

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "G" BENCH: NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITA No.5293/Del/2018

[Assessment Year : 2011-12]

SMS Paryavaran Ltd., SMS House, E 1/4, Sector-7, Rohini, New Delhi-110085. PAN-AAACS2177F	vs	DCIT, Circle-9(1), New Delhi.
APPELLANT		RESPONDENT
Appellant by	Shri Abhishek Bose, Adv.	
Respondent by	Shri Abhishek Kumar, Sr.DR	
Date of Hearing	21.12.2022	
Date of Pronouncement	21.12.2022	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee for the assessment year 2011-12 is directed against the order of Ld. CIT(A)-22, New Delhi dated 28.05.2018.

2. The assessee has raised following grounds of appeal:-

1. *“Return declaring Nil income was filed on 30.09.2011 and revised return was filed on 10.02.2012 declaring Nil income (after claiming deduction U/S-80IA of Rs.4,73,33,948/-). Necessary Assessment Order was passed by Ld. A.O on 28.03.2014 making taxable income of Rs. 2,38,39,978/-. There were certain income which was considered as part of business income by the assessee not allowed as business income by the Ld. A.O.*

The Assessee preferred an appeal before CIT (A) against the Order of Ld. AO and the said appeal is partially allowed with following disallowances.

1. *Interest Other Rs. 1,52,46,690/-*
2. *Misc. Income Rs. 42,61,194/-*

1. Interest Other Rs. 1.52.46.690/-

a) *Interest on Arbitration Award :- Rs. 1,43,75,609/-*

The details related to interest on Arbitration amount was submitted to AO and CIT(A) during the course of assessment proceedings and hearings.

The Ld. CIT(A) has passed Order without considering the documents provided by the Assessee.

b) *Interest on Security Deposit on Plant & Machinery:- Rs. 3,86,197/-*

The said interest was received which is on account of Security Deposit kept with Supplier for procuring Plant & Machinery which is solely used for business purpose and the CIT(A) passed Order without considering the same. The said interest amount is identical to ground no 1 (Interest earned on FDR) of the appeal and the Ld CIT(A) has allowed interest on FDR as business income .

c) *Interest on Income Tax refund :- Rs. 4,84,884/-*

The Ld CIT(A) has erred the facts without going into detail.

2. Misc. Income Rs. 42.61.194/-

The Ld. CIT(A) has passed order without considering the details submitted. The said details were already provided to Ld. AO & CIT(A) during assessment proceedings and course of hearings.

The appellant craves leave to add, amend and/or alter the above grounds of appeal.”

BRIEF FACTS OF THE CASE

3. Facts giving rise to the present appeal are that the assessee filed return of income on 30.09.2011, declaring NIL income. Subsequently, the assessee has filed a revised return on 10.02.2012 declaring NIL income. The same was processed u/s 143(1) of the Income Tax Act, 1961 (“the Act”). The case was selected for scrutiny under CASS and notice u/s 143(2) was sent on

09.08.2012. Again, notice u/s 143(2) alongwith questionnaire u/s 142(1) of the Act was sent on 17.10.2013. In response thereto, Ld. Authorized Representative on behalf of the assessee company, appeared from time to time and submitted the requisite details which were verified and placed on record. Thereafter, the assessment was framed vide order dated 28.03.2014 u/s 143(3) of the Act. While framing the assessment, the Assessing Officer assessed the income u/s 143(3) of the Act, at Rs.2,38,39,980/-.

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), who after considering the submissions, partly allowed the appeal of the assessee.

5. Aggrieved against the order of Ld.CIT(A), the assessee preferred appeal before this Tribunal.

6. It is seen that a letter dated 11.12.2022 by the Resolution Professional of the assessee company, Shri Sajeve Bhushan Deora has been filed. The relevant contents of the letter are reproduced as under:-

Respected Sir/Madam,

This is with reference to above referred appeal filed by SMS Paryavaran Limited (Appellant), which is fixed for hearing before your Honour on 12.12.2022.

In this regard, it is humbly submitted that-

- a) The Appellant had been admitted for initiation of Corporate Insolvency Resolution Process (CIRP) under the provisions of Insolvency and Bankruptcy Code, 2016, vide order dated 03.01.2020 passed by the Hon'ble National Company Law Tribunal, Principal Bench. New Delhi (NCLT) in C.P. IB-*

1935(PB)/2019. By the same order of the Hon'ble NCLT, the Applicant had been appointed as an Interim Resolution Professional of the Appellant, and was later appointed as Resolution Professional (RP). The CIRP of the Appellant is currently ongoing.

- b) The RP has been served with Notice of hearing fixed for 12.12.2022 by the Assistant Commissioner of Income Tax, Circle 22(2), New Delhi, vide his email dated 09.12.2022 at 3:16 PM. It has been noted from the aforementioned email that the address of the Appellant as stated in the communication is no more the communication address of the Appellant for the reason that the property had been taken over by the lender Banks under the provisions of SARFAESI Act, and communications issued by this Hon'ble Tribunal in the matter of fixing the Appeal for hearing, therefore, remained unserved on the Appellant. It is submitted that the registered address of the Appellant be taken on record as Sh-2, Vardhman Grand Plaza, Plot 7, Mangalam Place, Sector-3, Rohini, Delhi - 110085.
- c) As submitted hereinabove, the RP received the subject Notice of hearing 2 days before the scheduled date of hearing. The relevant documents pertaining to the Appeal are being compiled by the RP.

It is therefore, prayed that your Honour may kindly adjourn the hearing by about 6 weeks at a date convenient for the Hon'ble Bench.

The RP shall be grateful in case the prayer is allowed.”

7. Ld. Counsel for the assessee company further submitted that Hon'ble National Company Law Tribunal (“NCLT”) has decided the issue in *Company Petition No.IB-1935(PB)/2019* in the case of *ICICI Bank Ltd. vs SMS Paryavaran*

Limited. vide order dated 03.01.2020. The relevant contents of the order passed by Hon'ble NCLT are reproduced as under:-

13. *“Having heard learned counsel for the parties we are of the considered view that the Financial Creditor-Bank has succeeded in establishing a case for triggering the Corporate Insolvency Resolution Process.*
14. *The argument of the Respondent has failed to impress us that the Strategic Debts Restructuring (SDR) package of the Respondent is pending consideration and same was resolved by a super majority in the consortium in the meeting of JLF held on 28.07.2017 wherein it was agreed that the revival of the respondent should be enforced. All such efforts are the part of external processes which are beyond the scope of the Insolvency and Bankruptcy Code. It is imperative to observe that Insolvency is not equivalent to winding up. This involves restructuring, re-planning and facilitation of evolving a resolution for the industry to survive. If the solution is well in sight then there would not be any difficulty for the Committee of Creditors with the assistance of the Insolvency Resolution Professional to adopt a resolution plan in a time bound disciplined manner under the IBC-a Parliamentary Act. It would be acceptable to all the stake holders. It is only on the failure of a resolution that the liquidation process may have to be initiated in accordance with the provisions of Section 33 of IBC.*
15. *Another objection of the Corporate Debtor is that the petitioner is resorting to forum shopping firstly before Debts Recovery Tribunal and secondly before this Tribunal. Such an argument looks attractive at the first blush but lacks substance because the pendency of any proceeding much less before the DRT would not create a bar for initiation of Corporate Insolvency Resolution Process against a Corporate Debtor. In that regard reliance may be placed on the observations made by Hon'ble the Supreme Court in the case*

of Innoventive Industries Ltd. v. ICICI Bank and Ors. (2018) 1 SCO 407. Referring to Section 238 of the Code it has been held that the non-obstante clause of the Parliamentary enactment would prevail over the limited non-obstante clause of any earlier enactment. Therefore, the pendency of proceeding under the provisions of the SARFAESI Act or DRT would not exclude the jurisdiction of the Tribunal under the Insolvency and Bankruptcy Code, 2016.

16. *As regards the allegation of charging excessive rate of interest, the Financial Creditor has stated that the interest has been charged in accordance with the terms of sanction letter from time to time. It is submitted that the amount claimed in Part-IV of the application is based on the statement of Accounts maintained by the Bank in its ordinary course of business and in accordance with the banking systems. In any case no serious dispute with regard to the amount payable could legally be raised before us.*
17. *The Financial Creditor has placed on record various documents in relation to the disbursement of loan to the Respondent Company. The materials on record and the loan documents clearly depicts that the loan was sanctioned, disbursed and the loan/hypothecation agreement were properly executed. Respondent company utilized and enjoyed the loan facilities.*
18. *In addition, the Financial Creditor has filed the relevant statement of accounts duly certified in accordance with Banker's Book Evidence Act, 1891 as per the requirement of Form 1 Part V Column 7 of the application. True copy of statement of accounts submitted by the Financial Creditor pertaining to loan facility, kept during the course of banking business, based on which the claim has been raised, can be termed as sufficient evidence of the financial debt.*
19. *Section 4 of the Bankers' Books Evidence Act, 1891 provide for mode of proof of entries in bankers' books and the same read as under:-*

“Section 4. Mode of proof of entries in bankers books:-

Subject to the provisions of this Act, a certified copy of any entry in a banker’s books shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.”

20. *A perusal of the aforesaid provision would show that a certified copy of entry in a banker’s books is to be regarded as prima facie evidence in all legal proceedings with regard to the existence of such entry. It must be admitted as sufficient evidence of the matters, transactions and accounts therein recorded in every case.*
21. *The Corporate Debtor in its audited balance sheet for the financial year 2016-17 has admitted the factum of delays- and defaults in repayment of loan instalments along with interest to different Banks including the petitioner’s Bank. A reference has already been made to the aforesaid fact in preceding para 10 of this order. Moreover, the amount claimed in Part-IV of the application is based on the statements of Accounts maintained by the Bank in its ordinary course of business and in accordance with the banking systems. In any case no serious dispute with regard to the amount payable could legally be raised before us.*
22. *The Tribunal is not an adjudicating authority to ascertain the quantum of amount of default or to pass decree as to how much amount is actually due to the Petitioner-Financial Creditor. Adjudicating Authority is not to decide a money claim or suit. The Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default if it amounts to rupees one lac or above (Section 4) before admitting the petition.*

23. *We further find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied with as discussed in detail in our order dated 27.11.2018 rendered in the case of ECL Finance Limited vs. Digamber Buildcon Pvt. Ltd. {IB- 1039(PB)/2018}.*
24. *After a reading of Section 7 of the Code along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the application under sub section 2 of Section 7 is complete. The IRP proposed does not have any disciplinary proceedings pending against him.*
25. *As a sequel to the above discussion, this petition is admitted and Mr. Sajeve Bhushan Deora is appointed as an Interim Resolution Professional.*
26. *In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code.*
27. *We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*
28. *We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to her in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The*

needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors. The amount must be accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditors.

29. *Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.*
30. *Before parting we must notice the complaint generally made against Financial Creditor in the form of discrepancies in the statement of account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the Corporate Debtor for any such correction if need be and act accordingly by placing it before the Financial Creditor as it is only fair to do so.*
31. *The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its Master data & its website by updating the status of 'Corporate Debtor' and by making a specific mention regarding admission of this petition.*
32. *A copy of this order shall also be sent to the Secretary, Ministry of Corporate Affairs, New Delhi for compliance of directions issued in para 31 above."*

7. Ld. Sr. DR has no objection if the present appeal is dismissed with a liberty to the assessee for making application for restoration of appeal before the Tribunal after final order has been passed in *Company Petition No.IB-*

1935(PB)/2019 in the case of *M/s. ICICI Bank Limited vs SMS Paryavaran Limited* (supra) vide order dated 03.01.2020 by the Hon'ble NCLT.

8. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. Looking to the facts of the case and the decision by the Hon'ble NCLT in the above-mentioned case, we dismiss the appeal of the assessee with a liberty to approach this Tribunal for restoration of appeal after final order is passed by Hon'ble NCLT and if so advised. Thus, Grounds raised by the assessee are dismissed.

9. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on 21st December, 2022.

Sd/-

(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI