

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ, चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH
BENCH 'B' CHANDIGARH

BEFORE: SHRI A.D.JAIN, VICE PRESIDENT AND
SHRI KRINWANT SAHAY, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 362/CHD/2023

निर्धारण वर्ष / Assessment Year. : 2011-12

M/s SEL Manufacturing Co.Ltd., 274, G.T. Road, Dhandari Khurd, Ludhiana.	Vs	The DCIT, Central Circle-3, Ludhiana.
स्थायी लेखा सं./PAN /TAN No: AAHCS9189E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Ashwani Kumar, CA

राजस्व की ओर से/ Revenue by : Smt. Kusum Bansal, CIT DR

तारीख/Date of Hearing : 16.04.2024

उद्घोषणा की तारीख/Date of Pronouncement : 27.05.2024

HYBRID HEARAING

आदेश/ORDER

PER A.D.JAIN, VICE PRESIDENT

This is assessee's appeal for assessment year 2011-12 against the order dated 08.05.2023, passed by the CIT(A)-5, Ludhiana. The following Grounds have been taken:

- 1. That the order passed under section 250(6) of the Income Tax Act, 1961 by the learned Commissioner of Income Tax (Appeals) – 5 Ludhiana is against law and facts on the file in as*

much as he was not justified to uphold the action of the assessing officer in resorting to provisions of section 148.

2. That he was not justified to enhance the addition to Rs. 8,13,85,737/- as against Rs. 2,08,60,900/- made by the assessing officer and up hold the same by resort to the provisions of section 69C.

3. That he further gravely erred in making an addition of Rs. 16,27,714/- representing 2% of alleged bogus purchase of Rs. 8,13,85,737/-.

2. The following Additional Ground has also been raised:

“That the order dated 29.12.2018 passed under section 250(6) of the Income Tax Act, 1961 by the learned Commissioner of Income Tax (Appeals) – 5, Ludhiana is against law and facts on the file in as much as the same has been passed ignoring the provisions of the Insolvency and Bankruptcy code, 2016, which overrides the provisions of the other laws for the time being in force and the Order dated 10.2.2021 passed by the National Company Law Tribunal, whereby, the Income Tax Department is precluded from undertaking any action with respect to any issues or transactions prior to the date of the commencement of the insolvency process and specifically deals with the order passed by the Assessing Officer.”

3. The Additional Ground was admitted as it raises a purely legal issue, for which, no new evidence is required to be adduced at this stage.

4. Apropos the merits of the Additional Ground, the learned Counsel for the assessee has submitted that the order under appeal has wrongly been passed in violation of the provisions

of the Insolvency and Bankruptcy Code, 2016, although the said Code clearly overrides the provisions of any other law for the time being in force. It has further been submitted that by virtue of the order dated 01.02.2021, the National Company Law Tribunal, dealing with the order passed by the Assessing Officer, had specifically precluded the Income Tax Department from undertaking any action with regard to any issue or transaction pertaining to the period prior to the date of commencement of the insolvency process in the case of the assessee. It has been submitted that the impugned order has also been passed in violation of the said NCLT Order.

5. It has been contended that the assessee company has undergone a Corporate Insolvency Resolution Process ("CIRP") in the terms and provisions of the Insolvency and Bankruptcy Code, 2016 ("IBC") under the aegis of the Adjudicating Authority of the National Company Law Tribunal ("NCLT"), Chandigarh, New Delhi ("Adjudicating Authority"). It was contended that the CIRP with respect to the Company was initiated pursuant to a petition under Section 7 of the IBC filed by State Bank of India, before the Hon'ble Adjudicating

Authority vide Company Petition No, (IB)-114/Chd/Pb)/2017. The Adjudicating Authority admitted the petition under Section 7 vide its Order dated April 01,2018. Subsequently, after complying with the statutory and procedural requirements of IBC and in furtherance of the CIRP, the Chandigarh Bench of the NCLT passed an order dated February 10, 2021, wherein, the Resolution Plan submitted by the Consortium of ARR ESS Industries Private Limited and Leading Edge Commercial FZE was approved. It was further contended that any claim or demand assessed/raised/ordered by the Income-tax Department will be in the nature of an Operational Debt as defined under Section 5(21) of the IBC and the Department will be treated as an Operational Creditor as defined under Section 5(20) of the IBC. It was stated that accordingly, the Income-tax Department, being an Operational Creditor, is liable to be treated in the same method and manner, as provided for all the Operational Creditors of the Company. It has been contended that as per the terms of the approved Resolution Plan, no amounts are due or payable by the Company to the Operational Creditors (including the Income-tax Department), except to the

extent as provided for in the approved Resolution Plan. It has been stated that further, in terms of the approved Resolution Plan, all claims that may be made against or in relation to any payments required to be made by the Company under any Applicable Law (whether or not such claim was notified to or claimed against the Company at such time, and whether or not such Governmental Authority was aware of such claim at such time) shall unconditionally stand abated, settled and/or extinguished with immediate effect. It has been stated that in terms thereof, any claim or demand assessed/raised/ordered by the Income-tax Department shall not be payable by the Company. It has been stated that no Governmental authority (including the Income-tax Department) shall have any further rights or claims against the Company, in respect of any claim relating to the period prior to the approval of the Resolution Plan. It is further stated that the approved Resolution Plan further categorically provides for the effect of the Resolution Plan once the same is approved by the Adjudicating Authority. It has been stated that in terms of the approved Resolution Plan, any liability arising for a period prior to the Resolution

Plan shall immediately stand extinguished/abated/withdrawn and nothing shall be due and payable.

5.1 It has been contended that under Section 31(1) of the IBC, the Resolution Plan as approved by the Hon'ble Adjudicating Authority, is binding on all the creditors and other stakeholders. Further by the clarificatory amendment brought to the said Section 31 (1) by the Insolvency and Bankruptcy Code (Amendment) Act,2019, it has been categorically provided that a Resolution Plan upon its approval shall be binding on the Central and the State Government including local authorities to whom a debt is owed.

5.2 It has been stated that further, any future demand for a period prior to the approval of the Resolution Plan are also extinguished due to the operation of *non-obstante* clause as provided under Section 238 of the IBC, and as such are liable to be dismissed with immediate effect; and that section 238 of the IBC provides that the IBC has an overriding effect with respect to any law which is inconsistent with the provisions of the IBC.

5.3 It has been stated that in view of the above, since the provisions of the IBC override other laws for time being in force, any claim or demand assessed/raised/ordered by Income-tax Department endeavoring to saddle the Company with a liability for a period prior to approval of the Resolution Plan, would stand extinguished/abated/withdrawn except to the extent provided for in the approved Resolution Plan. In the instant case the proceedings relate to A/Y 2011-12 i.e. prior to the date on which the Resolution Plan was approved i.e., 10.02.2021 in respect of which the Income-tax Department is precluded from undertaking any action.

5.4 Reliance has been sought to be placed on 'Tata Steel Ltd. Vs Dy. Commissioner of Income Tax', (2024) 460 ITR 595 (Del) and 'Ghanashyam Mishra and Sons (P) Ltd. Vs Edelweiss Asset Reconstruction Co. Ltd.' [(2021) 227 Comp. Cases 251 (SC)].

6. The ld. DR, on the other hand, has sought to place strong reliance on the decision of the Surat Bench of the Tribunal in the case of 'Garden Silk Mills (P) Ltd. Vs DCIT', [2023] 150 taxmann.com 442 (Surat-Trib.), wherein, since the assessment

order was passed in the case of the assessee and demand was raised, but the assessee had already filed order of the NCLT showing the fact that the assessee had been impleaded as a corporate debtor before the NCLT by the financial creditor and the said petition had been admitted by the NCLT and a moratorium u/s 14 of the Insolvency and Bankruptcy Code, 2016, 'IBC', for short, had been declared and the NCLT had already appointed Interim Resolution Professional (IRP), however, the said Interim Resolution Professional or 'IRP' had not impleaded himself to represent the assessee company in the appeal before the Tribunal, it was held that in view of the provisions of Section 14 of the IBC, there could be no continuation of any pending proceedings before the Income Tax Appellate Tribunal and that the appeal was to be dismissed as not maintainable in the format as presented.

7. Having considered the rival contentions in the light of the material placed on record with regard to the additional ground raised, it is seen that indeed the assessee company underwent a CIRP in terms of the IBC, under the aegis of the NCLT. With regard to the CIRP, Section 7 of the IBC provides that;

Section 7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section

(2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

7.1 A petition u/s 7 of the IBC was filed before the NCLT/adjudicating authority. The NCLT, vide its order dated 01.04.2018 (copy placed on file), admitted the said petition.

7.2 It has been stated that subsequently, vide order dated 10.02.2021 (copy placed on file), passed by the NCLT, in furtherance of the CIRP, after complying with the statutory and procedural requirements of the IBC, the Resolution Plan (copy placed on record) submitted by the Consortium of ARR ESS Industries Pvt. Ltd. and Leading Edge Commercial FZE (i.e., the Resolution Applicant) was approved. This Resolution Plan was proposed. In relation to the CIRP under the IBC, for the assessee, SEL Manufacturing Industries Ltd., i.e., 'the assessee company' or the 'Corporate Debtor' subject to the approval of

this Resolution Plan by the NCLT, Chandigarh Bench, the Resolution Applicant were to infuse requisite funds, to the extent of the equity investment and debt infusion proposed in the Resolution Plan, into the assessee company.

8. Section 5(20) of the IBC defines 'Operational Creditor'

20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

8.1 Section 5(21) of the IBC describes 'Operational Debt';

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

9. As per the IBC, as rightly contended and not disputed, any claim or demand assessed or raised or ordered by the Income Tax Department would be in the nature of operational debt and the Department would be treated as an Operational Creditor of the company.

9.1 A perusal of the Resolution Plan shows that no amounts are due from or payable by the assessee company to its

operational creditors, except to the extent provided for in the Plan.

9.2 The Resolution Plan further provides that all claims that may be made against or in relation to any payments required to be made by the assessee company under any applicable law shall unconditionally stand abated, settled and/or with minimum effect. The Resolution Plan also provides that any claim or demand assessed or raised or ordered by the Department shall not be payable by the assessee company. The plan also provides that no Government Authority including the Income Tax Department shall have any further rights or claims against the assessee company in respect of any claim relating to the period prior to the approval of the Resolution Plan. In fact, para 5.4(c) (relevant portion) of the Resolution Plan states as under :

(viii) Upon making payment towards Operation Creditors in terms of this Resolution Plan, no Operational Creditor shall be entitled to take, initiate or continue any steps of proceedings against the Corporate Debtor or its assets (whether by way of demand, legal proceedings, alternative determination process(including arbitration or an expert determination process), the levying of distress, execution of judgment or otherwise) in any jurisdiction whatsoever for the purpose of placing the Company into liquidation or any analogous proceedings in respect of the liability paid/settled in terms of this plan.

(ix) Pursuant to the payments proposed to the Operational Creditors, under this Resolution Plan any and all legal proceedings pertaining to period prior to the NCLT Approval Date initiated before any forum by or on behalf of the Operational Creditors, to enforce its claims against the Company or enforce or invoke any security interest over the assets of the Company, shall immediately, irrevocably and unconditionally stand withdrawn, abated, settled and/or extinguished.

(x) Pursuant to the approval of this Resolution Plan by the NCLT and upon transfer of the payments towards settlement of Operational Creditors to such Operational Creditors and of payments towards CIRP Cost on the Effective Date as envisaged herein, any and all rights and entitlements of, claims of demands made by or liabilities of obligations owed or payable to, any Operational Creditors by any Person in respect of the affairs of the Corporate Debtor (whether admitted/verified or not, due or contingent, asserted or undisputed, present or future) pertaining to the period prior to the NCLT Approval Date shall stand permanently extinguished without any further act or deed by the Resolution Applicant and the Resolution Applicant, the Corporate Debtor and the SPV shall not at any point of time directly or indirectly, have any obligation, liability or duty in relation thereto.

(xi) The above said amount of Rs. 1.79 crores or amount mandatorily required to be paid as mentioned in Clause 5.4(e)(iii), whichever is higher, towards the Operational Creditors is the maximum payment to be made in this Plan, against the claims of the Operational Creditors, and under no circumstances, including any escalation in the Verified Amount of the Operational Creditors, and any additional exposure, in this regard, would be brought on to the Corporate Debtor/ Resolution Application/ SPV. Further, the Corporate Debtor / Resolution Applicant / SAPV will have no additional exposure arising out of the claims of the Operational Creditors which have not been admitted and/or the claims which have been rejected (partly or fully) by the Resolution Professional and/or because of the re-classification in the category of creditor(s).

(xii) Without prejudice to the generality of the provisions contained in this Resolution Plan, the Resolution Application, based on diligence conducted by the Resolution Applicant and the information available, identified the following for which the extinguishments are expressly sought for:

A. In respect of the pending assessment which are under process including the pending transfer pricing, TDS matter, excise assessment, VAT assessment and also with regard to notices issued by the relevant Government Authority for relevant assessment years under various provisions of the Applicable Law including Income Tax Act or indirect tax laws, the relevant Government

Authorities make any further assessment with respect to resolution of losses or unabsorbed depreciation or raise any demand in respect of payment of Tax on and before the NCLT Approval Date and the same shall stand settled at Nil value.

10. A perusal of the above prescription of the Resolution Plan shows that it provides that on making payment towards operational creditors in terms of the Plan, no Operational Creditor shall be entitled to take out or initiate or continue any proceedings against the assessee company (Corporate Debtor) or its assets for the purpose of placing the assessee company into liquidation in respect of liability paid or settled in terms of the Plan. Then, pursuant to the payments proposed to the Operational Creditors, all legal proceedings pertaining to the period prior to the NCLT approval date (i.e. 10.02.2021), to enforce claims against the assessee company shall stand withdrawn, abated, settled and/or extinguished immediately, irrevocably and unconditionally. Similarly, all rights and entitlements of claims of demands made by or liabilities towards any Operational Creditors pertaining to the period prior to the NCLT approval date shall also stand permanently extinguished and the assessee company shall not have any

obligation, liability or duty with regard thereto , directly or indirectly, at any point of time. Further, other than the general provisions of the Plan, extinguishment was also sought for expressly for, inter-alia, resolution of demand in respect of payment of tax on and before the NCLT approval date and the same were to stand settled at 'Nil' value.

11. Still further, in terms of the Plan, any liability arising for a period prior to the Resolution Plan shall stand extinguished or abated or withdrawn and nothing shall be due and payable. In this regard, the Resolution Plan specifically clearly states in clause (g), with regard to the claims under litigation, that all litigation/disputes and judicial proceedings against the assessee company in relation to any period prior to the NCLT approval date, shall be settled at 'Nil' value as against any amount determined, to be paid by the assessee company. It was specifically stated that all disputes in relation to any period on or before the NCLT approval date, shall be settled at 'Nil' value, *by virtue of the order of the NCLT approving the Resolution Plan.*

11.1 Then, Section 31(1) of the IBC reads as follows :

"31. Approval of resolution plan. –

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.,"

11.2 Thus, as per Section 31(1) of the IBC, once approved by the Adjudicating Authority, the Resolution Plan shall be binding on the assessee company and, inter-alia, its creditors, including, inter-alia, the Central Government to whom, a debt in respect of the payment of dues arising under law are owing. Thus, clearly, as rightly contended, by virtue of the provisions of Section 31(1) of the IBC, the Income Tax Department is bound by the terms of the Resolution Plan, as approved by the NCLT, vide its order dated 10.02.2021.

11.3 Then, Section 238 of the IBC reads as follows :

"Section 238. Provisions 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 such law."

11.4 Thus, Section 238 ensures that the provisions of the IBC shall override other contemporaneous laws, including the Income Tax Act, 1961, in so far as regards anything inconsistent in the Code, contained therein.

12. The AO resorted to the provisions of Section 148 of the Income Tax Act on the basis of information received that the assessee had made accommodation entries with Shree Shyam Enterprises. Such invocation of Section 148 of the Act has been upheld by the Id. CIT(A) by virtue of the impugned order. Further, the AO had made addition of Rs.2,08,60,900/- u/s 68 of the Act, on account of alleged unexplained cash credits representing bogus purchases made. The Id. CIT(A), on the other hand, enhanced the addition to Rs.8,13,85,737/-, invoking the provisions of Section 69C of the Act instead of those of Section 68 as invoked by the AO, holding that it appeared that the AO had inadvertently applied the provisions of Section 68 to the case, instead of those of Section 69C. However, in view of our discussion in the preceding paragraph, we find that the assessee is correct in contending that;

- i) The impugned order has been passed ignoring the provisions of the Insolvency and Bankruptcy Code, 2016, which overrides the provisions of the other laws for the time being enforce, in so far as they are inconsistent with the provisions of the IBC, and,
- ii) That the impugned order has been passed in violation or ignorance of the order dated 10.02.2021, passed by the NCLT, Chandigarh, by which order, the Income Tax Department has been precluded from undertaking any action with respect to any issue/transaction prior to the date of commencement of the insolvency process, holding so while specifically dealing with the order passed by the AO.

13. In this regard, in 'Tata Steel Ltd. Vs Dy. CIT', [2014] 460 ITR 595 (Del), it has been held, by virtue of order dated 31.10.2023, that dues payable to creditors in a Corporate Insolvency Resolution Proceedings, under the Insolvency and Bankruptcy Code, 2016 including statutory creditors for periods prior to the date when the Resolution Plan is approved, can only be paid in accordance with the terms contained in the Resolution Plan; that where no provision is

made for claims lodged on behalf of the creditors, or there is failure to lodge a claim with the Resolution Professional, all such claims stand extinguished; that this position in law obtains because of the provisions of Section 31 of the Code, which inter-alia, stipulates that once the Resolution Plan is approved, it shall be binding on the Corporate Debtor and, inter-alia, its creditors, which include, inter-alia, the Central Government under any law for the time being in force and also on authorities to whom statutory dues are owed; that the provision also stipulates that the Approved Plan shall be binding on guarantors and other stakeholders involved in forging; that a successful applicant whose Resolution Plan has been approved should not be put in a position where it is called upon to liquidate dues of creditors, including statutory creditors which are not imbedded in the Resolution Plan; that a successful applicant is, in law, provided with a clean slate; and that therefore, dues for the period prior to the date when the Resolution Plan was approved, cannot be recovered. While doing so, their Lordships followed 'Ghanashyam Mishra & Sons Pvt. Ltd. Vs Edelweiss Asset Reconstruction Co. Ltd.'

(supra), wherein it was held that Section 238 of the Code squarely states that any ambiguity that the provisions of the Code “shall” have effect, notwithstanding anything inconsistent contained in any other law for the time being enforce or any instrument having effect under any such law; that thus where matters covered by the Code are concerned, including Insolvency Resolution of Corporate persons, if the provisions contained therein are inconsistent with any other Statutes, including the Income Tax Act, 1961, they shall override such laws; and that if such an approach is not adopted, it will undermine the entire object and purpose of the enactment of the Code.

14. No decision to the contrary has been brought to our notice.

15. So far as regards ‘Garden Silk Mills P. Ltd.’ (supra), sought to be relied on behalf of the Department, in that case too, it was held that the provisions of the IBC would prevail over those of the Income Tax Act; that where the petition had been admitted by the NCLT u/s 7 of the Code and moratorium model u/s 14 of the IBC had been declared and the NCLT had

already appointed an Interim Resolution Professional, but the IRP had not impleaded himself to represent the assessee company in the appeal before the Income Tax Appellate Tribunal. In view of the provisions of Section 14 of the IBC, there could not be any continuation of any pending proceedings before the Income Tax Appellate Tribunal.

16. This decision, rather than helping the Department, in our considered opinion, goes to aid the case of the assessee instead. In fact, 'Ghanashyam Mishra & Sons Pvt. Ltd.' (supra) stands considered therein. Though the appeal of the assessee was dismissed, it was so done as not maintainable in the format presented, following the mandate of the provisions of the IBC, giving liberty to the IRP or his successor in interest to implead himself on behalf of the assessee company before the Hon'ble High Court at a later stage, in which event the appeals would be restored.

17. In view of the above, finding merit in the Additional Ground raised by the assessee, the Additional Ground is accepted. The order under appeal is, accordingly, set aside and cancelled.

18. In view of our decision on the Additional Ground, nothing further survives for adjudication, nor was anything argued.

19. In the result, appeal is allowed.

Order pronounced on 27.05.2024.

Sd/-

(KRINWANT SAHAY)
ACCOUNTANTMEMBER

Sd/-

(A.D.JAIN)
VICE PRESIDENT

“Poonam”

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. विभागीय प्रतिनिधि, आयकर अपीलिय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
5. गार्ड फाईल/ Guard File

आदेशानुसार/ By order
सहायक पंजीकार/ Assistant Registrar