

**IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI**

**BEFORE MS PADMAVATHY S, AM &
SHRI SANDEEP SINGH KARHAIL, JM**

I.T.A. No.3052/Mum/2024
(Assessment Year: 2013-14)

I.T.A. No.3051/Mum/2024
(Assessment Year: 2015-16)

I.T.A. No.3050/Mum/2024
(Assessment Year: 2017-18)

ACIT-5(3(1)) Room No. 573, Aayakar Bhawan, K. K. Road, Mumbai-400020.	Vs.	M/s Varun Resources Limited. Laxmi Building, 6, Shoorji Vallabhdas Marg, MKumbai GPO, Mumbai-400001. PAN : AAECR9929E
Appellant)	:	Respondent)

Revenue/ Appellant by : Shri Ankush Kapoor, CIT-DR

Respondent /Assessee by : Shri Haridas Bhatt, AR

Date of Hearing : 29.08.2024

Date of Pronouncement : 03.09.2024

ORDER

Per Padmavathy S, AM:

These appeals by the Revenue are against the separate orders of the Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre (NFAC), Delhi [in short 'the CIT(A)'] all dated 02.04.2024 for Assessment Year (AY) 2013-14, 2015-16 & 2017-18.

2. The assessee is engaged in the business of ship operation and is the amalgamated (resulting) company subsequent to the merger and amalgamation M/s Varun Shipping Company Ltd. The case of the assessee was reopened and the assessment under section 147 r.w.s.144 of the Income Tax Act, 1961 (the Act) on 30.05.2023 for AY 2013-14, dated 17.03.2023 for AY 2017-18 & dated 25.05.2023 for AY 2015-16 making an addition towards unexplained income and undisclosed interest. The assessee filed further appeal before the CIT(A) contending that the assessee the Assessee company was under the IBC, and the same went into liquidation vide order on 4th December 2018 passed by the National Company Law Tribunal (NCLT). The assessee submitted that this fact was intimated to the AO and that the AO did not consider this fact while completing the assessment making the above additions. The CIT(A) deleted the additions by placing reliance on the decision of the Bombay High Court in the case of Deutsche Bank Vs. S.P. Kala (1990) 67. The relevant observations of the CIT(A) for AY 2017-18 is extracted below –

5.1.2 The submission of the appellant has been perused. It is undisputed fact that the appellant company is under liquidation and official liquidator has been appointed by Hon'ble NCLT in the case of the appellant.

5.1.3 It is seen in Form 35 the official liquidator Sh. Sanjeev Maheswary who is appointed by the NCLT has filed this appeal. Vide order 4 th December 2018, the Hon'ble Tribunal at Mumbai ordered the commencement of liquidation of Varun Resources Ltd under section 33 of Insolvency and Bankruptcy Code, 2016. The Hon'ble National Company Law Tribunal, Mumbai bench also appointed Sh. Sanjeev Maheswary as a official liquidator of the company.

5.1.4 The appellant in his submission has contended that the provisions of Section 279 of the Companies Act, 2013 are parimateria the provisions of Section 446 of the Companies Act, 1956 in so far as the commencement or continuation of any 'other legal proceedings', after appointment of official liquidator, are concerned. In this regard, attention is also drawn to the

observations of Hon'ble High Court of Bombay, in the case of Deutsche Bank v. S. P. Kala {(1990) 67 Com. Cases}, wherein it was held that –

“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-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. Subsection (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 proceedings by or against the company whether such suit or proceedings 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, It is further clear that jurisdiction to entertain or dispose of any suit or proceeding by or against the company is vested in the company court without any kind of restriction..... The expression “any suit or proceeding by or against the company” is wide enough to bring within its sweep any kind of suits”.

5.1.5 In view of the above and respectfully following judgments of the Hon'ble High Court of Bombay, it is 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. As the case is filed by the official liquidator on behalf of the company and the company was already under liquidation process under IBC Code, 2016, no proceedings can be instituted against the company. Therefore, the addition made against the appellant company is not sustainable in law in view of provisions of section 33(5) of IBC, 2016. Therefore, the addition made by AO is hereby deleted.

5.1.6. Accordingly, the first ground of appeal is allowed.

3. The CIT(A) has made identical observations for AY 2013-14 and AY 2015-16 while deleting the additions made by the AO. The Revenue is in appeal against the order of the CIT(A).

4. The ld. AR submitted that the liquidation order is already passed in assessee's case and drew our attention to the Affidavit filed by the Official Liquidator NCLT where the "List of stake holder" as of 22.01.2024 was submitted. The ld AR submitted that "Other Statutory Dues" as per the said list includes only TDS demands payable to the Department and not any demand arising from assessment proceedings. Further the ld AR submitted that the CIT(A) has correctly deleted the addition made by the AO stating that no proceeding can happen once the liquidation process is initiated and the official liquidator is appointed.

5. The ld. DR on the other hand submitted that the co-ordinate bench in assessee's own case for AY 2012-13 (ITA No.2012/Mum/2024 dated 05.07.2024) has remanded the appeal back to the CIT(A) for considering the appeal on merits and prayed for a similar direction for the years under consideration also.

6. We heard the parties and perused the material on record. We notice that an application for an order of liquidation under section 33(1) of the IBC was moved before the NCLT. It is further noticed that the NCLT vide order dated 04.12.2018 allowed the application by passing the order of liquidation of the assessee company and appointed the Official Liquidator to complete the liquidation process. It is relevant to note the following observations in the order of liquidation with regard to any litigation against the assessee –

“(d) Since this liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor without prior approval of this Adjudicating Authority save and except as mentioned in sub-section 6 of Section 33 of the IBC”.

7. We also notice that the official liquidator has filed an affidavit before the NCLT containing the list of stake holders as on 22.01.2024 (page 12 and 30 of paper book) which is reproduced below:

Form C,D,E,F,G Claim Status up to 22-01-2024								
Sr. No.	Form No.	Particulars	Total No. of Claims Received	Total No. of Claims as per books	No of Claims Accepted	No of Claim rejected	Total Amount Claimed	Total Amount Admitted
1	Form C	Operational	4	317	321	-	2,15,96,20,495	2,15,96,20,495
2	Form D	Financial	14	NA	13	1	36,22,74,32,362	34,87,96,61,779
3	Form E	Employees	46	NA	44	2	8,84,17,087	8,72,13,429
4	Form F	AR of Wrokmn	1	NA	1	-	34,51,34,000	34,51,34,000
5	Form G	Others (Statutory)	4	NA	4	-	28,71,01,950	28,71,01,950
	Total		69	317	383	3	39,10,77,05,894	37,75,87,31,653

Annexure- V: Claims by any Other Stakeholder

Sr.No.	Name	Nature of Dues	Amount	Claim Amt.	Category
	Claims received after submission of stakeholders list				
1	Office of the Assistant Commissioner of CGST, Division-V, Mumbai South Commissionerate	Statutory Claims		1,31,79,740	53(1) (e) (i)
2	Office of the Income Tax Officer (TDS)-(2)(3)(3)	Varun Shipping Co. (FY 07-08 & 14-15)	25,30,09,178		
		VGIL(12-13 & 14-15)	1,56,53,219		
		Varun Resources (FY 15-16, 16-17 & 17-18)	9,50,500	26,96,12,897	53(1) (e) (i)
3	Office of State Tax Officer, GST, Mumbai, Maharashtra	RCM		9,67,284	53(1) (e) (i)
4	Assistant/Commissioner of Customs, Custom House, Kakinada, Andhra Pradesh	Interest	33,42,029	33,42,029	53(1) (e) (i)
	Total			28,71,01,950	

Note: *Apart from the claims mentioned above, no other claims have been received from the operational creditors/ employees and other stakeholders (if any) of the Corporate Debtor. Further, necessary modification shall be done in the above-mentioned list of stakeholders in case of any fresh/ modified claim received from any stakeholder, subject to approval of NCLT or otherwise.*

8. From the combined perusal of the above facts, it is clear that the demand pertaining to income tax is only with respect to the TDS and that the Department has not raised any claim against the assessee with regard to the assessment proceedings. The coordinate bench in assessee's own case for AY 2012-13 (supra) has held that -

“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.

9. From the above observations of the Tribunal it is clear that the Income Tax Department can raise the claim towards any tax dues of the assessee only through official liquidator. The CIT(A) has decided the appeal in favour of the assessee vide orders dated 02.04.2024 and therefore the tax demand as per AO's orders were very much pending as 22.01.2024. However we notice that the said demand is not part of the list of stakeholders as of 22.01.2024 filed by the official liquidator before the NCLT. In other words, the tax demand arising from the AO's orders have not been claimed by the revenue through official liquidator as 22.01.2024 and

therefore the same cannot be recovered from the assessee. Therefore, in our considered view, the appeals filed by the Revenue for AYs 2013-14, 2015-16 & 2017-18 have become infructuous since the revenue cannot raise any demand against the assessee whose liabilities as of 22.01.2024 are frozen and does not include any tax demand from assessment proceedings. Accordingly the appeals filed by the revenue are dismissed.

10. With regard to the submission that the Co-ordinate Bench has remanded the issue back to the CIT(A) in assessee's own case for AY 2012-13, we notice from the perusal of the order of the Tribunal that the order of liquidation and the affidavit filed by the liquidator before the NCLT with the list of stakeholders as of 22.01.2024 have not been produced before of the Tribunal and the Id AR in all fairness admitted the said fact. However during course of hearing of current appeals, Id AR submitted the copy of liquidation order and the affidavit of the liquidator filed before the NCLT before us. Therefore our decision with regard to issues contended for the years under consideration are based on materials submitted before us and accordingly distinguishable.

11. In the result, the appeal of the Revenue for AY 2013-14, 2015-16 & 2017-18 are dismissed.

Order pronounced in the open court on 03-09-2024.

Sd/-
(SANDEEP SINGH KARHAIL)
Judicial Member

**SK, Sr. PS*

Sd/-
(PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File

5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai