

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A No.2598/Kol/2019
Assessment year: 2015-16

Nippon Alloys Ltd.....Appellant
23A, N.S. Road,
7th Floor, Room No.31,
Kolkata-700001.
[PAN: AABCN1555D]

vs.

DCIT, Circle-3(1), Kolkata.....Respondent

Appearances by:

None appeared on behalf of the appellant.

Shri Sunil Kr. Agrawal, CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : August 09, 2023

Date of pronouncing the order : August 10, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee agitating against the additions made by the Assessing Officer in the order dated 19.10.2019 passed u/s 143(3)/92CA(3) r.w.s 144C(5) of the Income Tax Act (hereinafter referred to as the 'Act').

2. Earlier, Shri Manish Tiwari, FCA, had appeared on behalf of the assessee on various dates. On 27.07.2022, Shri Manish Tiwari, FCA, counsel for the assessee, submitted that the assessee company has gone into official liquidation and official liquidator has been appointed. Therefore, vide order dated 27.07.2022, it was directed to issue fresh notice to Shri Subodh Kr. Agarwal, official liquidator and the case was

adjourned on 26.09.2022. However, on the next date i.e. 26.09.2022, no one appeared on behalf of the assessee/official liquidator and it was again directed to issue notice to Shri Subodh Kr. Agarwal, official liquidator. Notice was sent through registered post as well as through email. However, on the next date of hearing i.e. on 01.11.2022, again the official liquidator failed to appear. It was again directed to issue notice to him and further it was also directed to inform the official liquidator by telephone also. However, on the next date of hearing i.e. on 26.12.2022, again no one appeared on behalf of the assessee/ official liquidator and the case was adjourned to 28.12.2022. Since, the Bench did not function on 28.12.2022, the case was adjourned to 09.02.2023 by the registry. Again on 09.02.2023, no one appeared on behalf of the assessee/ official liquidator and it was directed to issue notice to the official liquidator through RPAD and email for 17.04.2023. The Bench did not function on 17.04.2023 and the hearing was adjourned on 25.05.2023 and notice of hearing was again issued to the official liquidator. Again no one appeared on behalf of the assessee/ official liquidator. The notice was again issued through RPAD and email for today i.e. 09.08.2023 to the official liquidator, Shri Subodh Kr. Agarwal. Today, again no one appeared on behalf of the official liquidator. The Bench Clerk was directed to contact official liquidator telephonically, whereupon, the said official liquidator, instead of appearing, has informed the Bench Clerk that he has already received the notice of hearing sent by the Tribunal. However, he has sent on email a copy of the order dated 16.02.2023 passed by the Coordinate Delhi Bench of the Tribunal in ITA No.2861/Del/2018 in the case of ACIT vs. ABW Infrastructure Ltd.

3. From the above facts, it is clear that the official liquidator does not want to appear. Further, we note that in the case of ACIT vs. ABW Infrastructure Ltd (supra), the cross appeals of the revenue and of the assessee were dismissed by the Coordinate Bench of the Tribunal in view of moratorium order passed by the NCLT u/s 14 of the IBC Code. The Coordinate Bench of the Tribunal in para 7 of the said order has observed that in view of the moratorium order, no proceedings can be initiated against the corporate debtor i.e. assessee company including the income tax proceedings and further that the IBC has overriding effect on all other acts including Income Tax Act as provided u/s 178(6) of the Income Tax Act. The Coordinate Bench thereafter held that in view of the moratorium declared by NCLT, the income tax proceedings cannot be continued and therefore in that case, both the appeals i.e. of the revenue as well as of the assessee were dismissed. In view of the aforesaid facts and circumstances, the official liquidator is no more interested in pursuing the present appeal and he wants dismissal of the appeal of the assessee in the light of the order of the Coordinate Delhi Bench of the Tribunal dated 16.02.2023 (supra).

4. Since, the official liquidator is no more interested in prosecuting the appeal on behalf of the assessee and to watch the interest of the assessee company being the official liquidator, therefore, we are left with no option than to dismiss the appeal of the assessee company. However, before dismissing the appeal, we deem it fit to make certain observations relating to this appeal.

5. A copy of the order of the National Company Law Tribunal, Kolkata Bench has been placed on file in IA No.1169/KB/2020 in CP(IB) No.1889/KB/2019 u/s 33 of Insolvency & Bankruptcy Code, 2016 in the

case of Ply Com Private Limited vs. Nippon Alloy Limited order dated 08.12.2020. A perusal of the said order would reveal that a petition seeking liquidation of the assessee company has been filed before the National Company law Tribunal, Kolkata Bench, wherein, the applicant/resolution professional, Mr. Subodh Kr. Agrawal, has been appointed as official liquidator, wherein, in para 13 of the said order, the ld. National Company law Tribunal has ordered as follows:

“13.e. All the powers of the Board of Directors, and of key managerial persons, shall cease to exist in accordance with section 34(2) of the Code. Al these powers shall henceforth vest in the Liquidator.

f. The personnel of the Corporate Debtor are directed to extend all assistance and co-operation to the Liquidator as required by him in managing the liquidation process of the Corporate Debtor.

g. On initiation of the liquidation process but subject to section 52 of the Code, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor save and except the liberty to the liquidator to institute suit or other legal proceeding on behalf of the Corporate Debtor with prior approval of this Adjudicating Authority, as provided in section 33(5) of the Code read with its proviso.”

A perusal of the above clause (g) would reveal that the ld. National Company Law Tribunal, Kolkata Bench has ordered that initially on liquidation, no suit or other legal proceedings shall be instituted by or against the corporate debtor save and except with the liberty to the liquidator to institute suit or other legal proceeding on behalf of the Corporate Debtor with prior approval of the Adjudicating Authority.

6. It is pertinent to mention here that the present appeal has been preferred on behalf of the assessee/corporate debtor. The appeal was already pending before the initiation of insolvency proceedings against the assessee. It is further pertinent to mention here that the Income Tax Authorities i.e. Assessing Officer as well as CIT has already determined

the tax liability against the assessee/corporate debtor. It is not a fresh institution of any suit or other legal proceedings against the corporate debtor, rather, it is the appeal of the assessee which is pending before this Tribunal and the official liquidator, in our view, is supposed to watch the interest of the assessee to get reduced its tax liability. Further, the provisions of section 178 of the Income Tax Act are relevant in this respect, which, for the sake of convenience, are reproduced as under:

“Company in liquidation

178. (1) *Every person—*

- (a) *who is the liquidator of any company which is being wound up whether under the orders of a court or otherwise ; or*
- (b) *who has been appointed the receiver of any assets of a company; (hereinafter referred to as the liquidator) shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the [Assessing] Officer who is entitled to assess the income of the company.*

(2) *The [Assessing] Officer shall, after making such enquiries of calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the [Assessing] Officer, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by the company.*

[(3) *The liquidator—*

- (a) *shall not, without the leave of the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner], part 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 :*

Provided *that nothing contained in this sub-section shall debar the liquidator from parting with such assets or properties for the purpose of the payment of the tax payable by the company or for making any payment to secured creditors whose debts are entitled under law to priority of payment over debts due to Government on the date of liquidation or for meeting such cost and expenses of the winding up of the company as are in the opinion of the [Principal Chief Commissioner or]*

Chief Commissioner or [Principal Commissioner or] Commissioner] reasonable.

(4) If the liquidator fails to give the notice in accordance with sub-section (1) or fails to set aside the amount as required by sub-section (3) or parts with any of the assets of the company or the properties in his hands in contravention of the provisions of that sub-section, he shall be personally liable for the payment of the tax which the company would be liable to pay:

Provided that if the amount of any tax payable by the company is notified under sub-section (2), the personal liability of the liquidator under this sub-section shall be to the extent of such amount.]

(5) Where there are more liquidators than one, the obligations and liabilities attached to the liquidator under this section shall attach to all the liquidators jointly and severally.

(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].”

7. The Hon’ble Supreme Court in the case of Harshad Shantilal Mehta v. Custodian (1998) 99 Taxman 2016(SC) while relying upon the decision of Hon’ble Supreme Court in the case S.V. Kondaskar v. V.M. Deshpande [1972] 1 SCC 438 has observed as under:

“In the case of [S.V. Kondaskar v. V.M. Deshpande and Anr.](#) (1972 (1) SCC 438 at page 449) this Court examined the question whether under the [Income Tax Act](#) before commencing re-assessment proceedings, leave was required to be taken by the income tax authority of the Company Court under [Section 446](#) of the Companies Act, when the assessee-company was in winding up. This Court said that the [Income Tax Act](#) is a complete code with respect to assessment and re-assessment of income tax. The proceedings under the [Income Tax Act](#) would not fall within the meaning of the expression ‘other legal proceedings’ in [Section 446](#) and, therefore, leave would not be required of the Company Court for commencing such proceedings. This Court, however, went on to observe, (in paragraph 18) “We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the Revenue after income tax has been determined and its payment demanded from the liquidator. It would be open to the

liquidation court then, to decide how far, under the law, the amount of income tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up court can full safeguard the interests of the company and its creditors under the Act".

8. In view of the aforesaid legal position, in our view, Shri Subodh Kr. Agarwal, was supposed to watch the interest of the assessee company before this Tribunal. However, since the official liquidator is no more interested in pursuing the present appeal, the same is hereby dismissed. The concerned Assessing Officer may proceed against the assessee company/official liquidator as per the provisions of section 178 of the Income Tax Act read with other relevant provisions of the IBC Code, 2016 and other related provisions of company law etc. and may press its claim towards taxes recoverable from the assessee company before the National Company law Tribunal. Subject to the above observation, the appeal of the assessee company is hereby dismissed.

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

Kolkata, the 10th August, 2023.

Sd/-

[डॉक्टर मनीष बोरड /Dr. Manish Borad]

लेखा सदस्य /Accountant Member

Sd/-

[संजय गर्ग /Sanjay Garg]

न्यायिक सदस्य /Judicial Member

Dated: 10.08.2023.

RS

Copy of the order forwarded to:

- 1 Nippon Alloys Ltd
2. DCIT, Circle-3(1), Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches