

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

In the matter of

IA-117/2022

Mr. Devarajan Raman

... Applicant/
Resolution Professional

V/s.

**Principal Commissioner Income Tax,
(Mumbai-1) & Ors.**

... Respondents

IN

CP (IB) No.3269/MB-IV/2019

Under Section 60(5) of the IBC, 2016

In the matter of

**Equilink Capital Management Services
Limited**

...Operational Creditor

V/s.

Kotak Urja Private Limited

...Corporate Debtor

Order Pronounced on: **16.06.2023**

Coram:

Mr. Prabhat Kumar

Mr. Kishore Vemulapalli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant:

Mr. Devarajan Raman, Liquidator,
Adv.

For the Respondents:

None present.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This Interlocutory Application [IA-117/2022] is filed on 13.01.2022 by Mr. Devarajan Raman {“*The Applicant*”}, the Resolution Professional in the matter of Kotak Urja Private Limited {“*The Corporate Debtor*”}, under section 60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of NCLT Rules. 2016 seeking refund of money seeking a refund of Rs.90,42,174/-, being the amount of refund determined by the Income tax department and appropriated against the outstanding demands due from the Corporate Debtor after commencement of liquidation of the Corporate Debtor.
2. The Corporate Debtor was admitted to Corporate Insolvency Resolution Process (CIRP) vide order dated 18.11.2019 and the applicant Mr. Devarajan Raman was appointed as IRP & later confirmed as RP. The committee of creditors in its 7th meeting held on 04.01.2021 resolved by unanimous vote to liquidate the Corporate Debtor and this meeting concluded on 17.03.2021. Pursuant to it, the applicant filed an application on 18.05.2021 seeking liquidation of the Corporate Debtor which was allowed vide order dated 03.10.2022.
3. The applicant submits that, Assistant Commissioner of Income Tx- Circle 1(2)-1, Mumbai filed a claim on 20.01.2020 for an amount of Rs. 11,59,66,742/-, and subsequently submitted the proof of claim vide letter dated 03.02.2023 where upon the claim of the Income Tax department was duly admitted by the Applicant.
 - 3.1. The applicant submits that, after scrutinizing the 26AS Forms, the applicant realized that refund order has been shown as credited to the Corporate Debtor, however, the said amount was not received by the Bank of Corporate Debtor. In enquires with Deputy Commissioner, Circle No.

(1)(2)(1), the Applicant realized that an amount of Rs. 90,42,174/- has been adjusted against the outstanding tax demand of the Corporate Debtor during the CIRP period.

- 3.2. It is also submitted that, the Applicant's representative met IT Department and vide letter dated 07.01.2022 requested the department to refund the amount adjusted against the outstanding dues to the department as the refund due to the CD from the statutory authority cannot be adjusted against the outstanding claim of the department as on ICD. The Respondent despite repeated reminders has not returned the amount adjusted, after assuring to do so on many occasions.
4. The respondent was represented by counsel on 13.01.2023 and he was directed to file reply within 2 weeks however no reply was filed thereafter this case was listed on 16.02.2023 and no submissions were made by the counsel for the respondent present on the day. Thereafter this matter was listed on 30.03.2023 and none appeared on behalf of respondents consequently a court notice was issued to Principal Chief Commissioner of Income Tax, Mumbai for necessary directions and indulgence and the matter was posted on 08.06.2023. On this day, there was no representation on behalf of respondent. Therefore, this matter was reserved for orders.
5. This bench heard the applicant and perused the material on record.
- 5.1. This bench finds that, the Corporate Debtor was admitted into CIRP on 18.11.2019 and thereafter, Liquidation process in this matter commenced on 03.10.2022, pursuant to application of Liquidation dated 18.05.2021 filed by the applicant in accordance with the resolution of the Committee of Creditors passed on 04.01.2021. The claim of the respondent vide Schedule II Form C dated 01.02.2023 filed under regulation 17 of the Insolvency and

Bankruptcy Board of India (Liquidation Process) Regulations, 2016 for a sum of Rs.10,69,24,568/-was admitted by the Liquidator on 29.03.2023. It is noticed from the application that the respondent had earlier filed claim of Rs. 11,59,66,742/- on 20.01.2020 pursuant to intimation of commencement of CIRP in the matter of Corporate Debtor by the applicant, and that the applicant wrote to the respondent on 03.12.2021 about the adjustment of refund of Rs.90,42,174/-. This bench finds that the respondent made claim for total outstanding in the CIRP process and thereafter made claim in Liquidation process for an amount after reducing amount recovered from the refund.

5.2.I The applicant has submitted that the said amount has been adjusted against the outstanding demand without intimation to the Applicant. This bench finds from the said 26AS that the refund is shown to have been paid on 10.02.2021 i.e. in the Financial year 2020-21 and the notice u/s 245 of the Income Tax Act, which provides that “ *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), Commissioner (Appeals) 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*”, is to be sent on the registered mail-ID of the Corporate Debtor with the department. It is not the case of the Applicant that the said communication is not available on the Income Tax e-filing account of the Corporate Debtor or no mail was received on such registered mail-ID.

5.3. As regards the argument of the Applicant that the respondent could not have exercised the right of setoff, as available u/s 245 of the Income Tax Act,

1961, in view of moratorium coming into place upon admission of Corporate Debtor into CIRP or thereafter during the liquidation period. This bench finds that the right of setoff was exercised by the Respondent on 10.02.2021 as per form 26AS and CoC had resolved to liquidate the Corporate Debtor on 04.01.2021, pursuant to which, the applicant filed an application on 18.05.2021. This application seeking liquidation was disposed of by this tribunal on 03.10.2022. The CIRP period in this matter came to an end on 21.12.2020 after considering the 90 days extension and COVID-19 exclusion, as found from the bench record. The resolution to liquidate was passed in meeting dated 04.01.2021 after consideration of submissions of the applicant that *liquidation appears to be the only option unless some proposal to sell the CD as a going concern in liquidation is received.*

5.4. This bench notices that section 33(1) of the Code, provides that the adjudicating authority shall pass an order requiring the Corporate Debtor to be liquidated where no resolution plan is received till the expiry of the maximum period permitted for completion of CIRP u/s 12 of the Code, in the present case it came to an end on 21.12.2020. In other words, the Corporate Debtor was to be mandatorily put to liquidation under the scheme of the Code w.e.f. 22.12.2020, notwithstanding that the formal order came to be passed on 03.10.2022. It is not in dispute that right of setoff was exercised on 10.02.2021.

5.5. The question which arises in this case is whether the right of setoff exercised by the Respondent during the period beginning from the expiry of permitted CIRP period and passing of resolution by the CoC to liquidate the Corporate Debtor and ending with the passing of order of liquidation u/s 33 of the Code, by this Tribunal.

5.6. This bench is of the view that provisions of section 33(1) of the Code, emphatically suggests that the Corporate Debtor cannot escape liquidation after expiry of permitted period of the CIRP u/s 12 of the Code, which in this case

expired on 21.12.2020. It is not in dispute that no application was filed by any of the party to seek further extension in CIRP period in terms of section 123 of the Code. This bench further finds that right of secured creditor to realise security interest get suspended during CIRP period, but section 52 of the Code, allows exercise of such right by the secured creditor in the liquidation proceedings. There is no doubt that there was a vacuum from the expiry of the permitted CIRP period i.e. 21.12.2020 till the passing of order u/s 33(1) by this Tribunal i.e. 03.10.2022, this bench feels that provisions of the code should be read in a manner that furthers its objective. The provisions of the Code does not allow exercise of security interest by individual secured creditor during CIRP process, as such process is contemplated to be a collective process wherein the creditors, irrespective of their security interest, are mandated to decide on the resolution of the Corporate Debtor for its revival. On the contrary, there is no bar on realization of such individual security interest in liquidation proceeding where the object of the Code is to distribute the proceeds amongst the claimants in the matter provided in the code. Accordingly, this bench feels that the applicant, in the capacity of liquidator of the Corporate Debtor, cannot challenged the right of the Respondent to realise security interest u/s 52 of the Code.

5.7. This bench finds that the decision of this Tribunal's Mumbai Bench No.3 in the case of Mr. Ram Ratan Kanoongo vs. Deputy Commissioner of Income Tax I.A.241/2022 IN CP.IB.2469/MB/2018 is distinguishable on the facts as on the said decision was rendered in relation to set-off during the period of CIRP.

5.8. In view thereof, this bench is of the view that the present application i.e. IA-117/2022 deserves to be **dismissed**.

Sd/-
Prabhat Kumar
Member (Technical)
16.06.2023

Sd/-
Kishore Vemulapalli
Member (Judicial)