



SL. No.7

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

**CORAM: SHRI. RAJEEV BHARDWAJ – HON’BLE MEMBER (J)
CORAM: SHRI. SANJAY PURI - HON’BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 31.10.2023, At 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA (IBC)/659/2023 in CP (IB) No.262/7/HDB/2018
NAME OF THE COMPANY	Transstroy Tiruthani Chennai Tollways Pvt Ltd
NAME OF THE PETITIONER(S)	Allahabad Bank
NAME OF THE RESPONDENT(S)	Transstroy Tiruthani Chennai Tollways Pvt Ltd
UNDER SECTION	7 of IBC

ORDER

IA (IBC)/659/2023

Orders pronounced, recorded vide separate sheets. In the result, prayers made in the application are declined.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)



**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-II**

IA. No.659/2023

In

CP (IB) No. 262/07/HDB/2018

*[U/s.60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of National Company
Law Tribunal Rules, 2016]*

**In the matter of ALLAHABAD BANK (NOW INDIAN BANK) v
TRANSSTROY- TIRUPATHI- TIRUTHANI- CHENNAI TOLLWAYS
PRIVATE LIMITED**

In the matter of:

Mr. Sanjay Kumar Mishra,

Liquidator of

Transstroy- Tirupati- Tiruthani

Chennai- Tollways Private Limited.

R/o: 11th Floor, Tower II,

One International Centre, S B Marg,

Elphinstone (W), Mumbai- 400 013.

..... Applicant

Vs

1. National Highways Authority of India (NHAI)

R/o: G-5 and 6, Sector 10,

Dwarka, New Delhi-110075

Also at:

National Highways Authority of India (NHAI)

Project Implementation Unit (PIU),

SRI TOWERS, 3rd Floor,



DP-34(SP) Industrial Estate,
Guindy, Chennai, Tamil Nadu-600032.

...Respondent No.1

2. Income Tax Office

Chief Commissioner of Income Tax (TDS)
Fourth Floor, 'A' Block, Income Tax Towers,
Room No.411, 4-A, 10-2-3, A C Guards,
Masab Tank, CCIT-I, Hyderabad - 500004.

... Respondent No.2

Date of Order: 31.10.2023

CORAM:

Hon'ble Rajeev Bhardwaj, Member (Judicial)

Hon'ble Sanjay Puri, Member (Technical)

Counsels present:

For the Applicant : P. Ravi Charan

For the Respondent : -

PER: SANJAY PURI

ORDER

1. The present application is filed on behalf of **Mr. Sanjay Kumar Mishra**, Liquidator for Transstroy- Tirupati- Tiruthani Chennai- Tollways Private Limited, u/s 60(5) of Insolvency and Bankruptcy Code, 2016 (**IBC**) r/w Rule 11 of NCLT Rules, 2016, praying this Hon'ble Tribunal to direct Respondent No.1 (**R-1**) to remit the amount of Rs 2,80,44,000 out of Rs 140,22,00,000 which has been deducted on account of tax deducted at



source (“**TDS**”) against the Termination Payment or alternatively direct Respondent No.2 (**R-2**) to remit the said shortfall amount of Rs 2,80,44,000 if the same has been paid by R-1 to R-2 as TDS.

Submissions of the Applicant

2. The applicant was appointed¹ as liquidator for conducting liquidation process in relation to the Corporate Debtor (**CD**). Consequent thereon Stakeholder Consultation Committee (“**SCC**”) was constituted wherein it was deliberated and resolved to pursue termination payments from R-1 under the Concession Agreement dated 12.07.2010 (“**Concession Agreement**”). CD has no assets except for concession rights granted by the R-1 under the Concession Agreement.
3. An application² was then filed by the Applicant before this Authority, inter-alia seeking to pursue the termination of Concession Agreement executed by CD with NHAI and initiate recovery vide Termination Payment under the agreement in accordance with the decisions of SCC. This application was allowed by this Hon’ble Tribunal vide order dated 19.10.2022.
4. Conciliation Committee of Independent Experts (CCIE) was formed thereafter as per the Modified Standard Operating Procedure dated 9 April 2021 and NHAI policy circular on Establishment of a Conciliation & Settlement Mechanism for Contractual Disputes. Subsequently, based on the proceedings of the CCIE meeting held on 11.10.2022 and 30.11.2022, a Settlement Agreement dated 30.11.2022 (“Settlement Agreement”) was executed between CD represented by Liquidator and R-1 to terminate the Concession Agreement dated 12.07.2010.
5. A letter was then issued by R-1 on 16.07.2022 informing the Applicant of the net due amount of Rs 140,22,00,000. R-1 however paid only Rs 137,41,56,000 into the Escrow Account being maintained by CD on

¹ vide order dated 08.04.2022 (published on 19.04.2022) in IA No. 79 of 2022 in CP (IB) No. 262/7/HDB/2018

² IA No. 893 of 2022



05.01.2023 towards proceeds of Termination Payment in relation to the Project Agreements.

6. Applicant contacted R-1 to bring to their attention about the shortfall in the amount remitted as against the amount agreed to be paid under the Settlement Agreement. R-1 informed that an amount of Rs 2,80,44,000 was deducted towards TDS @ 2 % u/s 194C of the Income Tax Act ,1961 and balance amount of Rs 137,41,56,000 was remitted to Escrow Account of CD.
7. Applicant then sent an email on 06.01.2023 and reminder emails³ on 13.01.2023, 19.01.2023, 30.01.2023, 31.01.2023, 20.02.2023, 10.03.2023 and 21.03.2023 to R-1 informing about the orders passed by Hon'ble NCLAT in the matter of "*Om Prakash Agrawal v. Chief Commissioner of Income Tax (TDS)*" dated 8th February 2021 where under para 25 it is observed 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.”

and that

“..... 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.”

However, R-1 did not reply to any of the above-mentioned emails..

8. On the question of filing of income tax returns and claiming refund of TDS by Liquidator deducted under Income Tax Act the Applicant has relied on the aforesaid decision of Hon'ble NCLAT in the matter of Om

³ Copies of emails are attached as Annexure No. 4 (colly) at pg. nos. 195 to 207 of the Application



Prakash Agrawal (*supra*) where it was categorically observed that Liquidator of the Company in liquidation under the code is not required to file income tax returns, and therefore there is no question of claiming refund of TDS. Quoting Hon'ble NCLAT, the Applicant has extracted the following from that decision:

“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.”

Further reliance has been placed by the Applicant on JCIT vs Rohan and Rajdeep Infrastructure⁴ and Oberoi Hotels Pvt LTD vs CIT⁵ without specifying what part of those judgments have been referred to.

9. It is the position of the Applicant that tax should not have been deducted from the termination payment under the Income Tax Act, as its provisions concerning TDS are inconsistent with the provision of Section 53(1) (e) of IBC 2016, and under Section 238 of that Code the latter shall have overriding effect. Considering that R-1 has deposited the amount of TDS with the R-2 hence the Applicant is pressing upon the alternative prayer i.e. to direct the R-2 to remit the shortfall amount of Rs 2,80,44,000 being TDS out of Rs 140,22,00,000.
10. It is further contended that termination payment received from R-1 is not in the nature of revenue receipts, but capital receipt, as there was cessation of source of income and there shall be no revenue receipts in

⁴ ITAT (Pune) Order dated 05.01.2021 in ITA no. 53-55

⁵ (1999) 3 SCC 127 dt. 10.03.1999



future. Being a capital receipt, it was not taxable and TDS should not have been made on the same.

11. It is also asserted that that the non- obstante clause in Section 238 of IBC provides that its provisions will override anything inconsistent contained in any other enactment including the Income Tax Act, 1961 and the Applicant acting as liquidator was not required to file Income Tax returns and therefore, the question of claiming refund of TDS deducted does not arise.
12. It is also averred that in terms of Income Tax Act 1961, there is no applicability of TDS on transfer of intangible assets and therefore, in the instant case the act of transferring the concession rights as defined in Concession Agreement (being an intangible assets of the Corporate Debtor) pursuant to execution of Settlement Agreement does not mandate deduction of TDS.

Decision:

13. The central question in this case is whether the Liquidator appointed under IBC is required to file income tax return? If this question was to be answered in the affirmative, then the Liquidator can simply file tax return of the Company in Liquidation (**the Company**), make appropriate claims and seek refund of excess taxes paid on behalf of the Company. Conversely, if the answer is in the negative, then this application deserves to succeed and TDS for the Company needs to be refunded/returned without the Liquidator having to file the tax return on behalf of the Company.
14. To address the question at hand, one must begin by examining section 139 of the Income Tax Act, 1961 (**IT Act**) which mandates that every individual must file a tax return before the specified due date. Importantly, the definition of 'person' under section 2(31)(iii) of the Act encompasses companies, making it incumbent upon them to file their income tax returns, much like any other individual. It is worth noting



that a company in the process of liquidation remains legally recognized as a company until its eventual dissolution and the removal of its name from the companies register. Consequently, a company undergoing dissolution is also obligated to file its tax return, akin to any other functioning company.

15. Section 140(c) of IT Act, specifies by whom the tax return is to be signed and verified:

Return by whom to be verified.

140. The return under section 115WD or section 139 shall be verified—

...

(c) in the case of a company, by the managing director thereof, or where for any unavoidable reason such managing director is not able to verify the return, or where there is no managing director, by any director thereof **[or any other person, as may be prescribed for this purpose]**⁶

(emphasis supplied)

Rule 12AA⁷ of the Income Tax Rules, 1962 (**IT Rules**) elaborates the ‘prescribe person’ to be:

Prescribed person for the purposes of clause (c) and clause (cd) of section 140

12AA. *For the purpose of clause (c) or clause (cd), as the case may be, of section 140, any other person shall be the person, appointed by the Adjudicating Authority for discharging the duties and functions of an interim resolution professional, a resolution professional, or a **liquidator**, as the case may be, under the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and the rules and regulations made thereunder.*

⁶ Inserted w.e.f. 01.04.2020 by the Act no. 12 of 2020

⁷ Inserted by the IT (Twenty Fourth Amdt.) Rules, 2021, w.e.f. 18-8-2021.



Explanation.—For the purposes of this rule, "Adjudicating Authority" shall have the same meaning as assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

(emphasis supplied)

It is clear from the above that the Company ordered for Liquidation by this Adjudicating Authority is also to submit its return of income like any other person. Furthermore, the Liquidator appointed under IBC is competent to verify and sign the said return of income on behalf of the Company in Liquidation.

16. Given the specific provisions of the IT Act which govern who should sign the tax return for companies undergoing liquidation under IBC, the general provisions applicable to other companies in liquidation, as indicated by the second proviso under section 140(c), is irrelevant in this context. Therefore, any reference to section 178, as mentioned in the aforementioned proviso below section 140(c), is unnecessary. Moreover, it's important to note that section 178 places certain requirements on the Liquidator that are not applicable under IBC, such as informing the Assessing Officer of their appointment, allocating specific funds for potential taxes, and obtaining approval from Income Tax Authorities before disposing of any company assets, which are also irrelevant in this particular case.
17. As the provisions of section 139(1) in conjunction with section 140(c) of the IT Act, along with the corresponding Rule 12AA of the IT Rules, which became effective on 18.08.2021, were indeed in force at the time when the liquidator was appointed on 08.04.2022, they are directly applicable in the present case.
18. Regarding the conflict between the provisions of section 53 of the IBC and the requirement to file returns under the IT Act and Rules, it is evident that section 53 of the IBC outlines the distribution of proceeds from the sale of liquidation assets, prioritizing tax dues after CIRP/Liquidation



Costs, workmen's dues, and debts owed to secured and unsecured creditors. The requirements of the IT Act and Rules do not impede the implementation of section 53 of the IBC. Importantly, there is no provision in section 53 of the IBC that exempts a company in liquidation from the obligation to file a tax return, as mandated under section 139(1) of the IT Act, which applies to every person, including a company in liquidation.

19. Similarly, the responsibility for deducting tax at source, as per section 194C of the IT Act, rests with the deductor and not with the liquidator of the Company, from whose income the tax is to be withheld. Furthermore, it's essential to recognize that TDS is not the final tax liability for any entity. The final tax liability is contingent on the filing of tax returns and their processing. While tax demands for the period before the CIRP/Liquidation process are subject to section 53 of the IBC, tax refunds and tax demands raised during the CIRP/Liquidation process are not. A company in liquidation can file a tax return through the Liquidator and claim a refund for any taxes paid in excess of the due amount. As indicated in the previous paragraph, section 53 of the IBC also does not introduce any conflicting requirements in this regard.
20. Even IBBI (Liquidation) Regulations do not have any provision, which is in conflict with return filing requirement of the IT Act/Rules as enumerated in earlier part of this order. Regulation 5 of these Regulations provide:

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.
21. There is nothing in these regulations which bars filing of tax returns. An argument has been presented that, since Regulation 5 under the IBC does not explicitly mention the reporting of income by the Liquidator, the requirement to report income through an income tax return under Income Tax laws constitutes a conflicting requirement. It was contended that, under section 238 of the IBC, Regulation 5 should take precedence, and thus, the Liquidator of the Company was not obligated to file an income tax return.
22. We strongly disagree with this proposition. The requirements outlined in Regulation 5 of the IBC and section 139(1) of the IT Act are distinct and operate in parallel as obligations under two different legal frameworks. The absence of a particular requirement in one law does not automatically place them in conflict with the other. Therefore, section 238 of the IBC is not applicable in this context, as there is no inherent conflict between the two sets of requirements.



23. We are also not persuaded by the judgment of Hon'ble NCLAT in the case of **Om Prakash Agarwal** (*Supra*), as that judgment predates the amendments brought into the IT Act/Rules. Hon'ble NCLAT judgment of 08.02.2021 had no occasion to consider the amended provisions of Section 140 of the IT Act and Rule 12AA of IT Rules which came into effect from 18.08.2021.
24. In conclusion, we are of the view that the Company ordered in Liquidation under IBC, is also required to file its return of income under section 139(1) of the IT Act, which is to be verified by the Liquidator appointed under IBC under section 140 of IT Act read with Rule 12AA of the IT Rules.
25. Accordingly, we direct the Liquidator to file the Return of Income of the Company in Liquidation and make whatever claims he believes appropriate to claim refund of the taxes deducted at source.

Prayers made in the application are declined.

SD/-

Sanjay Puri, Member
(Technical)

SD/-

Rajeev Bhardwaj, Member
(Judicial)

Rakesh Kaidala (LRA)