

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

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

**&**

**SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER**

**ITA No. 2012/MUM/2024  
(Assessment Year : 2012-13)**

Asst. Commissioner of Income-Tax, Circle 5(3)(1)R. No.573, Aaykar Bhavan, M.K.Road, Mumbai-400020.	V.	Varun Resources Limited Laxmi Building, 6, Shoorji Vallabhdas Marg, Mumbai GPO, Mumbai-400001.
<b>PAN/GIR No.AAECR9929E</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Haridas Bhatt
Revenue by	Shri Ankush Kapoor CIT, DR
<b>Date of Hearing</b>	<b>02/07/2024</b>
<b>Date of Pronouncement</b>	<b>05/07/2024</b>

**आदेश / O R D E R**

**PER SUNIL KUMAR SINGH (J.M):**

1. This appeal has been preferred against the impugned order dated 19.02.2024 passed by learned CIT (A) in appeal no. CIT(A) 10, Mumbai/10441/2019-20 for the Assessment Year 2012-13, wherein learned CIT(A) has partly allowed assessee's appeal against the assessment order dated 29.12.2019 passed u/s. 143(3) r.w.s 147 of the income tax act 1961, hereinafter referred to as an 'Act'.

2. The brief facts leading to the appeal state that the appellant assessee was a limited company engaged in the business of ship operation and ceased to exist on 01.04.2011 by demerging part of its business in M/s. Valun Global Ltd (VGL) and with remaining business got amalgamated with M/s. Varun Resources Ltd (VRL). Appellant did not file its return of income for the A.Y. 2012-13 as it was not in existence due to aforesaid demerging/amalgamation. The notice u/s. 148 of the Act was issued. Subsequently assessing officer, gathered information from 26AS. Notice u/s. 142(1) of the act was issued by assessing officer asking certain informations from the assessee but for no avail. Assessing Officer, then proceeded on the basis of information available in ITS on ITD system and assessed income for A.Y. 2012-13 as Rs. 39,86,34,333/- vide assessment order dated 29.12.2019 passed u/s. 143(3) r.w.s 147 of the Act. Penalty proceedings u/s. 271(1)(C) of the Act for concealing the particulars of Income, penalty proceedings u/s. 271(1)(b) of the Act for non-compliance of notice u/s. 142(1) of the Act and penalty proceedings u/s. 271F of the Act for non filing of return of income, were also initiated. Aggrieved with the assessment order, assessee preferred an appeal before learned CIT(A), who deleted the addition made by assessing officer as not sustainable in view of section 33(5) of IBC 2016 as the assessee company was under liquidation process without adjudicating the case on merit.

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

*“1. Whether on facts and circumstances of the case and in law, the CIT(A) is justified in deleting the addition made u/s 147 rws 143(3) of the Income Tax Act by placing reliance on the decision of Hon'ble Bombay High Court in the case of Deutsche Bank vs. S P Kala(1990) 67 Com. case when the decision of the Hon'ble High Court is in respect of The Companies Act and the facts and circumstances of the assessee's case are distinguishable from the facts and circumstances of the case relied upon by the CIT(A)?*

*2. Whether on facts and circumstances of the case and in law, the CIT(A) is justified in deleting the addition made u/s 147 rws 143(3) of the Income tax Act without considering that the Moratorium under section 14 of the IBC Code is in respect of institution of suits or continuation of pending suits in a court of law or for recovery of the property of the corporate debtor therefore the Income Tax assessment proceeding for determination of total income is not covered by the Moratorium under section 14 of the IBC Code?*

*3. Whether on facts and circumstances of the case and in law the CIT(A) erred in deleting the addition made in the assessment order u/s143(3) r.w.s 147 of the Income-Tax Act because the assessee company is under liquidation proceedings, without considering the decision of Hon'ble Madras High Court in the case of M/s Dishnet Wireless Limited vs. Assistant Commissioner of Income Tax (OSD) in W.P. No. 34668 of 2018 wherein it is held that the Insolvency and Bankruptcy Code, 2016(IBC) cannot be pressed into service to dilute the rights of the Income Tax Department under the Income Tax Act and that the provisions of IBC cannot be misinterpreted to be inconsistent with any other law being at force?”*

4. In response to the notice issued by the tribunal, Learned Representative for the respondent/corporate debtor through liquidator represented and participated in the hearing of the case.

5. We have gone through the material 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?
7. At the very outset, it is pertinent to mention that the Assessing Officer and learned CIT(A) had knowledge of the fact that the respondent assessee/corporate debtor went into liquidation vide order dated 04.12.2018 passed u/s. 33 of the IBC 2016 by the National Company Law Tribunal (NCLT) Mumbai bench, which is an adjudicating authority under IBC. NCLT has appointed Mr. Sanjeev Maheshwari as official liquidator of the respondent corporate debtor.
8. 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. Revenue has referred Official Liquidator, High Court,...Vs Commissioner of Income Tax, West Bengal, AIR 1970 CAL349, in support thereof. 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,.....”*

9. Learned representative for the respondent/assessee has submitted that since liquidator was appointed on 4<sup>th</sup> 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.....”*

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 3<sup>rd</sup> 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 or adjudicatory authority as the case may be, within the statutory limitation period provided under the IBC for substantiating its claim under the waterfall mechanism related to the order of priority as provided u/s. 53 of IBC 2016. The first point is accordingly determined in positive except to the extent that the Income Tax Authorities are not barred from determining the tax

dues, which is “sine qua non” for staking its claim as creditor before the liquidator or the adjudicatory authority as the case may be, under the provisions of IBC.

14. Secondly, in view of the findings given at point no.1 referred as above, it is easily concluded that Learned CIT(A) has erred is not adjudicating the matter on merit, which was with respect to the determination of tax dues only, more so, when the liquidator, himself, was pursuing the matter before the first appellate authority. The second point is accordingly determined in positive.
15. In view of our findings given at point no. 1 & 2 above, the case deserves to be restored back to the file of learned CIT(A) for the disposal of the case on merits in accordance with law. It is clarified that we have not made any observations in respect of the merits of the case.
16. In the result, the appeal is allowed for statistical purposes. The impugned order dated 19.02.2024, is set aside. The case is restored back to the file of learned CIT(A) for passing an order afresh on merit in accordance with law after affording an opportunity of hearing to the appellant/corporate debtor through liquidator.

Order pronounced on 05.07.2024.

**Sd/-**  
**(OM PRAKASH KANT)**  
**ACCOUNTANT MEMBER**

Mumbai; Dated 05/07/2024  
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//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**