

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

**I.A. 1634 OF 2022**

Under Section 36, 53, 60(5) & 238 of  
Insolvency & Bankruptcy Code, 2016

Mr. Divyesh Desai

...Applicant/Liquidator

Vs.

The Deputy Commissioner of Income  
Tax & Another

...Respondent

In the matter of

C.P.(IB) No. 619/MB/2018

Nico Extrusions Limited

**Financial Creditor**

Vs.

Nicomat Industries Limited

**Corporate Debtor**

*Order delivered on: 17.10.2023*

*Coram:*

**Shri Prabhat Kumar**  
Hon'ble Member (Technical)

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

*Appearances*

For the Applicant : Mr. Ankit Lohia a/w Mr. Rishabh Chandra  
and Mr. Pankaj Soni, Advocates

For the Respondent :

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This Application I.A. 1634/2022 is filed by the Liquidator, Mr. Divesh Desai, of M/s Nicomet Industries Limited (Corporate Debtor) on 08.06.2022 seeking refund of entire amount of Tax Deducted Source ('TDS') on auction sale in course of liquidation of the Corporate Debtor.
2. The Corporate Debtor was incorporated on 02.04.1993 under the provisions of the Companies Act, 1956, and was admitted into CIRP and Mr. Devang Sampat was appointed as the Resolution Professional vide Order 14.12.2018 passed by this Tribunal. Thereafter, vide Order dated 16.12.2020, this Tribunal ordered for the liquidation of the Corporate Debtor and the Applicant was appointed as the Liquidator of the Corporate Debtor.
3. It is the case of the Applicant that, during the Liquidation period, the Income Tax amount to 1,93,64,421/- was deducted at source by the payers of sums to the liquidator in the following manner –
  - a. On 07.07.2021, the Applicant conducted E-Auction of certain assets of the Corporate Debtor. Vedanta Limited emerged as

the successful bidder in the E- Auction held. Vedanta Limited intimated the Applicant that he shall be acquiring the assets of the Corporate Debtor through its 100% subsidiary entity namely Malco Energy Limited ("Malco"). The Applicant issued a Letter of Acceptance dated 15.07.2021 to Malco thereby confirming Malco as the successful auction purchaser. Subsequently, on 11.11.2021, Malco made payment of the sale consideration amounting to INR 37,50,00,000/- plus applicable Goods and Services Tax ("CGST") being the full sale price of the assets after deduction of TDS amount of INR 1,87,50,000/-.

- b. In another E-Auction held on 07.07.2021, a bungalow belonging to the Corporate Debtor was sold for consideration of INR 70,50,000/- after deducting TDS amounting to INR 70,500/-.
- c. The Corporate Debtor has also received other incomes viz. interest income from banks on the fixed deposits in the name of the Corporate Debtor, on which, the TDS amounting to INR 5,43,921/- was deducted.

3.1. The Applicant filed an application dated 30.03.2022 to the Deputy Commissioner of Income Tax Circle 3 (2)(1), Mumbai (Respondent No. 1) for grant of refund of TDS amounting to INR 1,89,46,711/-. However, as per the updated Form 26AS, the revised amount is INR 1,93,64,421/- for which the refund of TDS is now been claimed by filing the instant application. Additionally, the Applicant addressed an email dated 01.04.2022 thereby briefly explaining the relevant provisions of the Code and the correct position of law, which necessitates

that the TDS by the payers as deposited with the Income Tax Department be refunded back to the Applicant for its lawful and compulsory inclusion in the liquidation estate of the Corporate Debtor as well as attached the application dated 30.03.2022 therein.

3.2. However, the TDS amount was not refunded by the Respondents to the Corporate Debtor nor any response was received by the Applicant from the Respondent No.1 pursuant to submission of the application dated 30.03.2022. Therefore, the Applicant addressed a reminder email dated to the Respondent No.1 on April 29, 2022. The Applicant has not received any response to email dated April 29, 2022 from the Respondent No.1 till the date of filing the present Application. Hence, the Applicant is constrained to file the present Application before this Hon'ble Tribunal and seek appropriate reliefs as sought herein.

4. We have heard the Learned Counsel and perused the materials available on record.

4.1. We find that the Liquidator has auctioned two properties and received income in the form of interest on deposits, the proceeds of which were subject to Tax Deduction at Source by the payers. The Applicant has sought refund of this TDS amount contending that Tax Deduction at Source is in the nature of advance tax collection and cannot be subjected to appropriation against the actual Income Tax payable on the corresponding monies by the Income Tax Department because

the Tax if any, payable on these sums is to be dealt with in accordance with provisions with Section 53 of the Code.

4.2. The Applicant has relied upon Section 178(6) of the Income Tax Act, which provides that “*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*”. Section 230 of the Code also makes provisions of Section 53 an overriding effect over other laws. Accordingly, the provisions mandating deduction of tax at source in terms of Chapter XVII part B should not have been applied to the sums paid to the liquidator by the payers. Since, the Tax Deducted at Source by the payers has been remitted to the credit of Central Government in terms of provisions of Income Tax Act and this fact is evidenced by 26AS wherein such tax is reflecting to the credit of the Corporate Debtor.

4.3. We find that the Hon'ble National Company Law Appellate Tribunal ("NCLAT"), in the recent case of *Om Prakash Agrawal v. Chief Commissioner of Income Tax (TDS) & Ors.: Company Appeal (AT) (Insolvency) No. 624 of 2020*, has clearly held that recovery of tax at source from a company under liquidation by way of tax deduction at source is contrary to the provisions of Section 53 of the Code and by virtue of Section 238 of the Code, the provisions of Section 53 shall have an overriding effect on the provisions of the IT Act. Accordingly, the Hon'ble NCLAT has directed the Income-tax Department to refund the amount of TDS to the assessee. Relevant portion of the said decision is reproduced hereunder:

*"30. 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."*

4.4. In view of the above, we hold that no tax was deductible at source on the sums paid to the liquidator and the payers have erroneously deducted tax at source and remitted to the credit of Central Government. Accordingly, this amount becomes refundable from the Government.

4.5. It is trite law that the claim of all creditors, including statutory dues owed to the Government, are to be settled in accordance with the mandate of Section 53 of the Code and liquidator is duty bound to ensure that such claims are settled accordingly. The Liquidator is directed to determine the tax payable on such sums and include such amount of tax so determined as claim of the Income Tax Department for the purpose of distribution of the liquidation estate in accordance with Section 53 of the Code. A copy of said determination may be made available to the respondent for their objection, if any, which shall be presented to the liquidator within 30 days from the date of receipt of such determination by the liquidator.

4.6. In view of the forgoing, we direct the Income Tax Department including the Respondent to refund the sum of Rs.1,93,64,421/- to the Liquidator within 30 days from the date

of communication of this order in accordance with Circular No. 285, dated 21-10-1980 issued by Central Board of Direct Taxes. It is made clear that the delay, if any, occurred in seeking refund in terms of said circular, shall stand condoned. The Liquidator shall also move appropriate application in accordance with the said circular with the TDS officer with a copy to the Respondents alongwith copy of this order within two weeks from the communication of this order.

4.7. It is also clarified that no appropriation shall be made from these sums by the Respondents as these sums are in a nature of amounts erroneously deducted at source and remitted to the Central Government.

4.8. Accordingly, I.A. 1634/2022 is allowed and disposed of.

Sd/-

**Prabhat Kumar**  
Member (Technical)

Sd/-

**Justice V.G. Bisht**  
Member (Judicial)