



**THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"**

**IA No. 678/2020
in
CP (IB) No. 246/Chd/Hry/2018
(Admitted)**

**Under Section 60(5) of the Insolvency
and Bankruptcy Code, 2016**

In the matter of:

Touchlife Pharma Private Limited

...Petitioner/Operational Creditor

Vs.

Alchemist Hospitals (Gurgaon) Private Limited

....Respondent/Corporate Debtor

In the matter of IA No. 678/2020

Mr. Sudhir Kumar Jain (Liquidator)

In the matter of

Alchemist Hospitals (Gurgaon) Pvt. Ltd.

SCO 2935-36, 2nd Floor Sector 22

Chandigarh-160022

...Applicant

Vs.

Office of Commissioner of Income Tax
Aayakar Bhawan, Sector 2 Panchkula Circle,
Panchkula- 134112

....Respondent No. 1

Office of Assistant Commissioner of Income Tax
Aayakar Bhawan, Sector 2 Panchkula Circle,
Panchkula- 134112

....Respondent No. 2

Order delivered on: 17 .04.2023

**Coram: Hon'ble Mr Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr Subrata Kumar Dash, Member (Technical)**

Present :

For Applicant

: Mr. Pulkit Goyal, Advocate



For the Income Tax Department :1. Mr. Yogesh Putney, Senior Standing Counsel
2. Mr. Harveet Singh Sehgal, Advocate
3. Mr. Yatin Chadha, Advocate

Per: Harnam Singh Thakur, Member (Judicial)

ORDER

IA No. 678/2020

1. The present application is being filed by Mr Sudhir Kumar Jain (herein referred to as Applicant) against the Office of Commissioner of Income Tax & Anr. (herein referred to as Respondents) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016.
2. It is prayed by the applicant to direct the respondents to refund an amount of Rs. 13,54,752/- which is deducted as TDS and the Income Tax Department may file a separate claim as per the provisions of IBC, 2016.
3. The brief facts of the case as mentioned in the application, are that
 - i. The Corporate Insolvency Resolution Process was initiated against the Corporate Debtor on 25.01.2019. Thereafter, the liquidation has been commenced by order dated 23.08.2019, and the present applicant was appointed as liquidator.
 - ii. After the commencement of the liquidation, the liquidator informed the Income Tax Department as well as Goods and Service Tax Authorities (GST) of the liquidation and to submit their claims against the Corporate Debtor. The letter is attached as Annexure A4 of the application.
 - iii. The Income Tax Department has informed the liquidator vide letter dated 02.09.2019 that the scrutiny is pending for the Assessment Year 2017-18. By letter dated 11.09.2019, it is informed by Income Tax



Department that no demand is outstanding as on date, and the Scrutiny is pending for A.Y. 2017-18. It is further intimated by Income Tax Department that as per the provisions of Section 178(2) of the Income Tax Act, 1961, an amount of Rs. 11,70,29,862/- is payable by the Corporate Debtor for the A.Y. 2017-18.

- iv. The Income Tax Department has also issued the Assessment order under Section 143(3) dated 09.12.2019 (Annexure A5 of the application) wherein the total tax was computed as Rs. 21,97,469/- including penalty and after adjustment of the TDS amount of Rs. 13,54,752/- and further raised a demand of Rs. 8,42,717/- as an additional tax.
- v. It is submitted that no new demand of the tax can be raised after the commencement of liquidation and is contrary to the provisions of IBC, 2016, and the liquidator has apprised the respondents by letter dated 18.01.2020 and asked the department to file the claim. It is also intimated by a letter dated 23.06.2020 that any adjustment of TDS against the recovery of tax dues after liquidation proceedings is contrary to the provisions of IBC, 2016.

4. The respondent has filed his reply by Diary No. 00520/2 dated 24.02.2022 and written submissions by Diary No. 00520/5 dated 05.01.2023 wherein it is stated that this Adjudicating Authority has not conferred with any power to issue directions under the special Statute, i.e. Income Tax Act, 1961. The scrutiny assessment commenced on the issuance of notice on 14.08.2018 under Section 143(2) of the Income Tax Act, 1961, which is much prior to the declaration of a moratorium on 31.01.2019. The Income Tax Department has claimed its dues in



Form C which is not the gross amount, but it was claimed only after setting off against their respective claims. The respondent has relied upon the judgement of **Swiss Ribbons Private Limited Vs. Union of India & Others, reported as (2019) 4 SCC 17** wherein the legitimacy of the doctrine of set-off has been well established. Another judgement passed by the Supreme Court in the case of **Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs, bearing Civil Appeal No. 7667 of 2021 decided on 26.08.2022**, is also referred by the respondent to support his contentions holding that the Authorities can take steps to determine the tax, interest, fines or any penalty which is due.

5. The applicant has filed the rejoinder by Diary No. 00520/3 dated 30.03.2022 wherein It is stated that TDS under Section 194-1A is an advanced capital gain tax, recovered through transferee on priority with other creditors of the company, and therefore the same is inconsistent with the provisions of Section 53 of the Insolvency and Bankruptcy code, 2016 and by virtue of Section 238 of the IBC, 2016, the provisions of Section 53 shall have overriding effect. The applicant has placed reliance on the judgement of **Om Prakash Aggarwal Vs. Chief Commissioner of Income Tax & Anr.** dated 08.02.2021 passed by Hon'ble NCLAT in which respondent no. 1 is directed to refund the amount of TDS so deposited with the department by the successful bidder. It is stated that there is no fiscal statute or the IBC, 2016 for the refund of TDS except through the return of income to be filed under Section 139 of the Income Tax Act is not enabled in the eyes of the law, and the respondent could not have made fresh assessment when the liquidation was ordered by the Tribunal.



6. We have heard the learned counsel for the applicant and respondent and have pursued the records carefully.

7. In the present case, the liquidation of the Corporate Debtor commenced on 23.08.2019, and the Income Tax Department issued the Assessment Order on 09.12.2019. From the perusal of the assessment order dated 09.12.2019, it is seen that the Income Tax Department has assessed the net tax liability of the Corporate Debtor as Rs. 19,88,381/- and after setting of TDS of Rs. 13,54,752/-, total amount payable comes out to be 8,42,717/-. We are conscious of the decision of Hon'ble Apex Court in the case of **Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs (Supra)** wherein it has been held that:-

“44. Therefore, this Court held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above ratio squarely applies to the interplay between the IBC and the Customs Act in this context.

45. From the above discussion, we hold that the respondent could only initiate assessment or reassessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC. The interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive.”

8. In this regard, we make a reference to the Sub-section (3) & (6) of Section 178 of the Income Tax Act, 1961 which is reproduced below :-

“178 (3) The liquidator-

(a) shall not, without the leave of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner,



party with any of the assets of the company or the properties in his hands until he has been notified by the Assessing officer under sub-Section (2) ; and

(b) on being so notified, shall set aside an amount, equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands:

xxx

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xxx

(6) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force except the provisions of the Insolvency and Bankruptcy Code, 2016”

9. The records indicate that in the assessment order dated 09.12.2019 under Section 143(3) for the Assessment Year 2017-18, the amount payable works out to Rs. 8,42,717 after giving credit to TDS paid of Rs. 13,54,752/- against net tax liability of Rs. 19,88,381/-.

10. From the joint reading of aforesaid provisions and the judgement in the case of **Sundaresh Bhatt, Liquidator of ABG Shipyard (supra)**, it is crystal clear that the Income Tax Department are free to complete the assessment of the Corporate Debtor as per the provisions of the Income Tax Act, 1961 and to raise the demands; however, the authorities cannot enforce the recovery of such demand. The respondent(s) are directed to file their revised claim with the liquidator including the amount of the total tax liability (without giving credit to TDS) arising out of their assessment order under Section 143(3) for the Assessment Year 2017-18. The amount of TDS, adjusted during the moratorium period, however, is directed to be refunded to the applicant within 30 days of this order.



11. In view of the aforesaid directions, IA No. 678/2020 is allowed and disposed of accordingly.

-sd-
(Subrata Kumar Dash)
Member (Technical)

-sd-
(Harnam Singh Thakur)
Member (Judicial)

April 17, 2023
SM/SA