

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 2968 OF 2022

Under Section 7 of IBC, 2016

Mr. Avil Menezes

...Applicant

V/s

Principal Chief Commissioner of Income
Tax, Mumbai

... Respondents

In the matter of

C.P.(IB) No. 2295/MB/2018

American Express Bank Corp.

**...Financial
Creditor**

V/s.

Sunil Hitech Engineers Limited

**...Coporate
Debtor**

Order delivered on: 22/11/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Mr. Gaurav Jain, Advocate

For the Respondent : Mr. Manoj Shirsat, Sr.
Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This IA No. 2968/2022 is filed by Sh. Avil Menezes, the Liquidator (“M/s Applicant”) of M/s Sunil Hitech Engineers Limited (“Corporate Debtor”) in the Liquidation Proceedings of the Corporate Debtor under Insolvency & bankruptcy Code, 2016 (“Code”) to seek directions against Principal Chief Commissioner of Income Tax, Aaykar Bhaan, M.K. Road, New Marine Lines, Mumbai-400020 (“Respondent”) to grant refund of Rs. 6,45,26,280/- for the Assessment Year 2019-20 and 2020-21 along with interest; and to refund the Interest on Income Tax Refund Amount of Rs. 11,46,020/- for the Assessment year 2019-20, as such amount ought to be part of the Liquidation Estate.
2. The Corporate Insolvency Resolution Process (“CIRP”) commenced on 10.09.2018 in the case of Corporate Debtor, and thereafter, the Corporate Debtor was ordered to be liquidated on 25.7.2019 in terms of provisions of Code. A public announcement inviting claims from the Creditors in the Liquidation process was published on 1.7.2019.
3. It is stated that the Income Tax Authority in regular assessment has adjusted the Refund Amount for the Assessment year 2019-20 and 2020-21 against the pre-CIRP dues pertaining to Assessment Year 2010-11 & 2011-12. Upon knowledge of such adjustments from the Annual Information Statement of the Corporate Debtor for Assessment Year 2021-22, the Liquidator wrote to the Income Tax Authorities vide letter dated 22.7.2022, and 10.08.2022 about such illegal adjustment. As per this statement, a demand of Rs. 2,98,97,590/- has been adjusted towards Income Tax Demand for Assessment Year 2010-11, and a sum of Rs. 2,85,49,460/- towards Income Tax Demand for Assessment Year 2011-12, both on 12.11.2021.

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- 3.1. Further, the Corporate Debtor was entitled to refund of Rs. 60,79,230/0 as refund for Assessment Year 2020-21 in terms of intimation u/s 143(1) and this amount has also been adjusted towards Income tax dues pertaining to Assessment year 2020-21, which is reflected in the Annual Information Statement for the Assessment Year 2022-23.
- 3.2. The Applicant has further stated that the Respondent may file their claim in form D in accordance with Regulation 18 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, for the amounts due in the Assessment Years 2010-11 & 2011-12 as the Applicant had never received any claim from the Respondent viz., Income Tax Department for the dues pertaining to Assessment Years 2010-11 and 2011-12.
- 3.3. The Applicant has further stated that in view of provisions of section 238 of the Code, the provisions of section 245 of the Income tax Act, 1961 entitling the Income Tax Authorities to adjust the refunds arising to the assessee towards the outstanding dues, could not have been invoked. The Applicant has also relied upon decision of Hon'ble Supreme Court in the matter of **Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs, Civil Appeal No. 7667 of 2021**; and decision of Co-ordinate Chandigarh Bench of this Tribunal in IA No. 460-2020 in C.P. (IB) No. 174-Chd-2018.
4. We have heard the Counsel and perused the material available on records.
- 4.1. We find that the Income Tax Department has appropriated the refunds on 12.11.2021, and the Liquidation proceedings commenced in the case of Corporate Debtor on 25.07.2019, which implies that the refunds were appropriated towards income tax demand due from the Corporate Debtor after commencement of liquidation proceedings.
- 4.2. Regulation 37 of the IBBI (Liquidation Process) Regulations, 2016 provides that "*A secured creditor who seeks to realize its security interest under section 52 shall intimate the liquidator of the price at which he proposes to realize its secured asset*".

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4.3. The security interest is defined in Section 3(31) of the Code as *“security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.”*

4.4. Section 245 of the Income Tax Act, 1961 provides that -

“(1) Where under any of the provisions of this Act, a refund becomes due or is found to be due to any person, the Assessing Officer or Commissioner or Principal Commissioner or Chief Commissioner or Principal Chief 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 sub-section.

(2) Where a part of the refund is set off under the provisions of sub-section (1), or where no such amount is set off, and refund becomes due to a person, and the Assessing Officer, having regard to the fact that proceedings for assessment or reassessment are pending in the case of such person, is of the opinion that the grant of refund is likely to adversely affect the revenue, he may, for reasons to be recorded in writing and with the previous approval of the Principal Commissioner or the Commissioner, as the case may be, withhold the refund up to the date on which such assessment or reassessment is made.”

4.5. From the provisions of Section 245 of the Income Tax Act, 1961, we find that the Income Tax Department acquires a statutory right to set off the refunds determined in relation to any proceedings against the taxes

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in arrears under any proceedings. Accordingly, we are of considered view that the Income Tax Department acquires security interest in terms of section 245(1) of Income Tax Act, 1961, on determination of refund in liquidation proceedings, in terms of section 3(31) of the Code, as section 3(31) also includes charge as well as encumbrances.

- 4.6. We further find that the Section 245(1) of the Income Tax Act, 1961 mandates prior notice, which is issued by the Income Tax Department on the log in account of each assessee. Accordingly, we do not find any infirmity in the action of the Respondent in appropriation of refunds determined during the liquidation proceedings against the tax arrears of pre-CIRP period, as such set-off has taken place during the Liquidation proceedings, wherein the right of set-off is available to the Creditors.
- 4.7. We further find that the decision in the case of Sundaresh Bhatt (Supra) was rendered in relation to demands created during the CIRP period, whereas the demands in the present case were in existence prior to CIRP commencement. Further, the decision in case of Chandigarh Bench of this Tribunal in IA No. 460-2020 (Supra) was rendered in relation to adjustment during CIRP period, and not adjustment during the Liquidation period. Since, both the decisions are distinguishable on facts, we are of considered view that these decisions do not assist the case of the Applicant.
5. In view of above, IA 2968/2022 is dismissed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

V.G. Bisht
Member (Judicial)