

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

**BEFORE SHRI N.K.BILLAIYA, ACCOUNTANT MEMBER &
SHRI KUL BHARAT, JUDICIAL MEMBER**

ITA No.540/Del/2019

[Assessment Year : 2011-12]

JCIT, Circle-22(2), New Delhi.	vs	S R Foils & Tissue P.Ltd., 2 nd Floor, Vardhman Plaza-II, J-Block, Community Centre, Rajouri Garden, New Delhi-110027. PAN-AAACR7410E
APPELLANT		RESPONDENT
Appellant by		Shri Upvan Gupta, Adv.
Respondent by		Ms. Maninder Kaur, Sr.DR
Date of Hearing		05.01.2023
Date of Pronouncement		11.01.2023

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the Revenue for the assessment year 2011-12 is directed against the order of Ld. CIT(A)-22, New Delhi dated 29.10.2018.

The Revenue has raised following grounds of appeal:-

1. *“Whether on the facts and circumstances of the case and in law, the LD. CIT(A) erred in deleting the addition of Rs.2,75,15,116/- on account of disallowance out of section 68 of the Income tax Act, 1961.*
2. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.2,75,15,116/- by ignoring the CBDT Circular in F. 279/Misc. 142/2007-ITJ(Pt.) dated 20.08.2018.*
3. *The appellant craves leave to add, alter or amend any of the ground(s) of appeal before or during the course of hearing of the appeal.”*

2. The only effective ground in this appeal is against the deletion of addition of Rs. 2,75,15,116/- made u/s 68 of the Income Tax Act, 1961 ("the Act") in respect of disallowance of sundry creditors.

3. Facts giving rise to the present appeal are that in this case, the assessee had filed its return of income declaring an income of Rs.32,19,20,154/- on 31.08.2012 through e-mode. The case was selected for scrutiny assessment and the assessment u/s 143(3) of the Act, was framed vide order dated 27.03.2014. The Assessing Officer ("AO") during the course of assessment in order to verify the correctness of the claim of sundry creditors, issued notice u/s 133(6) of the Act. The AO received response from the sundry creditors partly therefore, treating 50% of the creditors as bogus, he made additions of Rs.2,75,15,116/- hence, assessed income at Rs.34,94,35,270/- against the returned income of Rs.32,19,20,154/-.

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A). Before Ld.CIT(A), the assessee also filed certain evidence alongwith application under Rule 46A of the Income Tax Rules, 1962 ("the Rules"). Ld.CIT(A) sought Remand Report from the AO and after considering the Remand Report and material placed before him, he deleted the addition.

5. Aggrieved against such deletion, the Revenue is in appeal before this Tribunal.

6. Ld. Sr. DR vehemently argued that Ld.CIT(A) was not justified in deleting the addition. She contended that before the AO, the assessee failed to furnish

the confirmation from such sundry creditors and the notice sent u/s 133(6) of the Act, was not responded by the creditors.

7. On the other hand, Ld. Counsel for the assessee brought to our notice that Ld. National Company Law Tribunal (“NCLT”) vide its order dated 04.03.2020 under the provision of section 33(2) of Insolvency & Bankruptcy Code, 2016 (“CIRP”) had passed directions for liquidation of the assessee company and appointed Shri Anil Kohli as Resolution Professional as Liquidator for the said purpose. He contended that in view of the order of Ld. NCLT, this appeal filed by the Revenue deserves to be dismissed. He further reiterated the submissions as made in the application dated 05.01.2023. For the sake of clarity, the relevant contents of the same are reproduced as under:-

“The assessee is a company incorporated under the provisions of the Companies Act, 1956, and was engaged in the business of manufacturing foils, tissue and cling film products.

Re: Assessee company is under liquidation

*The assessee humbly wishes to bring to your Honours attention that, the Hon'ble National Company Law Tribunal (‘NCLT’) vide order dated 04.03.2020 under the provisions of section 33(2) of the Insolvency and Bankruptcy Code, 2016 (‘the Code’) had passed directions for liquidation of the assessee company and appointed Mr. Anil Kohli, Resolution Professional as Liquidator for the said purpose. Copy of the said NCLT order in this regard is attached herewith as **Annexure 1**.*

Re: Our legal submissions

In the above background, it is most respectfully submitted as under:

Section 53(1) of the Code reads as under:

“Section 53. (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being

in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:-

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:-

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:-

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be."

It is important to note down here that, in terms of the provisions of section 53(1) of the Code, having an overriding effect over all Central! State Statutes, the proceeds of liquidation assets can be distributed in the order of priority specified in the said section only. Any action contrary to the same, it is respectfully submitted, shall be illegal, unsustainable and untenable in law.

The assessee/ liquidator is bound to follow the waterfall mechanism provided in section 53(1) of the Code for distribution of liquidation proceeds, as per which, CIRP/liquidation costs, wages, secured creditors and liabilities towards financial creditors has a precedence of payment over dues towards the Income-tax Department. The assessee/liquidator strongly apprehends that, available funds with the assessee company are not even sufficient for meeting out such liabilities/costs, leave apart making any payment towards income-tax dues from the leftover funds.

Therefore, in accordance with the provisions of section 53(1) of the Code read with the decision of Hon'ble Supreme Court of India in the case of CIT vs Moser Baer India Limited: Civil Appeal No. 4704 of 2014 (copy attached herewith as Annexure 2), no tax liability, if any, can be collected by the Income-tax Department from the assessee neither the assessee is in a financial position to make payment of income-tax.

The relevant extract of the aforesaid Supreme Court's decision (mentioned supra) is reproduced hereunder:

'The Official Liquidator has filed a report that the Respondent-Company (Moser Bear India Ltd.) is not financially viable and is under liquidation in proceedings pending before the National Company Law Tribunal. Even if the Appellant- Revenue were to succeed, the Official Liquidator is not in a position to pay the tax amount involved in these appeals.

Indisputedly, the respondent-Company has gone in liquidation. The Company in liquidation is not in a position to pay its outstanding dues including taxes. Moreover, the tax effect in the concerned appeals is just over Rs.2,000,00,000/- (Rupees Two Crore Only).

Taking overall view of the matter, we deem it appropriate to dispose of these appeals, leaving the question of law open, to be decided in appropriate case.

It is imperative to point out here that, as per section 238 of the Code, the provisions of the Code have an overriding effect over all other Central and State Statutes. This position has been upheld by the Supreme Court in the case of PCIT vs Monnet Ispat and Energy Ltd: SLP (C) No 6483 of 2018 (order dated 10.08.2018). The relevant extract of the said decision in this regard is reproduced below:

"Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income- Tax Act:"

It was similarly held by the High Court of Andhra Pradesh and Telangana in the case of Leo Edibles & Fats Limited vs The Tax Recovery Officer (Central), Income Tax Department, Hyderabad: Writ Petition No.8560 of 2018, that, by virtue of section 238 of the Code, the provisions of the Income-tax Act, 1961 ('the Act') are overridden by the Code in entirety. Infact, the High Court went a step ahead and held that, the Income- tax Department cannot exercise any right of recovery even in respect of assets attached prior to initiation of liquidation process. The relevant extract of the said decision in this regard is reproduced below:

'As rightly pointed out by Mr. Vadeendra Joshi, learned counsel, Section 178(6) of the Act of 1961 starts with a non-obstante clause but by virtue of the amendment made thereto, vide Section 247 of the Code, exclusion of the said provision in so far as liquidation proceedings under the Code are concerned forms an exception to Section 178(6) of the Act of 1961. Learned counsel would also point out that the provisions of Sections 220 and 222 of the Act of 1961 do not start with any non-obstante clause and therefore, they would necessarily be subject to the overriding effect of the Code, by virtue of Section 238 thereof. We find merit in this submission.

On the above analysis, this Court holds that the first respondent cannot claim any priority merely because of the fact that the order of attachment dated 27.10.2016 issued by him was long prior to the initiation of liquidation proceedings under the Code against VNR Infrastructures Limited, Hyderabad. It may be noted that Section 36(3)(b) of the Code indicates in no uncertain terms that the liquidation estate assets may or may not be in possession of the corporate debtor, including but not limited to encumbered assets. Therefore, even if the order of attachment constitutes an encumbrance on the property, it still does not have the effect of taking it out of the purview of Section 36(3)(b) of the Code. The said order of attachment therefore cannot be taken to be a bar for completion of the sale effected by the fifth respondent under the provisions of the Code. The first respondent necessarily has to submit the claim of the Income-tax Department to the fifth respondent for consideration as and when the distribution of the assets, in terms of Section 53(1) of the Code, is taken up."

Re: Our submissions qua the captioned matter

In an overall view of the above, it is respectfully submitted before your Honour that, continuing with the captioned assessment proceedings would be purely infructuous and academic in nature, which shall practically not serve any purpose for the Income-tax Department to collect taxes/ revenue from the assessee.

Re: Our prayer

In view of the aforesaid submissions, the assessee, most humbly requests your Honour that, in view of the Supreme Court decision in the case of Moser Baer India Limited (mentioned supra), the captioned proceedings may kindly be closed and thus justice may be rendered in accordance with the principle of judicial discipline.

We trust that our aforesaid request shall be acceded to."

8. Reliance is placed upon the decision of the Co-ordinate Bench of the Tribunal in the case of *M/s. Moserbaer India Ltd. vs DCIT in ITA No.4195/Del/2016 [Assessment Year 2011-12]*.

9. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. We find that there is no dispute with regard to the fact that the assessee company has gone into liquidation, order passed by Ld. NCLT in *(IB)-144(PB)/2017* in the case of *ICICI Bank Ltd. vs S.R.Foils & Tissue Ltd.* order dated *04.03.2020* has directed as under:-

6. *“Though this company petition has been admitted on 07.08.2017, till date neither resolution plan has come for approval before this Bench, nor has this bench decided the liquidation application pending before this Bench despite soon after two and half years passed by now. This objector has come before this Bench asking for another round of invitation of EOI is not acceptable because the CIRP period has already been over on 03.06.2019, therefore, we are of the view that this company petition is fit for passing the liquidation order because it is the CoC that has taken a decision that the liquidation is the only course left to it to proceed, whereby, we hereby ordered for liquidation of the company with the directions as follows:-*

a) This Bench hereby orders the Corporate Debtor to be liquidated in the manner as laid down in the chapter by issuing a public notice stating that the Corporate Debtor is in liquidation with a direction to the liquidator to send this order to ROC with which this company has been registered.

b) The Resolution Professional VIZ. Mr. Anil Kohli is hereby appointed to act as Liquidator for the purpose of liquidation of the

corporate debtor, therefore, all powers of the board of directors, Key managerial personnel and partners of the Corporate Debtor, as the case may be, shall cease to have effect and shall be hereby vested in the liquidator. The Personnel of the Corporate Debtor are directed to. extend all co-operations to the liquidation as may be required in managing the affairs of the Corporate Debtor. The Insolvency Professional appointed as liquidator will charge fees for conduct of the liquidation proceedings in proportion to' the value of the liquidation estate assets as specified under regulation 4 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and the same shall be paid to the Liquidator from the proceeds of the liquidation estate under Section 53 of the Code.

c) Since this liquidation order has been passed, no suit or other legal proceedings shall be instituted by OT against the Corporate Debtor without prior approval of this Adjudicating Authority save and except as mentioned in sub-section 6 of Section 33 of the Code.

d) This liquidation order shall be deemed to be notice of discharge to the officers, employees and workmen of the Corporate Debtor except to extent of the business of the Corporate Debtor is continued during the liquidation process by the Liquidator.

e) The liquidator is directed to carry the functions of the Liquidator as envisaged under the Insolvency and Bankruptcy Code, 2016 and also Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

The Registry is hereby directed to immediately communicate this order to the Liquidator, the Corporate Debtor and the IBBI & concern ROC by way of E-Mail.

Accordingly, this application stands disposed of.”

10. We find that Ld.CIT(A) has given a finding on fact by observing as under:-

- 5.3 *“The remand report submitted by the AO is given to the appellant for filing reply. The appellant replied vide-letter dated 18.10.2016 and submitted that an application u/r 46A filed was not strictly related to additional evidence as the concerned confirmation were already on the record before AO. The Ld. AR further stated that it is appropriate to state that rule. 46A was referred only statistical purpose to cover arty negligible default on either part. The Ld. AR further relied upon various case laws plethora of case laws including the decision of Hon’ble Delhi High Court in the case CIT Vs. Virgin Securities & Credits Pvt.Ltd., [332 ITR 396] and Punjab & Haryana High Court in the case of CIT vs Jind Co-op. Sugar Mills Ltd. [335 ITR 43]. It is also submitted that the AO has ignored the copy of the paper book alowntih confirmation of the concerned creditors filed during the assessment proceeding.*
- 5.4 *I have carefully gone through the finding of the AO, remand report and submission of the appellant. In the remand report the AO has not given any comment on merit of the additional evidences. The remand report itself is full of contradiction as the AO at one point of time is saying that out of three creditors in case of M/s Universal Print-O-Pack, the confirmation is received after passing the assessment order and in case of two other creditors the letter returned back as unserved. However, in the ordersheet reproduced by the AO, the AO states that he has asked to submit reply in case of one creditor M/s Marward Roadlines which is unserved. By plain reading of the remand report it can be concluded that in the case of only M/s Marward Roadlines, the confirmation was not received because the notice u/s 133(6) was not served. The appellant was asked by the AO on 18.03.2014 to submit the reply in case of M/s Marward Roadlines and given the date of 24.03.2014 to reply and the assessment order was passed on 27.03.2014. The above facts shows that the AO is not fair in saying that sufficient opportunity was given to the assessee to furnish the documents. In view of these facts I am inclined to accept the argument of thy Ld. AR. Since these*

evidences are necessary for decision in the appeal and in the interest of justice, the additional evidence submitted by the appellant is' admitted.

6. *Coming over to the addition of Rs.2,75,50,116/- i.e. 50% of the total creditors u/s 68 of the Act. The AO stated that notices u/s 133(6) of the Act was issued to six creditors but only three creditors responded to the notice. On this basis the AO concluded that 50% of the total creditors are non-genuine and bogus. In appeal the Ld. AR of the appellant submitted that entire information as sought by the AO has been furnished and, no discrepancy has been pointed by the AO and merely non-compliance of section 133(6) by the concerned creditors is not valid in the eyes of law. It is further submitted that if purchases have been accepted and the opening balance of these accounts are also not in dispute as the previous year assessment i.e. A.Y. 2010-11 was completed u/s 143(3), thus, if does not attract any adverse action u/s 68 of the Act. The Ld. AR relied on decision of Hon'ble Delhi High Court in the cases of D. C. Rastogi Vs. Commissioner of Income tax [259 ITR 513] and Commissioner of Income Tax vs. Kinetic Capital Finance ltd. [354 ITR 296] and submitted that adhoc addition in the light of these cases are unjustified. In appeal the Ld. AR submitted a copy of account of the creditors who had not responded as per AO, for F.Y. 2009-10, 2010-11 & 2011-12. I have examined the accounts and found that there is a regular transactions with these parties and in the very next year the account of these creditors are majorly settled. I have perused the judgments cited by the Ld. AR and find that ratio of the case laws relied upon by the Ld. AR are applicable to the facts of the case. Further purchases have been accepted, the opening balance of these concerned creditors are also not in dispute, Sales, Gross Profit and Net Profit are better than earlier years thus, an estimated addition made by the AO is not justified. The addition made deserves to be deleted.”*

11. The above finding on fact has not been rebutted by the Revenue by placing any contrary material on records. We therefore, do not see any reason to interfere in the finding on fact recorded by Ld.CIT(A), the same is hereby affirmed. Thus, grounds raised by the revenue are dismissed. Moreover, now it is brought to our notice that the assessee company has already gone into liquidation. Therefore, in view of the provision of section 238 of CIRP code, the proceedings before Ld. NCLT would have over-riding effect. Therefore, it is made clear that the parties shall be at liberty to exercise their remedies available under Insolvency and Bankruptcy Code, 2016 (“IBC”).

12. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 11th January, 2023.

Sd/-
(N.K.BILLAIYA)
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