mechanism stipulated under Section 53 of the Code. For this proposition, placed reliance on the Judgment of Hon'ble Andhra Pradesh High Court in the case of Leo Edibles & Fats Limited Vs. Tax Recovery Officer (Central) (WP No. 8560 of 2018 dated 26.07.2018) wherein it is held that the Tax Recovery Officer cannot claim any priority merely because of the fact that the order of attachment issued by him was long prior to the initiation of Liquidation Proceedings. It is also submitted that the Income Tax liability arising out of sale of assets by the Liquidator shall be distributed in accordance with the provisions of Section 53 of the Code and the capital gain tax shall not be treated as liquidation cost as held by the Adjudicating Authority (National Company Law Tribunal) Bench at Allahabad in LML Limited Vs. Office of Commercial of Income Tax, Mumbai (C.A. No. 389 of 2019 in CP(IB)No. 55/ALD/2017.

6. Learned PCA further submitted that a Liquidator is duty bound to maintain or update the Books of Account till the Liquidation commencement date and however, during the liquidation period there is no requirement of maintaining profit and loss account and balance sheet of the Corporate Debtor and to get the same audited. The Income Tax Return is filed after 6 months' end of the financial year and filing of Income Tax Return and getting refund of TDS is a long drawn process and goes directly against the scheme and specific regulations provided under the Code. He has also

submitted that in such company on an overall basis it is always be a capital loss and hence, there is no such provision inbuilt either in the Code or the Regulation for filing of Income Tax Return and hence mode of distribution is provided based on existence of Liquidation Estate on liquidation commencement date.

7. Learned PCA representing the Appellant further submitted that when the Company is in liquidation under the provisions of Code then there is no requirement of filing of return of a Company as it is directly in conflict with the whole scheme of the Liquidation stipulated under the Code. It is that for filing of return requires financial statements to be drawn which is not envisaged anywhere in the Code and Regulation thereto. It is notable that the Liquidation Process is required to be completed within a year as per Regulation 44 of the IBBI (Liquidation Process Regulation 2016). It is argued on behalf of the Respondent No. 1 that the Liquidator may seek refund is also misplaced as no refund is possible without due filing of return as explained above. The Code does not stipulate of filing of return by a Company in Liquidation under the Code. Thus, the provisions under Section 194 IA of the IT Act are inconsistent with Section 53 of the Code. Therefore, by virtue of Section 238 of the Code, the provision of Section 53 of the Code shall have overriding effect. Learned Adjudicating Authority has incorrectly interpreted the law. Therefore, the impugned order is liable to be set aside and the Respondent No. 1 be directed to refund the amount of TDS which is deposited by the Respondent No. 2.

8. *Per Contra*, Ld. Counsel representing the Respondent No. 1 submitted that the Appellant is drawing inference beyond what is mandated by the

code. The Section 247 of the Code r/w the Third Schedule of I&B Code 2016 duly describes the manner in which IT Act was to be amended with regard to companies in liquidation. According to Third Schedule of the Code, only Section 178 of the IT Act was to be amended, there is no amendment in Section 194-IA of the IT Act. Further, nowhere it is mentioned in the code that company under liquidation outside the purview of Section 139 of the IT Act. Therefore, the liquidator is not exempted from filing return of the income. It is also submitted that TDS is required to be deducted as per provisions of Section 194-IA of the IT Act in respect of sale of immovable property under liquidation and exemption from the TDS would actually tantamount to amending the provisions of the IT Act. The liquidator being a principal officer within the meaning of Section 2(35) of the IT Act for the purpose of furnishing return can file and verify the return as held by Hon'ble High Court of Andhra Pradesh in the case of Income Tax Officer vs. Official Liquidator [1977 106 ITR 119(Andhra Pradesh)].

9. It is also submitted by the Learned Counsel for the Respondent No. 1 that there is no conflict between Section 194-IA of the IT Act and Section 53 of the Code as the intent and purpose of both the sections are different. One is fiscal provision whereby TDS is required to be made in case of sale of immovable property for a consideration more than 50 lacs. The other determines priority amongst different stake holder in case of distribution of sale proceeds of assets of Corporate Debtor under liquidation. Thus, both the provisions operate under entirely different domain having different purposes and there is no conflict between them.

10. Ld. Counsel for the Respondent No. 1 also submitted that the assessment proceedings were outside pale of jurisdiction of all civil courts including company court. The liquidation court cannot perform the functions of Income Tax officers as held by Hon'ble Supreme Court in the case of S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land & Mills Co. Ltd. Vs. VM Deshpande, Income Tax Officer [1972 83 ITR 685(SC)]. Ld. Counsel for the Respondent No. 1 further submitted that ld. Adjudicating Authority has rightly held that the TDS u/s 194-IA of the IT Act does not mean assessment and raising demand for collection of Tax by the Department. Thus, the deduction of TDS does not tantamount to recovery of Income Tax in priority to the other creditors. Hence, the Appeal is liable to be dismissed.

11. After hearing Ld. counsel for the parties we have perused the record and gone through the relevant provisions of the Code and the IT Act. The Question for our consideration is:

“Whether the provisions of u/s 194-IA of the Income Tax Act, 1961 are inconsistent with Section 53 (1) (e) of the Insolvency and Bankruptcy Code, 2016?”

12. First of all, we have considered what was the necessity to amend Sub-Section 6 of Section 178 of the IT Act. Section 247 of the Code deals with the amendment to the IT Act, 1961 and provides that the said IT Act shall be amended in the manner specified in the Third schedule. The amendment brought into effect from 01.11.2016 after the amendment sub-Section 6 of Section 178 of the IT Act reads as under: -

“Company in liquidation

178. (1) Every person—

(a) who is the liquidator of any company which is being wound up whether under the orders of a court or otherwise; or

(b) who has been appointed the receiver of any assets of a company; (hereinafter referred to as the liquidator) shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the Income-tax Officer who is entitled to assess the income of the company.

(2) The Income-tax Officer shall, after making such enquiries of calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the Income-tax Officer, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by the company.

[(3) The liquidator—

(a) shall not, without the leave of the Commissioner, part with any of the assets of the company or the properties in his hands until he has been notified by the Income-tax Officer under sub-section (2); and

(b) on being so notified, shall set aside an amount, equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands:

Provided that nothing contained in this sub-section shall debar the liquidator from parting with such assets or properties for the purpose of the payment of the tax payable by the company or for making any payment to secured creditors whose debts are entitled under law to priority of payment over debts due to Government on the date of liquidation or for meeting such cost and expenses of the winding up of the company as are in the opinion of the Commissioner reasonable.

(4) If the liquidator fails to give the notice in accordance with sub-section (1) or fails to set aside the amount as required by sub-section (3) or parts with any of the assets of the company or the properties in his hands in contravention of the provisions of that sub-section, he shall be personally liable for the payment of the tax which the company would be liable to pay:

Provided that if the amount of any tax payable by the company is notified under sub-section (2), the personal liability of the liquidator under this sub-section shall be to the extent of such amount.]

(5) Where there are more liquidators than one, the obligations and liabilities attached to the liquidator under this section shall attach to all the liquidators jointly and severally.

(6) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force. **(except the provisions of the Insolvency and Bankruptcy Code, 2016) (Inserted by the Insolvency and Bankruptcy Code, w.e.f 01.11.2016.)”**

13. Hon’ble Supreme Court in the case of Imperial Chit funds (P) Ltd. Vs. Income Tax Officer (1996) 219 ITR 498 considered Section 178 of the IT Act, in relation to the preferential payments covered by Section 530 of the Companies Act, 1956. The Supreme Court took the view that the Income Tax Department is to be treated as a secured creditor in the light of the words occurring in Sections 178 (3) and (4) of the IT Act to the effect that the liquidator shall set aside the amount notified by the Income Tax Officer and if it is not so done, the liquidator is personally liable to pay the amount of Tax. With this proposition, the Income Tax Department is to be treated as a secured creditor and in liquidation proceedings such dues shall get priority. Whereas, as per Section 53 (1) (e) of the Code, the legislature assigned the 5th position in the order of priority to government dues (including Income Tax Dues)

Section 53 Distribution of Assets

“Section 53(1)(e) the following dues shall rank equally between and among the following”

(i) any amount due to the Central Government and State Government including the amount to be received on account of the consolidated fund of India and the consolidated fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date”

14. Thus, in Section 53(1) (e) of the Code and in Section 178 of the IT Act for Government dues priority is different. Section 178 (6) of the IT Act and

Section 53 of the Code both Sections start with non-obstante clause, therefore, legislature in its wisdom to give effect to the scheme of the Code amended Section 178(6) of the IT Act. By virtue of the amendment the whole of Section 178 has no application to the liquidation proceedings initiated under the Code. With the aforesaid, it was necessary to amend Section 178(6) of the IT Act.

15. Now, we have considered, whether Section 194 IA of the IT Act and Section 53 (1) (e) of the Code are inconsistent, these Sections reads as under:

Section 194 IA of IT Act.

“Section 194 IA (1) Any person, being a transferee, responsible for paying (Other than the person referred to in section 197 LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (Other than agricultural land), shall, at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent of such sum as income-tax thereon.

(2)xxx

(3) xxx

Section 53 of I&B Code.

53.Distribution of Assets- (1) Notwithstanding anything to the contrary contained in any law enacted Acted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely: -

- (a) The insolvency resolution process costs and the liquidation costs paid in full;
- (b) The following debts which shall rank equally between and among the following:-
 - (i) Workman’s dues for the period of twenty four months preceding the liquidation commencement date; and
 - (ii) Debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
- (c) Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- (d) Financial debts owed to unsecured creditors;
- (e) The following dues shall rank equally between and among the following:-

- (i) Any amount due to the Central Government and the State Government including the amount to be received on account of the consolidated fund of India and the consolidated fund of a Stat, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
- (ii) Debts owed to a secured creditor for any amount following the enforcement of security interest;
- (f) Any remaining debts and dues;
- (g) Preference shareholders, if any; and
- (h) Equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section—

- (i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and
- (ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.”

16. Section 194 IA of the IT Act provides that where the consideration for transfer of the immovable property is more than 50 Lakhs, then the transferee is responsible to deduct the amount which is 1% of the consideration as Income Tax.

17. Section 199 of the IT Act reads as under: -

“(1) Any deduction made in accordance with the foregoing provisions of this chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property of the unit-holder, or of the shareholder, as the case may be.

- 2. xxx
- 3. xxx”

18. Section 199 of the IT Act, provides that any deduction made in accordance with the Section 194 IA of the IT Act and paid to the Central

Government shall be treated as payment of tax on behalf of the person from whose Income deduction was made, or the owner of the security or of the depositor or of the owner of the property.

19. Section 45 of the IT Act, reads as under:-

“(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H be chargeable to income of the previous year in which the transfer took place.”

20. Section 45 of the IT Act, provides that any profits are gains arising from the transfer of a capital asset effected in the previous year shall save as otherwise provided in the Section be chargeable to Income Tax under the head of capital gain and shall be deemed to be the Income of the previous year, in which the transfer took place. Thus, the TDS under Section 194 IA is nothing but advance capital gain tax recovered through transferee (Purchaser) on behalf of the transferor (seller).

21. As per Section 194 IA of the IT Act 1% TDS is recovered on priority to other creditors of the transferor, which is partial capital gain tax, whereas, Section 53(1)(e) of the Code in waterfall mechanism provides that the Government dues comes fifth in order of priority. Thus, in regard to recovery of the Government dues (Including Income Tax) from the Company in Liquidation under the Code, there is inconsistency between Section 194IA of the IT Act and Section 53(1) (e) of the Code therefore, by virtue of Section 238 of the Code, Section 53 (1) (e) of the Code shall have overriding effect on the provisions of the Section 194 IA of the IT Act. Otherwise also Section 53 starts with a non-obstante clause, whereas Section 194 IA of the IT Act, does not start with a non-obstante clause, and it would necessarily be

subject to overriding effect of the Code and therefore, there was no requirement to amend the Section 194 IA of the IT Act.

22. It is suggested on behalf of the Respondent No. 1 that the Appellant, Liquidator being a principal officer can verify the return of the Company and in the return, can claim refund the amount of TDS. The Liquidator being a principal officer can verify the return, as held by Hon'ble High Court in the case of Income Tax Officer (Supra).

23. There is specific provision in regard to filing of return in the third proviso of Section 140 of the IT Act, which reads as under: -

Provided further that:

“(a) Where the company is being wound up, whether under the orders of a court or otherwise, or where any person has been appointed as the receiver of any assets of the company, the return shall be verified by the liquidator referred to in sub-section (1) of section 178.

(b) Where the management of the company has been taken over by the central government or any state government under any law, the return of the company shall be verified by the principal officer thereof.

(c) Where in respect of company, an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under Section 7 or Section 9 or Section 10 of the IBC, 2016 (31 of 2016), the return shall be verified by the insolvency professional appointed by such Adjudicating Authority.

Explanation: For the purpose of this clause the expression ‘insolvency professional’ and ‘adjudicating authority’ shall have the respective meaning assigned to them in clause (18) of Section 3 and clause 1 of Section 5 of the Insolvency and Bankruptcy code, 2016 (31 of 2016)”

24. Thus, it is clear that when the Company is wound up under the orders of Court or otherwise the return shall be verified by the Liquidator referred to in Sub-Section 1 of Section 178 of the IT Act, during corporate insolvency resolution process under Section 7, 9 or 10 of the Code, the return shall be verified by the Insolvency Professional appointed by the

Adjudicating Authority. However, there is no such provision in the IT Act, Code or IBBI (Liquidation Process Regulation, 2016) that the Liquidator of the Company in Liquidation under the Code is required to file Income Tax Return. For filing of return, the financial statements are required to be annexed but the Code/IBBI (Liquidation Process Regulation 2016) does not assign a duty on the Liquidator to prepare financial statements. Chapter III of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 provides powers and functions of liquidator, Regulation 5 & 6 of the Regulations is reproduced below:

“Regulation 5-5. Reporting. (1) The liquidator shall prepare and submit:

- (a) a preliminary report;
- (b) an asset memorandum;
- (c) progress report(s);
- (d) sale report(s);
- (e) minutes of consultation with stakeholders; and
- (f) the final report prior to dissolution to the Adjudicating Authority in the manner specified under these Regulations.

(2) The liquidator shall preserve a physical as well as an electronic copy of the reports and minutes referred to in sub-regulation (1) for eight years after the dissolution of the corporate debtor.

(3) Subject to other provisions of these Regulations, the liquidator shall make the reports and minutes referred to sub-regulation (1) available to a stakeholder in either electronic or physical form, on receipt of

- (a) an application in writing;
- (b) costs of making such reports and minutes available to it; and
- (c) an undertaking from the stakeholder that it shall maintain confidentiality of such reports and minutes and shall not use these to cause an undue gain or undue loss to itself or any other person.

6. Registers and books of account.

(1) Where the books of account of the corporate debtor are incomplete on the liquidation commencement date, the liquidator shall have them completed and brought up-to-date, with all convenient speed, as soon as the order for liquidation is passed.

(2) The liquidator shall maintain the following registers and books, as may be applicable, in relation to the liquidation of the corporate debtor, and shall preserve them for a period of eight years after the dissolution of the corporate debtor-

- (a) Cash Book;
- (b) Ledger;
- (c) Bank Ledger;
- (d) Register of Fixed Assets and Inventories;

- (e) Securities and Investment Register;
- (f) Register of Book Debts and Outstanding Debts;”

25. We are of the view that the Liquidator of a Company in liquidation under the Code is not required to file Income Tax Return, then there is no question of claiming refund of TDS deducted under Section 194 IA of the IT Act.

26. As per chapter XIX of the Act, ‘Refunds’ has been dealt with at length vide Section 237, 239 and 245 of the IT Act. The same is reproduced below for clarify:

“237. Refunds (1) If any person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess.

Section 239- Every claim for refund under this Chapter shall be made in the prescribed form and verified in the prescribed manner.

(2) No such claim shall be allowed, unless it is made within the period specified hereunder, namely:-

(a) where the claim is in respect of income which is assessable for any assessment year commencing on or before the 1st day of April, 1967 , four years from the last day of such assessment year;

(b) where the claim is in respect of income which is assessable for the assessment year commencing on the first day of April, 1968 , three years from the last day of the assessment year;

(c) where the claim is in respect of income which is assessable for any other assessment year, one year] from the last day of such assessment year.]

(d) where the claim is in respect of fringe benefits which are assessable for any assessment year commencing on or after the first day of April, 2006, one year from the last day of such assessment year.

Section 245 - Set off of refunds against tax remaining payable.— Where under any of the provisions of this Act, a refund is found to be due to any person, the [Assessing Officer], [Deputy Commissioner (Appeals)] [, or the Commissioner (Appeals) or Commissioner or [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner]], as

the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section.”

27. All these reflect that this is a cumbersome process to take refund from Income Tax Department and hence Code and IBBI (Liquidator Process) Regulation 2016 is silent on the subject of filing of Income Tax Return as Code provides for a time bound period for completion and maximization of value of assets and cease of doing business.

28. Learned Counsel for the Respondent No. 1 cited the Judgment of S.V. Kondaskar, Official Liquidator (Supra) in that case Hon'ble Supreme court held that the Liquidation court cannot perform functions of ITO while assessing amount of Tax payable by assessee even if, assessee be a company which is being wound up by the Court. We are not assessing amount of Income Tax. Thus, this ruling is not helpful to the Respondents.

29. The Respondent No. 1 has also filed a General Circular No. 41 of 2011 dated 06th July, 2011 issued by the Government of India, Ministry of Corporate Affairs, this circular was issued for removal of the difficulty in e-filing of Income Tax Return in respect of the companies under liquidation. This circular is prior to coming in force the Code, thus this circular is not relevant for deciding the issue involved in this Appeal.

30. Ld. Adjudicating Authority has erroneously held that the deduction of Tax at source does not mean raising demand for collection of tax by the Department. Actually TDS under Section 194 IA, is an advance capital gain tax, recovered through transferee on priority with other creditors of the

company. Hence, inconsistent with the provision of Section 53 (1) (e) of the Code and by virtue of Section 238 of the Code, the provision of Section 53(1) (e) shall have overriding effect. Thus, the impugned order is not sustainable in law. Therefore, it is hereby set aside.

31. The Respondent No.1 is directed to refund the amount of TDS to the Appellant which is deposited by the Respondent No. 2 with the department.

Thus, the Appeal is allowed. However, no order as to cost.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
08th February, 2021
SC