

**IN THE INCOME TAX APPELLATE TRIBUNAL, ' F ' BENCH
MUMBAI**

**BEFORE: SHRI OM PRAKASH KANT, ACCOUNTANT
MEMBER**

&

SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER

**ITA No. 4518/MUM/2023
(Assessment Year : 2017-18)**

M/s Varun Resources Limited GMJ & Co. 3 rd & 4 th Floor, Vaastu Darshan-B, Above Central Bank of India, Azad Road, Andheri East, Mumbai-400069	V.	Income Tax Officer 5(3)(1), Aayakar Bhawan, Mumbai-400020
PAN/GIR No. AAECR9929E		
(Appellant)	..	(Respondent)

Assessee by	Shri Haridas Bhatt
Revenue by	Shri Ankush Kapoor CIT, DR
Date of Hearing	01/05/2024
Date of Pronouncement	27/05/2024

आदेश / O R D E R

PER SUNIL KUMAR SINGH (J.M):

1. This appeal has been preferred against the impugned order dated 30.10.2023 passed by learned CIT (A) in appeal no. ,NFAC/2016-17/10057982, for the Assessment Year 2017-18, wherein learned CIT(A) has dismissed assessee's appeal against the penalty order

dated 12.08.2021 passed under section 270 A of the income tax act 1961, hereinafter referred to as an 'Act'. On account of under reporting its income within the meaning of Section 270A(2) of the Act.

2. The brief facts leading to the appeal state that the assessee filed its return of income electronically on 28.11.2017 for the Assessment year 2017-18, declaring a total loss of Rs. 47,06,21,218/- under normal provisions and Rs. 16,52,60,60,90/- u/s. 115JB of the Act. The case was selected for scrutiny under CASS the notice u/s. 143(2) dated 27.08.2018 was issued and served upon the assessee. The assessment was completed Under Section 143(3) of the Act at a loss of Rs. 12,99,31,580/- on 26.12.2019. Notice u/s. 274 r.w.s 270A, were, issued but assessee did not respond to penalty order dated 03.08.2021 despite service. It was learnt from the website of ministry of Corporate affairs that the assessee was under liquidation before the NCLT during the course of assessment proceedings. Notice was issued to the liquidator Mr. Sanjeev Maheshwari but for no avail. It was learnt that assessee under reported income as Rs 34,06,89,638/- as per order dated

26.12.2019 for the relevant Assessment year 2017-18.

Hence, the penalty of Rs. 6,05,32,030/- @50% of the tax payable on under reported income was imposed u/s. 270A of the Act. Assessee went in appeal before CIT(A), who dismissed assessee's appeal as not maintainable and having become infructuous due to the pendency of liquidation process. This led the Assessee/through liquidator to approach this Tribunal.

3. The appellant/assessee has filed this appeal on the following grounds:

“GROUND 1

A. On the facts and circumstances of the case, Commissioner of Income Tax Appeals (the CIT Appeals) erred in levying the penalty of Rs. 6,05,32,030/- being 50% of the tax payable on underreported income.

B. The learned CIT Appeals and AO erred in not appreciating the fact that:

- i. The company is under liquidation process under IBC Code, 2016 since 4th December, 2018.*
- ii. The official liquidator is in charge of all the legal proceedings as well as affair of the company.*
- iii. CIT Appeals and AO were aware of the fact that the assessee was under liquidation still went on with levying the penalty.*
- iv. As per IBC Code 2016, no proceedings can proceed on the assessee under liquidation.*
- V. Therefore the order passed is bad in law.*

C. The appellant, therefore, prays that penalty order may please be quashed.

GROUND 2 (without prejudice to ground 1)

- A. *On the facts and circumstances of the case, Commissioner of Income Tax Appeals (the CIT Appeals) erred in levying the penalty of Rs. 6,05,32,030/- being 50% of the tax payable on underreported income.*
- B. *The learned CIT Appeals erred in not appreciating the fact that:*
- i. The appellant has filed an appeal before the CITA towards the quantum order passed u/s 147 r.w.s 144.*
 - ii. The said appeal is lying undisposed yet.*
 - iii. CITA confirmed the penalty in haste without waiting for the disposal of the quantum.*
- C. *The appellant, therefore, prays that penalty charged of Rs. 6,05,32,030/- may please be deleted.*

GROUND 3 (without prejudice to ground 1)

- A. *On the facts and circumstances of the case, the Assessment Unit (the A.U.) erred in levying penalty on the addition of Rs. 7,00,00,000/- towards the amount of FD made during the year u/s 69A as unexplained investments.*
- B. *The learned AU erred in not appreciating the fact that:*
- i. The existence of the FD was explained to the AU with books of account and supporting documents.*
 - ii. The assessee has received funds from a sister concern as a loan.*
 - iii. The AU passed the order without informing the assessee about their observation regarding the source of funds.*
 - iv. The impugned additions are already recorded in the books of accounts.*
 - v. The assessee has neither concealed any income nor has furnishing inaccurate particulars.*
- C. *The appellant, therefore, prays the penalty levied on addition of Rs. 7,00,00,000/- towards the amount of FD made during the year u/s 69A as unexplained investments may please be deleted.*

GROUND 4 (without prejudice to ground 1)

- A. *On the facts and circumstances of the case, the Assessment Unit (the A.U.) erred in levying penalty on the addition of Rs. 5,31,195/- towards the amount of FD interest earned during the year.*
- B. *The learned AU erred in not appreciating the fact that:*

- i. The said income was offered to tax and explained to the AU with supporting evidences.*
 - ii. The assessee has already offered the said income to tax.*
 - iii. Addition had resulted in double taxation of the same income.*
 - iv. AU made addition ignoring the computation and profit and loss submitted before them*
 - vi. Non claim of the TDS cannot be a reason for making the additions.*
 - vi. The impugned additions are already recorded in the books of accounts.*
 - vii. The assessee has neither concealed any income nor has furnishing inaccurate particulars.*
- C. The appellant, therefore, prays the penalty levied on addition of Rs. 5,31,195/- towards the amount of FD interest earned during the year may please be deleted.”*
4. In response to the notice issued by the tribunal, Learned Representative for the department appeared and participated in the hearing of the case.
 5. We have gone through the materials available on record and Heard learned representatives for both the parties.
 6. The following points are to be determined under appeal.
 - I. Whether, the provisions of the IBC code 2016 would prevail over the Income Tax Act 1961, and if so to what extent?
 - II. Whether learned CIT(A) erred in not adjudicating the issue on merit, merely because of the pendency of the liquidation process against the assessee corporate debtor?

III. Whether assessee is entitled to any relief?

7. At the very outset, it is pertinent to mention that all the Income Tax Authorities had knowledge of the fact that the appellant assessee/corporate debtor was admitted into corporate insolvency resolution process (CIRP) vide order dated 14.06.2017 passed by the National Company Law Tribunal (NCLT) Mumbai bench (NCLT is an adjudicating authority under IBC). Mr. Sanjeev maheshwari was appointed as Interim Resolution professional. Due to non approval of Resolution Plan by the committee of creditors within the statutory period, adjudicating authority passed liquidation order dated 04.12.2018 under section 33(1) of the IBC in respect of the assessee/Corporate debtor.
8. Learned representative for the assessee has submitted that since liquidator was appointed on 4th December, 2018 by NCLT, no legal proceedings could be initiated subsequent there to. He has referred *Deutsche Bank vs S.P.Kala Official Liquidator of Sea*, [1990]67COMPCAS474(BOM). The relevant para 6 reads as under:

“.....Section 446 of the Companies Act provides that, when a winding up order is made or the official liquidator is appointed as provisional liquidator, no suit or legal proceedings should be commenced or if pending on the date of the winding, winding-up order, shall be proceeded with, against the company, Except with the leave of the court and subject to such terms as may be imposed. Sub-section (2) further lays down that the court which is winding-up the company shall, notwithstanding anything contained in any other law in force, have jurisdiction to entertain or dispose of, inter alia, any suit or proceeding by or against the company, whether such suit or proceeding has been instituted or is instituted. A careful examination of these provisions of law makes it clear that once a winding-up order is made or the official liquidator is appointed as provisional liquidator, no proceedings can continue or be instituted against the company without the permission of the court.....”

9. Learned Representative for the revenue department has submitted that no leave of the adjudicating authority is necessary to be obtained by the Revenue Department in respect of assessment proceedings. He has referred Official Liquidator, High Court,...Vs Commissioner of Income Tax, West Bengal, AIR 1970 CAL349, in support of his arguments. The relevant para 49a read as under:

“49a. Assessment proceedings and recovery proceedings, although both are proceedings under the Income-tax Act, do not, to my mind, stand on the same footing in so far as leave under Section 446(1) of the Companies Act, 1956 is concerned. So long as the duty of assessment is not performed, the right to recover does not arise at all. Assessment validly done in accordance with the provisions of the Income-tax Act is the only way of creating a debt in favour of the Department

and does not affect the assets and properties of the company or the scheme of administration thereof or the winding up of the company in any way. When any debt for payment of taxes arises on an assessment, it is open to the Department to prove the debt in liquidation, claim payment thereof and the debt of the Department will be paid in the same manner as the debt of other creditors of the same class) It may also be open to the Department to seek to enforce its right of recovery of the debt in accordance with the provisions of the Income-tax Act. But the right to enforce recovery by taking recourse to recovery proceeding against the assets of the company in liquidation is and cannot be an unfettered right. This right to recover in enforcement of the recovery proceedings under the Income-tax Act is controlled by Section 446(1) of the Companies Act, 1956 and is subject to necessary leave of Court,.....”

10. It is true that the IBC is more recent statute.

Section 238 of IBC reads as under:

“238. Provision of this Code to override other laws.- *The Provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*

11. The non-obstante clause in the above referred

Section 238 clarifies that the IBC Code shall have the effect of overriding the provisions of other laws. Section 178 of the Act makes provision in respect of the ‘company in liquidation’. The relevant Section 178(6) of the Income Tax Act reads as under:

“(1).....
(2).....
(3).....
(4).....

(5).....

(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].”*

12. Above referred Sub Section 6 of Section 178 of the Act was amended by Section 247 r/w 3rd schedule of IBC with effect from 01.11.2016. This provision makes it clear that IBC code will override the provisions of Income Tax Act 1961. The three judges bench of Hon’ble Supreme Court in Civil Appeal No. 7667 of 2021, Sundaresh Bhatt, Liquidator of ABC Shipyard V. Central Board of Indirect Taxes and Customs, vide order dated 26.08.2022, has held that the respondent could only initiate assessment or re-assessment of the duties and other levies, once a moratorium is imposed in terms of Section 14 or 33(5) of the IBC as the case may be, the respondent authority, only has limited jurisdiction to assess/determine the quantum of the customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues. Liquidator 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.

13. We accordingly, on the basis of aforesaid binding precedent, hold that the provisions of IBC 2016 would prevail over the Income Tax Act. However, Income Tax authorities have limited jurisdiction to assess/determine the quantum of Income Tax dues but have no authority to initiate recovery of such dues at its own during the period of moratorium in violation of Section 14 or 33(5) of the IBC. The Income Tax Authorities are like any other creditor, may stake their claim before liquidator in the statutory limitation period provided under the IBC. The first point is accordingly determined in positive in favour of the assessee.

14. Secondly, in view of the findings given at point no.1, it is easily concluded that Learned CIT(A) has erred in not adjudicating the matter which was with respect to the determination of tax dues only, more so, when the liquidator, himself, was pursuing the matter. The second point is accordingly determined in positive in favour of the assessee and against the revenue department.

15. Now coming thirdly and lastly on the merits of the case, learned CIT(A) has not adjudicated the issues involved before him on merit despite no legal impediments. The learned representative of the assessee company has filed electronically generated copy of the order dated 02.04.2024, passed against the reassessment order dated 17.05.2023 passed u/s. 147 r.w.s 144 of the Income Tax Act for the relevant Assessment Year 2017-18, wherein the part of additions were not found sustainable due to moratorium imposed upon the appellant corporate debtor u/s. 33(5) of IBC. This apart, part of additions u/s. 69A of the Act have also not been adjudicated. This submission of appellant is not fruitful in view of our findings recorded at point No. 1 in respect of the fact that the income tax authorities are not barred from determining the tax dues during the moratorium imposed upon the appellant assessee/corporate debtor in terms of section 14 or section 33(5) of the IBC 2016. In view of our finding given at point No. 1 and 2 above, the case deserves to be restored back to the file of learned CIT(A). It is clarified that we have not made any observations in respect of the

merits of the case. The appeal is liable to be partially allowed.

16. In the result, the appeal is partially allowed. The impugned order dated 30.10.2023, is set aside. The case is restored back to the file of learned CIT(A) for passing order afresh on merit in accordance with law after affording an opportunity of hearing to the appellant assessee/corporate debtor.

Order pronounced on 27.05.2024.

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai; Dated 27/05/2024
Anandi Nambi, *steno*

Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

ITA No. 4518/MUM/2023.
M/s. Varun Resources Limited,

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai