

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 203
CP-294/2018

IN THE MATTER OF:

Om Prakash Agarwal Applicant/petitioner
v.
Chief Commissioner of Income Tax (IDS) & Anr. Respondent

Order under Section 60(5) of Insolvency & Bankruptcy Code

Delivered on 11.06.2020

CORAM:

SH. B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

PRESENT:

For the Liquidator	Mr. Rohan Aggarwal & Darshit Dave, Advs.
For the Respondent	Mr. Nand Kishore, Adv.
For the IT	Mr. Suresh Kumar, Adv.
For the IT Officer TDS	Mr. Dheeraj Rohilla, Adv.

ORDER

Heard and Dictated in the open court on 11.06.2020

IA-992/2020

The liquidator has filed this Application asking for direction against R2 (successful bidder in the auction held for sale of the asset of the Corporate Debtor) and R1 (Income Tax Authority) not to deduct 1% TDS from the sale held in favour of R1 for a sale consideration ₹ 43 Crores on the premise that Tax Dues cannot be collected by the Government in priority to the water fall mechanism set out under section 53 and for the reason section 238 has



overriding effect upon other enactments which are inconsistent with IBC.


2. Against which, the Income Tax Department's counsel has replied that there is no provision either under IBC or Income Tax Act **(the Act)** for exemption from deduction of TDS over the sale of an asset by the corporate debtor in liquidation, and in this case, sale being taken place for a sale consideration ₹ 43 Crore which is above the limit of ₹ 50 lakhs mentioned under the Act, Section 194IA of the Act requires a buyer to deduct tax at the rate of 1% of the sale consideration, if the value of the transaction is ₹ 50 lakhs or more and to deposit the TDS amount to the credit of the central government, within 30 days from end of the month in which the tax is so deducted.

3. On hearing the submissions of the Liquidator counsel as well as the counsel of Income Tax Department, it is apparent on record that there is no provision exempting purchaser from remitting TDS to the Income Tax Department by deducting it from the sale consideration payable to the Seller.

4. As to the argument of the Liquidator counsel saying that 238 will have overriding fact over tax deductions, this Bench hereby


clarifies that Section 238 overriding effect will be applicable to the issues in between the creditor and debtor but not to TDS deductions. When Government comes before the liquidator as creditor, then it is obvious it is bound by section 53 and section 238 of the Code. The concept of operational creditor and government tax dues is applicable to the situation where claim is over the demand made by the Government. Here in this case, the Income Tax Authority has not placed any claim before the liquidator to settle it off before distribution of the proceeds among the creditors and shareholders as set out in the water fall mechanism under section 53 of the Code. As per law whatever sale price that comes to the liquidator, it comes only after deduction of TDS, so where is the question of Income Tax Authority standing in que for realisation of TDS. Therefore, deduction of TDS is not inconsistent with any of the provisions of the IBC, therefore deduction of Tax at source shall not be construed as Tax Demand.

5. As to the judgment relied upon by the Liquidator (W.P. No. 8560 of 2018, ***Leo Edibles & Fats Limited and The Tax Recovery Officer (central), Income Tax Department, Hyderabad and Ors.*** pronounced vide order dated 26.07.2018), the issue



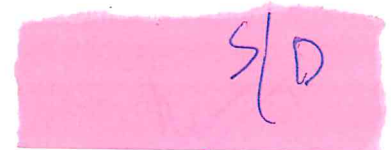
involved in the case above is with regard to Section 178 of Income Tax Act but not relating to TDS deduction under section 194 IA of the Act.

6. Moreover, Income Tax Department counsel has also stated that the liquidator in the Sale Memorandum specifically stated that it shall be the responsibility of the purchaser to bear all taxes including GST and TDS, now at the time of deduction how this liquidator could retract from his statement and seek exemption from paying TDS over the sale held. It is true that Nil or lower tax rate deduction of TDS u/s 197 is not applicable to the items falling under Sections 194B, 194BB, 194DA, 194E, **194IA** of the Act, therefore the question of issuing exemption certificate will not arise. Above all, as stated by the Income Tax department counsel, deduction of tax at source u/s 194IA of the Act does not mean assessment and raising demand for collection of tax by the Government, collection of Tax will arise only after passing appropriate orders under relevant section of the Act subsequent to filing of Income Tax Return by the assessee, which is not the case here. In view thereof deduction of TDS does not tantamount to payment of government dues in priority to other creditors, because



it is not a tax demand for realisation of Tax dues, nevertheless the liquidator is not asked to pay TDS, and it is the duty of the purchaser to credit TDS to the Income Tax Department.

7. Therefore, this application is hereby dismissed.



(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT