

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT- I
KOLKATA**

**I.A. (IB) No. 1168/KB/2020
in
C.P(IB) No. 3/KB/2017**

*An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016
and Regulation 9 of the Insolvency and bankruptcy Board of India
(Liquidation Process) Regulations,2016.*

In the matter of:-

Nicco Corporation Limited (In Liquidation)

.....Corporate Debtor

And

I.A. (IB) No. 1168/KB/2020

In the matter of:-

Vinod Kumar Kothari,

Liquidator of the Corporate Debtor

.....Applicant

Versus

- 1. The Assessing Officer, Income Tax Department**
- 2. The Assistant Commissioner, Income Tax Department**
- 3. Commissioner of Income Tax**
- 4. Principal Chief Commissioner of Income Tax**

.....Respondents

Date of pronouncement: 1.02.2024

Coram:

Shri Rohit Kapoor	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

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Appearances (through video conferencing):

For the Applicant : Ms. Barsha Dikshit, PCS

For the Respondents : Mr. S.K. Tiwari, Advocate

ORDER

Per Rohit Kapoor, Member (Judicial)

1. The Court convened through hybrid mode.

Preliminary

2. *Vide* order dated 17 October 2017, this Adjudicating Authority directed the Corporate Debtor *viz.* Nicco Corporation Limited to undergo liquidation. Mr. Vinod Kumar Kothari, having registration no. IBBI/IPA-002/IP-N00019/2016-17/10033 was appointed as the Liquidator of the Corporate Debtor.

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3. The instant application has been filed by Mr. Vinod Kumar Kothari, Liquidator of the Corporate Debtor against the Income Tax Authorities, under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) and regulation 9 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (“Liquidation Regulations”) seeking the following reliefs:-

a. Necessary directions to R1-R4 for refunding the full amount of Rs.54,40,064/- in the Liquidation account of the Corporate Debtor, which is wrongfully adjusted against purported tax dues of the Corporate Debtor;

b. Pass such other order/orders as this Hon’ble Bench may deem fit and proper

4. Pursuant to receipt of the order initiating liquidation of the Corporate Debtor, the Applicant herein, published a notice in Form B of the Liquidation Regulations and the notice was published the same in four newspapers *viz.* Financial Express (All India edition), Odisha Bhaskar (Odiya) (Odisha

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edition) and Aajkal (Bengali) (Kolkata edition) on 25 October 2017 and in Mumbai Mitra (Marathi) (Mumbai edition) on 26 October 2017. The Applicant had also served notice of initiation of liquidation process of the Corporate Debtor to the Respondent No.1 herein in terms of section 178 of the Income Tax Act, 1961 (“IT Act”).

5. It is submitted that the Liquidator filed Income Tax Return with respect to the Corporate Debtor for the Assessment Year 2019-2020 under section 139(1) of the I.T. Act. On 08 May 2020, the Liquidator received an order thereby setting out that a sum of Rs. 54,40,064/- (Rupees Fifty Four Lakh Forty Thousand and Sixty Four only) as Income Tax Refund receivable by the Corporate Debtor for the Assessment Year 2019-2020, and on 09 May 2020 another notice was received by the Liquidator wherein it was stated – *‘Your return has been processed at CPC. The refund determined will be adjusted against the outstanding demand as shown in “Outstanding demand table” annexed herewith’*. Such outstanding demand table reflected the demands pertaining to the Assessment Years 2008, 2009, 2011, 2012, 2013 and 2016 i.e., prior to liquidation commencement date.
6. The Liquidator responded to the same vide email dated 15 May 2020 and submitted that – *‘the Department ought to file its claim in the liquidation proceedings and cannot exercise its right under Section 245 of the Income Tax Act in case of a company in liquidation under the Code. In any case, in terms of Section 238 of the Code, the provisions of the Code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.’*
7. No response was received from the Respondents, hence the Liquidator sent email dated 01 June 2020 to which the Respondent No.2 replied vide mail dated 07 June 2020 and asked for contact details of the Liquidator and after due discussion the Liquidator was informed that the appropriate authority for discussing the same was the Respondent No.1.
8. Pursuant to the same, the Applicant had sent an email dated 09 June 2020 but no response was received and as a result, a show cause notice dated 28 July

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- 2020 was served on the Respondent No.1 for wrongful adjustment of the refund due to the Corporate Debtor against the provisions of the Code along with reminder cum request to resolve the matter.
9. Further, no response was received, therefore Applicant approached the higher authorities i.e., Respondent No.3 and 4 for necessary direction vide email dated 19 August 2020 but no response was received by the Applicant.
 10. The applicant submits that the outstanding dues constitute Government dues under section 53 of the Code and would stand at 5th position in terms of priority of priority of repayment and shall be paid accordingly. Further the Applicant has placed reliance on *Leo Edible Oils & Fats Limited v. tax Recovery Officer (Central)*¹ wherein the Andhra Pradesh High Court held that the said Tax Recovery Officer cannot claim any priority based on the fact that its claims pertained to a period which was long prior to the initiation of the liquidation proceedings against the Corporate Debtor.
 11. It is stated that on 30 April 2021, the Assistant Director of Income Tax intimated the Applicant vide an email that the refund for the A.Y. 2020-2021 of Rs.16,85,230/- has been adjusted against the outstanding demand for A.Y. 2008-2009 i.e., for a period prior to commencement of liquidation.
 12. The learned Counsel submitted that the Corporate Debtor was ordered to be liquidated hence during liquidation, any asset belonging to the Corporate Debtor shall form part of the liquidation estate of the Corporate Debtor, from which payment can only be made in terms of section 53 of Code, and no recovery can take place outside the provisions of the Code.
 13. In support of its contention, the learned Counsel placed reliance on the ruling of Hon'ble Supreme Court in *Union of India and Anr. v. India Fisheries (P) Ltd, 1966 AIR 35, 1965 SCR (3) 679*, wherein the Hon'ble Supreme Court dealt with the direct question involving section 49E of the Income Tax Act, 1922 (corresponding to section 245 of the Income Tax Act, 1961) and section 228 and 229 of the Companies Act, 1913 which provides for the priorities under the law (corresponding to section 53 of Code) and held that:

¹ WP No. 8560 of 2018

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*“The effect of these statutory provisions is, inter alia, that an unsecured creditor must prove his debts and all unsecured debts are to be paid pari passu. Therefore, once the claim of the Department has to be proved and is proved in the liquidation proceedings, the Department cannot by exercising the right under s. 49E of the Income Tax Act get priority over the other unsecured creditors. If we were to read s. 49E in the way suggested by the learned Additional Solicitor-General, it would be defeating the very object underlying ss. 228 and 229 of the Companies Act, 1913. If there is an apparent conflict between two independent provisions of law, the special provision must prevail. Section 49E is a general provision applicable to all assesseees and in all circumstances; ss. 228 and 229-deal with the proof of debts and their payment in liquidation. In our opinion, s. 49E can be reconciled with ss. 228 and 229 by holding that s. 49E applies when insolvency rules do not apply. Accordingly, agreeing with the High Court, we hold that **the Income Tax Officer was in error in applying s. 49E and setting off the refund due...**”*

14. Reliance was also placed on the judgement of the Hon’ble Supreme Court in the matter of **PR. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd**, wherein the Supreme Court ruled,

“Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income-Tax Act.

*We may also refer in this Connection to Dena Bank vs. BhikhabhaiPrabhudas Parekh and Co. &Ors. (2000) 5 SCC 694 and its progeny, **making it clear that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.**”*

15. The above establishes that the Income Tax Department ought to file its claim in the liquidation proceedings and cannot exercise right under section 245 of the Income Tax Act, 1961 in case of a company under liquidation under IBC. Further, in any case, pursuant to section 238 of IBC the provisions of IBC shall have effect notwithstanding anything inconsistent contained in any other

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law for the time being in force or any instrument having effect by virtue of any such law.

16. Further, the Liquidator also humbly submits that the said action of the Income Tax Department is not warranted because the Department does not have the right to adjust the past income tax demands with the money belonging to the liquidation estate in contradiction to section 53 of IBC simply because the possession of the same is with the Department. Also, if the said action is not disregarded, it will drastically discount the very objective of the “*waterfall mechanism*” in liquidation i.e., order of priority in payment out of the liquidation estate.
17. As regards contention of the Respondents is concerned, it is submitted that the set off has been done pursuant to the provisions of section 245 of the I.T. Act which empowers “*the Assessing Officer or Commissioner or Principal Commissioner or Chief Commissioner or Principal Chief Commissioner*” to set off the amount to be refunded or any part thereof, against the sum, if any, remaining payable under the IT Act by the person to whom such refund is due.
18. Adjustment is merely a mechanical procedure followed by the IT Department for the purpose of adjustment of refund against dues. Hence, given the provisions of IT Act, the Respondents, being empowered, are correctly made parties and the contention of the Respondents, is completely baseless.
19. The Respondents are liable to refund the amount set off against its dues.

Reply filed by the Respondent

20. The Respondent contends that the processing of the e-filed return for the A.Y. 2019-2020 was duly processed under section 143(1) of the Income Tax Act, 1961 by the Central Processing Centre, Bengaluru (“CPC”) which is under the jurisdiction of the Commissioner of Income Tax, CPC, Bengaluru. However, it is a normal procedure that if any demand is outstanding at the end of “CPC recovery module” in departmental database, then the CPC Bengaluru adjusted the same after issuing notice under 245 of the Income Tax Act, 1961 and subsequently adjusted the said refund under consideration with the outstanding demand on 08 May 2020.

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21. It was also contended that during COVID Pandemic, the charge of erstwhile Circles being Circle 3(1), Circle 3(2), Circle 21, Circle 2(2) and Circle 1(2), Kolkata were merged into one charge being Circle 1(1), Kolkata on the date 13 August 2020.
22. It was lastly contended that upon receipt of the notice from this Hon'ble Tribunal, the matter has been forwarded to the Ld. Commissioner of Income Tax, CPC, Bengaluru alongwith all attachments for his perusal and necessary action and reply in regard to the same is still awaited.

Analysis and Findings

23. Heard the learned Counsel appearing on behalf of the Liquidator and the Respondents and perused the records.
24. The only contention raised by the Respondents is that the amount was adjusted after due process with respect to the IT Act.
25. It is pertinent to note that once the Corporate Debtor is undergoing liquidation, hence the Corporate Debtor falls under the purview of the Code, and when there is inconsistency between the IT Act and the Code, the Code overrides the IT Act.
26. We seek to place reliance on the judgment of Tata Steel Ltd. Vs. Deputy Commissioner of Income Tax², wherein the Hon'ble High Court at Delhi has held that *without any ambiguity that the provisions of the 2016 Code "shall" have effect, notwithstanding anything inconsistent contained in any other law for the time being in force, or any instrument having effect under any such law. Thus, where matters covered by the 2016 Code are concerned [including insolvency resolution of corporate persons] if provisions contained therein are inconsistent with other statutes, including the 1961 Act, it shall override such laws.*
27. Although the dues of the Corporate Debtor to the Income Tax Department may relate to the period preceding the initiation of Liquidation Process, but has been deducted after the initiation of liquidation of the Corporate Debtor.

²(2023) ibclaw.in 861 HC

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28. The Income Tax Department may have claim against the Corporate Debtor and would fall under the category of an Operational Creditor and would have to accordingly file their claim before the Resolution Professional or the Liquidator, in the present case, with the Liquidator for recover of their dues in the requisite form.
29. Further, the refund from the Income Tax falls under the asset of the Corporate Debtor and would be added to the liquidation assets. Under the scheme of the code, the Creditors; in this case the Income Tax Department, are not empowered to set off the returns of the Corporate Debtor which fell within the liquidation period against the past dues.
30. Thus, it is clear that the Code overrides the IT Act in so far as the present case is concerned and hence the adjustment of the Income Tax returns during the liquidation period which is an asset of the Corporate Debtor in pursuance to the IT Act is void.
31. Hence, we direct the Respondents to refund the sum recovered i.e. Rs. 54,40,064/- (Rupees Fifty Four Lakh Forty Thousand and Sixty Four only) to the Liquidator within two weeks from the date of this order.
32. I.A. (IB) No. 1168/KB/2020 is allowed in above terms and is disposed of accordingly.
33. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
34. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.
35. File be consigned to the records.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Order signed on the 1st day of February, 2024.