

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No.301

IA/678(AHM)2022

in

CP(IB) 149 of 2017

Order under Section 35(1)(n) r.w 60(5) IBC r.w Rule 11 of NCLT Rules, 2016

IN THE MATTER OF:

Sunil Kumar Agarwal Liquidator for Varia Emgineering
Works Pvt

.....Applicant

Ltd

.....Respondent

V/s

Chief Commissioner of Income Tax (TDS), Ahmedabad

Order delivered on 11/12/2023

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

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DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

CHITRA HANKARE
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD (COURT - II)

IA No. 678 of 2022

IN

CP(IB) No. 149 / NCLT / AHM / 2017

(Filed under Section 35(1)(n) r/w 60(5)(c) of the Insolvency &
Bankruptcy Code, 2016 r.w Rule 11 of the NCLT Rules, 2016)

IN THE MATTER BETWEEN

Sunil Kumar Agarwal

Liquidator of

Varia Engineering Works Pvt. Ltd.

... Applicant

Vs.

Chief Commissioner of Income Tax (TDS),

Ahmedabad

... Respondent

Order pronounced on 11.12.2023

Coram:

MRS. CHITRA HANKARE

HON'BLE MEMBER (JUDICIAL)

MR. VELAMUR G VENKATA CHALAPATHY

HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

Sunil Kumar Agarwal

Liquidator of

Varia Engineering Works Pvt. Ltd.

Reg. No. IBBI/IPA-001/IP-P01390/2018-19/12178

Having Office At:

Tower 6/603, Devnandan Heights,

Near Podar School, New CG Road,

Chandkheda, Ahmedabad-382424

... Applicant

Versus

Chief Commissioner of Income Tax (TDS),

Ahmedabad

Having Address At:

Navjeevean Trust Building,

B/h Gujarat Vidhyapith,

Ashram Road, Ahmedabad-380014

... Respondent

Present:

For the Applicant : Mr., Vishal Dave, Adv. a.w. Ms. Pragati
Tiwari, Adv. Mr. Nandish Chudgar, Adv., Mr.
Aravindakshan V. Nair, Adv.

For the Respondent : Mr. Maithili Mehta, Adv.

JUDGEMENT

1. This is an application filed under Section 35(1)(n) read with Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “IBC”) read with Rule 11 of the NCLT Rules for refund of amount of TDS deducted by the Income Tax Authorities.

Facts of the case:

2. Bank of Baroda filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiation of Resolution Process against Varia Engineering Works Private Limited. In application bearing CP(IB) No.149 of 2017, CIRP

was initiated by an order dated 21.12.2017. In pursuant to CIRP process the order for liquidation of company was passed on 22.07.2019 by appointing applicant as a liquidator. Accordingly, the applicant sold assets of Corporate Debtor by conducting various e-auctions. Sale Certificates were also issued to successful bidders. The applicant further stated that multiple amounts of TDS to the extent of total amount of Rs.28,92,101/- were deducted as per provisions of Income Tax Act by the successful purchasers. The applicant further submitted that the provisions of Section 194-IA of Income Tax are inconsistent with provision of Section 53 (1)(e) of the IBC.

3. The applicant demanded access to Income Tax Portal of Corporate Debtor but Deputy Commissioner of Income Tax did not grant access to it and call him in office. During the liquidation process, the liquidator is only bound to prepare receipts of payments and cannot file a return of Corporate Debtor. In such a case, TDS would remain unclaimed in the account of Corporate Debtor. Hence, prayed for directing Income Tax Department to credit the amount of

Rs.28,92,101 deducted as TDS into the account of Corporate Debtor.

Reply:

4. The Income Tax Department stated that Section 194-IA of Income Tax Act does not bring within its purview any rising demand which is to be collected by the department including tax deducted at source. The provision is in the nature of prepaid tax. It is duty of purchaser to credit the said amount of TSD before the department. Liquidation proceedings against the Corporate Debtor does not exempt Corporate Debtor in filing its return nor does it exempt deduction and payment of TDS under Section 194-IA of the IT Act in respect of sale of immovable property. If they are exempted from TDS it will tantamount to amending provisions of IT Act. According to the Income Tax Department the Income Tax Act is the fiscal provision where TDS is required to be deducted even in cases of sale of immovable property for consideration more than 50 lakhs whereas Section 53 of the IBC determines the priority of payment to different stake holders in case of distribution of

sale proceeds of assets of the Corporate Debtor. It has further stated that Sec. 194-IA of the IT Act is not repugnant to Section 54 of the IBC as the intent and purpose of both enactments are different. There is no application pending seeking refund of said amount. As per the circular dated 27.04.2021 after meeting existing tax liability of the deductor the balance amount will be refunded to the deductors. Hence, prayed for dismissal of the application.

5. We have heard the Ld. Counsel for both the parties and perused the material available on record. The applicant relied upon the cases of:
- i. Om Prakash Agarwal, Liquidator of S. Kumars Natinowide Limited vs. Chief Commissioner of Income Tax (TDS) [Company Appeal (AT) (Insolvency) No.624 of 2020];
 - ii. LML Limited (under Liquidation) vs. Office of Commissioner of Income Tax, Mumbai [C.A. No. 389 of 2019 in CP(IB) No. 55/ALD/2017]; and

- iii. Leo Edibles & Fats Limited vs. The Tax Recovery Officer (Central), Income Tax Department, Hyderabad and Ors.

Reasons:

6. After appointment of liquidator he has sold the assets of Corporate Debtor being Land and Building (Bawla), Office (Titanium) and Factory (Vatva). For the sale of these three assets TDS of Rs. 22,50,750/- to 2,29,582/- and 4,11,750/- were deducted by the successful purchasers towards TDS, a capital gain of Corporate Debtor. It is 1% of the sale consideration as per Section 194-IA of the Income Tax Act. The liquidator further submitted that the provisions of Section 53(1)(e) of the IBC assigned 5th position in the order of priority to government dues. In the light of the provisions of Section 178 (3) and (4) of the IT Act, the tax department is treated as secured creditor. Thus, Section 53 (1)(e) of the IBC and Section 178 of the IT Act for government dues priority is different. Section 194-IA of the IT Act provides that where the consideration for transfer of immovable property is more than 50 lakhs, 1% of the sale consideration is to be

deducted towards Income Tax by the transferee. While Section 199 of Income Tax Act provides that any deduction made in accordance with Section 194-IA of the Act and paid to the Central Government shall be treated as payment of tax on behalf of the person from whose income deduction was made, or the owner of the security or of the depositor or of the owner of the properties. If we go to Section 45 of the Income Tax Act, it provided for any profits or gains arising from the transfer of capital asset effected in the previous years shall save as otherwise provided in the Section be chargeable to Income Tax under the head of capital gain and shall be deemed to be Income Tax of the previous years in which the transfer took place. Thus, the TDS under Section 194-IA of the Income Tax is nothing but advanced capital gain tax recovered through the purchaser.

7. With respect to recovery of government dues from the company in liquidation there is inconsistency between Section 194-IA of Income Tax Act and Section 53 of the IBC. By virtue of Section 238 of the IBC Section 53(1)(e) shall have overriding effect on the provision of Section 194-IA

(Section 53 of the IBC has non-obstante clause while Section 194 of Income Tax Act has no non-obstante clause). The IBC does not provide for filing of any Income Tax Return by the liquidator. Therefore, the liquidator cannot claim refund of TDS deposited by the purchaser. The Income Tax deducted and paid by the purchaser amounts to recovery of tax from Corporate Debtor on priority with other creditors as mentioned in Section 53 of the IBC, which is against the object and provisions of IBC. The Hon'ble NCLAT observation in case of Om Prakash Agarwal, Liquidator of S. Kumars Natinowide Limited vs. Chief Commissioner of Income Tax (TDS) [Company Appeal (AT) (Insolvency) No.624 of 2020] is squarely applicable to the present application.

8. In view of above provisions and ruling cited the Income Tax department is liable to return the amount of Rs.28,92,101/- deducted as TDS into the account of Corporate Debtor.
9. Hence we are passing the following orders:

ORDER

Application is allowed.

The Income Tax Department is directed to return the amount of Rs.28,92,101/- into the account of Corporate Debtor within one month from the date of the order.

IA No. 678 of 2022 in CP(IB) No. 149 of 2017 is disposed of.

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DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

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CHITRA HANKARE
MEMBER (JUDICIAL)

