

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA no.486/Nag./2016
(Assessment Year : 2007-08)

ITA no.488/Nag./2016
(Assessment Year : 2009-10)

Dy. Commissioner of Income Tax
Central Circle-1(3), Nagpur

..... Appellant

v/s

M/s. Gigeo Construction Co. Pvt. Ltd.
Dhantoli, Nagpur 440 010
PAN - AAACG6861E

..... Respondent

ITA no.97/Nag./2017
(Assessment Year : 2003-04)

M/s. Gigeo Construction Co. Pvt. Ltd.
Dhantoli, Nagpur 440 010
PAN - AAACG6861E

..... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle-1(3), Nagpur

..... Respondent

Assessee by : Shri Manoj G. Moryani a/w
Shri Bhavesh Moryani
Revenue by : Shri Kailash C. Kanojiya

Date of Hearing - 20/08/2024

Date of Order - 09/09/2024

ORDER

PER K.M. ROY, A.M.

The Revenue has filed appeals for the assessment year 2007-08 and 2009-10, which arose out of the impugned orders of even date 21/06/2016, and the assessee has also filed its appeal for the assessment year 2003-04,

which arose out of the impugned order dated 28/12/2016. All these appeals have been passed by the learned CIT(A)-3, Nagpur.

2. For the assessment year 2007-08, the Revenue in its appeal has raised following grounds:-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance u/s 40(a)(ia) to Rs. 24,11,192/- as against Rs.3,87,04,378/- disallowed by the AO holding that disallowance u/s 40(a)(ia) can be made only of such expenses on which tax was not deducted at source and which were payable as on the last day of the year without appreciating the fact that the Gujarat High Court in the case of Sikandarkhan N.Tunvar (33 taxmann.com 133) and Calcutta High Court in the case of Crescent Exports Syndicate (33) taxmann.Com 250) have held that the provisions of sec. 40(a)(ia) would cover not only the amounts which are payable as on 31 March of a previous year but also the amounts which are payable at any time during the year

2. On the facts and in the circumstances of the case and in law, the Ld. CIT (Appeals) has erred in deleting the addition of ALV of the unsold flats under the head income from house property without taking into consideration the decision of the Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (354 ITR 180) wherein it has been held that the annual letting value of unsold flats in the closing stock/inventory should be taxed under the head income from house property.

3. Any other ground that may be urged at the time of hearing."

3. For the assessment year 2008-09, the Revenue in its appeal has raised following grounds:-

"1. On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance u/s 40A(3) of Rs.44,36,022/- without appreciating the fact that the provisions of sec 40A(3) are clear in as much as any payment made to a person above Rs.20,000/- in a day other than by account payee cheque or bank draft is not allowable as deduction subject to certain exemptions in Rule 6DD and financial difficulties and business expediency are not covered by the exemptions in Rule 6DD.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of inflated expenses of Rs.7,36,755/- without appreciating the fact that the director of the company in his statement had submitted that there was inflation of expenses to the tune of Rs.7,36,755/-

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of unaccounted income of

Rs.1,37,46,465/-without appreciating the fact that the assessee followed mercantile system of accounting as such the total contract receipts of Rs.3,32,67,046/- should have been offered as income during the year under consideration.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in the disallowance u/s 40(a)(ia) to Rs.1,31,802/- as against Rs.76.87.215/- disallowed by the AO holding that disallowance u/s 40(a)(ia) can be made only of such expenses on which tax was not deducted at source and which were payable as on the last day of the year without appreciating the fact that the Gujarat High Court in the case of Sikandarkhan N Tunvar (33 taxmann.com 133) and Calcutta High Court in the case of Crescent Exports Syndicate (33 taxmann.Com 250) have held that the provisions of sec. 40(a)(ia) would cover not only the amounts which are payable as on 31st March of a previous year but also the amounts which are payable at any time during the year.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT (Appeals) has erred in deleting the addition of ALV of the unsold flats under the head income from house property without taking into consideration the decision of the Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (354 ITR 180) wherein it has been held that the annual letting value of unsold flats in the closing stock / inventory should be taxed under the head income from house property.

6. Any other ground that may be urged at the time of hearing.”

2. Before us, during the course of hearing, while going through the material available on record filed by the learned Authorised Representatives appearing for the assessee, it is evident that the assessee company had gone under insolvency proceeding under Insolvency and Bankruptcy Code Act, 2016, and furnished a copy of the order dated 04/06/2024, passed by the National Company Law Tribunal ("NCLT"), Mumbai Bench-VI, a copy of which is placed on record vide Paper Book Page-7 to 27, whereby, as per order passed by the NCLT, pending proceedings before the Tribunal has been prohibited. The relevant part of the order dated 04/06/2024, passed by the NCLT is reproduced below:-

"ORDER

This application bearing C.P. (IB) No. 1180/MB/2022 filed under Section 7 of the Code by the Financial Creditor for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Gigeo Construction Company Private Limited, the Corporate Debtor, is admitted.

We further declare moratorium under Section 14 of the Code with consequential directions as mentioned below:-

I. We prohibit-

a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;"

3. During the course of hearing before us, the learned A.R. for the assessee also filed a copy of Form-A: Public Announcement, a copy of which is placed on record at Page-1 and 2 of the Paper Book and also filed newspaper cutting which is also placed on record at Page-3 to 6 of the Paper Book. The learned A.R. further relied on following judgments in support of his arguments which are placed on record:-

- i) *Murli Industries Ltd. v/s DCIT, ITA no.182 to 185/Nag./2022, order dated 01/01/2024 (ITAT-Nagpur-Virtual Hearing);*
- ii) *Murli Industries Ltd. v/s ACIT, W.P. no.2948/2021, judgment dated 09/12/2021 (Nagpur-HC);*
- iii) *Murli Industries Ltd. v/s ACIT & Ors, [2022] 441 ITR 008 (Bom.);*
- iv) *Ghanashyam Mishra And Sons Pvt. Ltd. v/s Edelweiss Asset Reconstruction Co. Ltd., Civil Appeal no.8129 of 2019, etc., judgment dated 13/04/2021 (SC);*
- v) *Vasan Health Care Pvt. Ltd. v/s ACIT, ITA no.260 to 266/Chny/2021, order dated 28/11/2022;*
- vi) *PCIT v/s Monnet Ispat And Energy Ltd., [2018] 169 DTR 262 (SC);*
- vii) *Alchemist Asset Reconstruction Co. Ltd. v/s Hotel Gaudavan Pvt. Ltd. & Ors., Civil Appeal no.16929 of 2017, judgment dated 23/10/2017 (Arising out of SLP (C) no.18195 OF 2017 (SC);*
- viii) *ACIT v/s Amrit Feeds Ltd., ITA no.2307/Kol./2016, etc., order dated 28/02/2023;*
- ix) *Pratibha Industries Ltd. v/s DCIT, [2022] TaxPub (DT) 6520 (Mum-Trib.); and*
- x) *DCIT v/s Global Softech Ltd. & Ors., [2022] 212 DTR 133 (Mum-Trib.).*

4. The learned Departmental Representative could not controvert this position and submitted that the assessee company has gone under Insolvency proceeding under Insolvency and Bankruptcy Code Act, 2016.

5. We have given a thoughtful consideration to the arguments made by the rival parties and perused the material available on record in the light of the provisions of Insolvency and Bankruptcy Code, 2016, and the judicial pronouncements of various Courts including that of the Hon'ble Supreme Court and Hon'ble Bombay High Court and other Jurisdictional Benches which strongly support the case of assessee. The NCLT has prohibited all the proceedings against the assessee before any of the Courts including this Tribunal and also judgments relied upon by the learned A.R. for the assessee which covers the case of the assessee respondent. Hence, in view of the judicial pronouncements, as relied upon by the learned A.R. appearing for the assessee, the appeal filed by the Revenue is liable to be dismissed.

6. In the result, appeals filed by the Revenue for the assessment year 2007-08 and 2009-10 are dismissed.

ITA No.486/Nag./2016
Assessee's Appeal – 2003-04

4. Following grounds have been raised by the assessee:–

"The order passed is illegal, invalid and bad in law.

2. The Commissioner of Income Tax (Appeals)-III, Nagpur erred in confirming penalty imposed U/s. 271(1)(c) is unjustified, unwarranted and excessive.

3. On the facts and in the circumstances of the case the Commissioner of Income Tax (Appeals)-III, Nagpur erred in confirming penalty without considering the contention of the assessee though assessee is not liable for

penalty U/s. 271(1)(c), imposition of penalty is unjustified, unwarranted and excessive.

4. On the facts and in the circumstances of the case the Commissioner of Income Tax (Appeals)-III, Nagpur erred in confirming penalty even though the concealed income determined as per CIT(A) order at Rs. 38,19,636/- and confirmed the penalty of Rs.33,00,000/- is unjustified, unwarranted and excessive.

5. On the facts and in the circumstances of the case the Commissioner of Income Tax (Appeals)-III, Nagpur erred in confirming penalty when the assessee has not hidden any income from the department, therefore penalty imposed is unjustified, unwarranted and excessive.

6. On the facts and in the circumstances of the case the Commissioner of Income Tax (Appeals)-III, Nagpur erred in confirming penalty when the addition made by assessing officer merely on account of disallowances, therefore the penalty order passed is unjustified, unwarranted and excessive.

7. The appellant seeks permission to add any other ground of appeal or amend or alter the aforesaid ground of appeal at the time of hearing of the appeal."

5. As we have already discussed above, the assessee company has gone under Insolvency proceeding under Insolvency and Bankruptcy Code Act 2016, and an order has been passed by the NCLT prohibiting the proceedings before the Tribunal.

6. We find that the issue before us for adjudication is covered by the judgment of Hon'ble Supreme Court vide judgment dated 10/08/2018, in PCIT v/s Monnet Ispat And Energy Ltd., [2018] 304 CTR 0233 (SC), wherein the Hon'ble Supreme Court held as under:-

"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.

We may also refer in this Connection to Dena Bank vs. Bhikhabhai Prabhudas Parekh and Co & Ors (200) 5 SSC 694 and its progeny, making it clearly that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.

We are of the view that the High Court of Delhi, is therefore, correct in law”

7. This issue is also covered by the decision rendered by the Co-ordinate Bench of the Tribunal, Mumbai “C” Bench, in Pratibha Industries Ltd. v/s DCIT, ITA no.1395 to 1399/Mum./2021, order dated 13/06/2022, wherein the Tribunal held as under:-

“Subject to section 52, when a liquidation order has been passed, no suit or other legal proceedings shall be instituted by or against the corporate debtor;

Therefore, we are of the considered opinion that no suit or other legal proceedings shall be initiated by or against the corporate debtor which is also applicable for pending proceedings and the proviso to section 33(5) also provides prior approval of the Adjudicating Authority to be obtained by the Official Liquidator.

Pertinently, it is also to be observed that in case of parallel proceedings under Income Tax Act 1961 and IBC, 2016, the IBC has an overriding effect over the provisions of the Income Tax Act which has been decided by Hon’ble Apex Court in Pr. CIT v. Monnet Ispat & Energy Ltd (2019) 107 taxmann.com 481 (SC) : 2018 TaxPub(DT) 6660 (SC) wherein the Hon’ble Apex Court had observed that as per section 238 of IBC, the IBC Code will override anything inconsistent contained in any other enactment, including the Income Tax Act. It is also trite to peruse section 178 of the Income Tax Act 1961 which has been amended for the purpose of preventing any conflict and provision of IBC Code which is reproduced as under

‘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 Income Tax Officer who is entitled to assess the income of the company*

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

(3) The liquidator –

- (a) shall not, without the leave of the Commissioner, part with any of the assets of the company or the properties in his hands until he has been notified by the Income Tax 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 Commissioner

(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 is 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 any things to the contrary contained in any other law for the time being in force (except the provisions of the Insolvency & Bankruptcy Code, 2016)'

8. Keeping in view the aforesaid judicial pronouncements, we hold that the appeal filed by the assessee is liable to be dismissed. We respectfully follow the directions, as contained in Para-4 of the order dated 28/11/2022, passed in Vasan Health Care Pvt. Ltd. (supra), wherein the Hon'ble J.M. is a party to that order, are reproduced below:-

"4. Under the given factual matrix, we see no reason to keep the appeals pending. Both sides concurred that the appeals may be dismissed with a liberty to seek revival of the same at appropriate he has stage considering the outcome of IBC proceedings. Accordingly, taking the same view as taken by Tribunal in aforesaid appeals, all the appeals

filed by the assessee stand dismissed with a liberty to the assessee / official liquidator / revenue to seek recall of the order when the occasions warrants."

9. In the result, appeal filed by the assessee for the A.Y. 2003-04 is dismissed.

10. To sum up, all the appeals are dismissed.

Order pronounced in the open Court on 09/09/2024

Sd/-
V. DURGA RAO
JUDICIAL MEMBER

Sd/-
K.M. ROY
ACCOUNTANT MEMBER

NAGPUR, DATED: 09/09/2024

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Nagpur; and*
- (5) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Sr. Private Secretary
ITAT, Nagpur