IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 2948 OF 2021

Murli Industries Limited.,
Through its Dy. Ex. Director
Block No.802, A Wing, 9th Floor,
Shreeram Shyam Towers,
S.V. Patel Marg, Kingsway,
Civil Lines, Nagpur – 440 001 .... PETITIONER

// VERSUS //

1. Assistant Commissioner of Income Tax
MECL Building, Dr. Baba Saheb Ambedkar
Bhavan, Seminary Hills, Nagpur.
Maharashtra – 440 006

2. Principal Commissioner of Income Tax -1
Nagpur, Aaykar Bhavan, Civil Lines,
Maharashtra – 440 001

3. Union of India
Through the Secretary, Department of
Finance, Ministry of Finance, Government
of India, North Block,
New Delhi – 110 001. .... RESPONDENTS

WITH

WRIT PETITION NO. 2965 OF 2021

Murli Industries Limited.,
Through its Deputy Director (Exc.) Tax,
Block No.802, A Wing, 9th Floor,
Shreeram Shyam Towers,
S.V. Patel Marg, Kingsway,
Civil Lines, Nagpur – 440 001 .... PETITIONER

// VERSUS //

1. Assistant Commissioner of Income Tax
MECL Building, Dr. Baba Saheb Ambedkar
Bhavan, Seminary Hills, Nagpur.
Maharashtra – 440 006

2. Additional/Joint Commissioner of Income Tax Range-1,
Nagpur Aaykar Bhavan, Civil Lines,
Maharashtra – 440 001

3. Union of India
Through the Secretary, Department of
Finance, Ministry of Finance, Government
of India, North Block,
New Delhi – 110 001. .... RESPONDENTS

Mr. Niraj Sheth, Advocate a/w Mr. A.N. Agrawal, Advocate for petitioner in both writ petitions.
Mr. S. N. Bhattad, Advocate a/w Mr. A.J. Bhoot, Advocate for respondent Nos.1 & 2 in both writ petitions.

CORAM : SUNIL B. SHUKRE, AND
ANIL L. PANSARE, JJ.

Date of Reserved : 09.12.2021

Date of Pronouncement : 23.12.2021

JUDGMENT: [PER: Anil L. Pansare, J.]

Rule. Rule made returnable forthwith. The matter is heard finally by the consent of the learned counsel for the parties.

2. Heard Shri Sheth, learned counsel for the Petitioner and Shri S.N. Bhattad, learned counsel for the Respondent Nos. 1 and 2.

3. The question involved in the Petition is;

“Whether the Authorities of the Income Tax Department can issue notice under Section 148 of the Income Tax Act, 1961 to a Corporate Debtor, calling upon it to submit a return in the prescribed form for the assessment year falling prior to the date of approval of Resolution Plan under Insolvency and Bankruptcy Code,

2016 on the ground that Respondent No. 1 – Assessing Officer had a reason to believe that the income chargeable to tax of the Corporate Debtor has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961?"

4. There are two connected Petitions herein. The impugned notice in WP No. 2948 of 2021 is dated 25.03.2021 and in WP No. 2965 is dated 24.03.2021. For the sake of convenience, the facts of Writ petition No. 2948 of 2021 are being considered. The Petitioner - Murli Industries Ltd., is a company registered under the Companies Act, 1956, and is engaged in the business of manufacture and sale of cement. According to the Petitioner, the Petitioner – company had filed its return of income for the assessment year 2014 – 15 on 29.09.2014 declaring a loss of ₹ 2,80,30,74,365/-. The Petitioner's case was selected for scrutiny by the Income Tax Authorities and an order to that effect was passed on 27.12.2016 under Section 143(3) read with Section 144 of the Income Tax Act, 1961 (hereinafter referred to as "**the Act**"). Respondent No. 1 is the Assessing Officer of the Petitioner who has issued the impugned notice. Respondent No. 2 is the Principal Commissioner of Income Tax, who has the administration jurisdiction over the cases of the Petitioner and who has allegedly

granted approval for issuance of impugned notice. Respondent No. 3 is the Union of India and is the employer of Respondent Nos. 1 & 2. The Respondent No. 1 – Assessing Officer has issued the notice dated 25.03.2021 under Section 148 of the Act, seeking to reopen the concluded assessment of the Petitioner company for the assessment year 2014 – 15. The Petitioner has challenged the legality and validity of the said notice mainly on the ground that it is contrary to the decision of the Hon'ble Supreme Court of India in the case of ***Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and others*** reported *in 2021(9) SCC 657*.

5. In the present case, one M/s. Edelweiss Asset Reconstruction Company Limited filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "**IBC**") to initiate Corporate Insolvency Resolution Process (hereinafter referred to as "**CIRP Proceedings**") against the Petitioner. The said Application was admitted by the National Company Law Tribunal, Mumbai (hereinafter referred to as "**NCLT**") vide order dated 05.04.2017 and on 11.04.2017, an Interim Resolution Professional (hereinafter referred to as "**IRP**") was appointed by the NCLT. The IRP was later appointed as the

Resolution Professional (hereinafter referred to as "**RP'**) of the Petitioner company. The RP made a public announcement in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, calling upon the creditors to submit a proof of their claim. In response, the Deputy Commissioner of Income Tax (TDS), Circle – 1, Nagpur, (hereinafter referred to as "**DCIT-TDS**") submitted a claim for Rs. 50,23,770/-. According to the Petitioner, this was the only claim received from the Respondents – Income Tax Department in response to the public announcement. The Respondents did not raise any other claim.

6. Dalmiya Cement (Bharat) Limited submitted a Resolution Plan on 28.12.2017. The said plan was approved subject to certain modifications by the NCLT vide order dated 03.06.2019 and 22.07.2019. The Resolution Plan and the orders of the NCLTwere upheld by National Company Law Appellate Tribunal, New Delhi (hereinafter referred to as "**NCLAT**") by an order dated 24.01.2020. The Resolution Plan was made effective from 25.08.2020.

7. In this background, learned counsel for the Petitioner contends that the Resolution Plan having been approved by the Adjudicating Authority i.e., the NCLT under IBC and the effective date for making the resolution Plan operational having been notified as on 25.08.2020, the Respondents – Income Tax Department could not have issued the impugned notice dated 25.03.2021 i.e., subsequent to the approval of the Resolution Plan. The contentions are based on the proposition that the claims which were not a part of the Resolution Plan are not maintainable against the Corporate Debtor, nor can any claim be initiated thereafter and hence, the Respondents are not entitled to initiate any proceedings for recovery of any dues from the Petitioner (Corporate Debtor).

8. There is no dispute that the claim raised through the impugned notice was not a part of the Resolution Plan. However, Shri Bhattad, learned counsel for the Respondent Nos. 1 and 2, has come up with a defense that the claim raised through the impugned notice could not be a part of the Resolution Plan inasmuch as the claim was not crystallized at that time. According to him, the notice has been issued under Section 148 of the Act on the ground that the income chargeable to tax for the assessment year 2014-15 has escaped assessment and therefore, the Petitioner has been called

upon to submit its return under the provisions of the Income Tax Act, 1961. The claim itself has been disclosed subsequent to the approval of the Resolution Plan and therefore, it could not have been raised before the Resolution Professional under the CIRP proceedings. Thus, according to Mr. Bhattad, such statutory claim is maintainable even after the approval of the Resolution Plan. In fact, he has raised a preliminary objection of maintainability of the Petition by contending that once notice under Section 148 is issued, a proper course of action for the noticee is to file its returns and if he so desires, then to seek reasons for issuing notice. After which, the Respondent No. 1 – Assessing Officer is bound to furnish reasons as sought by the noticee. On receipt of such reasons, the noticee is entitled to file objections for issuance of notice. After the objections are filed, Respondent No. 1 – Assessing Officer is bound to dispose of the same by passing a speaking order. The aforesaid argument has been made in view of the law laid down by the Hon'ble Supreme Court in the case of ***GKN Driveshafts (India) Ltd. Vs. Income-Tax Officer***, reported ***in 2002 (125) Taxman 963 SC***. Accordingly, it is argued by the learned counsel for the Respondent Nos. 1 and 2 that the alternate and only remedy for the Petitioner is to seek reasons for issuance of notice from the Respondent No. 1 – Assessing Officer and thereafter, to file objections.

9. We are unable to accede to the submissions made by Mr. Bhattad, learned counsel for Respondent Nos. 1 and 2, raising preliminary objections, the reasons for which will follow in the later part of the judgment.

10. Coming back to the core issue as to whether the impugned notice could have been issued by the Respondent No. 1 – Assessing Officer subsequent to approval of the Resolution Plan, the answer is traceable in *Ghanashyam Mishra's case (supra)*. The Hon'ble Supreme Court while dealing with the batch of matters relating to CIRP proceedings, framed the following important questions.

> "*2.1. (i) As to whether any creditor including the Central Government, State Government or any local authority is bound by the resolution plan once it is approved by an adjudicating authority under sub-section (1) of Section 31 of the Insolvency and Bankruptcy Code, 2016.*
>
> *2.2. (ii) As to whether the amendment to Section 31 by Section 7 of Act 26 of 2019 is clarificatory/declaratory or substantive in nature?*
>
> *2.3 (iii) As to whether after approval of resolution plan by the adjudicating authority a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of*

the dues from the corporate debtor, which are not a part of the resolution plan approved by the adjudicating authority?"

11. While settling the answer to the aforesaid questions, the Hon'ble Supreme Court has elaborately discussed series of its judgments. We will cite only those findings that are helpful in answering the question involved in the present Petition.

12. As held by the Hon'ble Supreme Court, one of the dominant objects of the IBC is to see that an attempt has to be made to revive the Corporate Debtor and make it a going concern. For that a Resolution Applicant has to prepare a Resolution Plan on the basis of the Information Memorandum containing various details that have been gathered by Resolution Professional after having received various claims in response to the statutorily mandated public notice. The resolution plan is approved by Committee of Creditors(hereinafter referred to as "COC"). The Resolution Plan is then required to be approved by the Adjudicating Authority i.e., NCLT and once it is approved, the management is handed over under the plan to the Successful Resolution Applicant so that the Corporate Debtor is able to pay back its debt and get back on its feet.

13. The Adjudicating Authority conducts an enquiry in terms of Section 30(2) of IBC on the point as to whether the Resolution Plan provides, *inter alia*, the repayment of the debts of Operational Creditors in the prescribed manner and that the plan does not contravene any provisions of the law for the time being in force. In that sense, once the Resolution Plan is approved by the Adjudicating Authority and once it attains finality, it could be presumed that the plan does not contravene any of the provisions of law for the time being in force including provisions of the Income Tax Act, 1961.

14. The Hon'ble Supreme Court, in context with raising subsequent claims has held that a Successful Resolution Applicant cannot suddenly be faced with undecided claims after the Resolution Plan is submitted by him, as it would lead to uncertainty about the amount payable by a Prospective Resolution Applicant who would successfully take over the business of the Corporate Debtor. It is accordingly held by the Hon'ble Supreme Court that once the plan is approved by Adjudicating Authority, it becomes binding on the Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders including statutory bodies involved in the Resolution Plan. It is further held that the legislative

intent behind this is to freeze all the claims so that the Resolution Applicant starts on a clean slate and is not flung with any surprise claims.

15. On the point of claims by the Central Government, State Government or other local authorities, the important rulings find place in the following paragraphs:

> "*94. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. We therefore hold, that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.*
>
> *98. It is a cardinal principle of law, that a statute has to be read as a whole. Harmonious construction of sub section (10) of Section 3 of the I&B Code read with sub sections (20) and (21) of Section 5 thereof would reveal, that even a claim in respect 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 would come within the ambit of 'operational debt'. The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of 'operational creditor' as defined under subsection (20) of Section 5 of the I&B Code. Consequently, a person to whom*

a debt is owed would be covered by the definition of 'creditor' as defined under subsection (10) of Section 3 of the I&B Code. As such, even without the 2019 amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term 'creditor' and in any case, by the term 'other stakeholders' as provided in sub section (1) of Section 31 of the I&B Code.

99. The Division Bench of the Rajasthan High Court in D.B. Civil Writ Petition No.9480 of 2019 in the case of Ultra Tech Nathdwara Cement Ltd. vs. Union of India & Ors., by judgment and order dated 7.4.2020 has taken a view, that the demand notices, issued by the Central Goods and Service Tax Department, for a period prior to the date on which NCLT has granted its approval to the resolution plan, are not permissible in law. While doing so, the Rajasthan High Court has relied on the judgment of this Court in the case of Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra).

100. The Calcutta High Court in the case of Akshay Jhunjhunwala & Anr. vs. Union of India through the Ministry of Corporate Affairs & Ors. 35 has also taken a view, that the claim of operational creditor will also include a claim of a statutory authority on account of money receivable pursuant to an imposition by a statute. We are in agreement with the views taken by these Courts."

(Emphasis supplied)

16. Ultimately, the Hon'ble Supreme Court has answered the questions framed in the following manner.

> "*102.1. That once a resolution plan is duly approved by the Adjudicating Authority under sub section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;*
>
> *102.2. 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;*
>
> *102.3. Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.*"

17. A careful reading of the above findings, would show that even a claim in respect of dues arising under any law for the time being in force, including claims under the Income Tax Act, 1961 which is payable to the Central Government or the State Government, would come within the ambit of Operational Creditors. Further, the claim of operational creditors will also include a claim of statutory authority like Income Tax Department on account of money receivable pursuant to an imposition by a statute. The Hon'ble Supreme Court has also upheld the view taken by the Rajasthan High Court holding that the demand notices issued by the Central Goods and Service Tax Department, for a period prior

to the date on which NCLT has granted its approval to the Resolution Plan, are not permissible in law. The concluding remarks of the Hon'ble Apex Court are that, on the date of approval of the Resolution Plan by the Adjudicating Authority, all such claims which are not a part of the Resolution Plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not a part of the Resolution Plan. The expression 'that no person will be entitled to initiate any proceedings' would include the proceedings in the nature of notice issued under Section 148 of the Income Tax Act, 1961.

18. As we understand from the above rulings, the aim and object of IBC is to revive the Corporate Debtor by putting quietus to the claims against it. Providing certainty to the Resolution Applicant of "no" claims in future against the Corporate Debtor appears to be the essence of the Resolution Plan. Such inference could further be substantiated on the ground that the provisions of the IBC (Section 238 of IBC) have an overriding effect, if there is any inconsistency with any of the provisions of the law for the time being in force, including the Income Tax Act, 1961. The Hon'ble Apex Court has also held that section 31 of the amended Act will have retrospective effect.

19. Having said so, it is now crystallized that the claims which were not a part of the Resolution Plan including recoverable statutory dues, shall stand extinguished upon approval of the Resolution Plan.

20. In the present case, the Income Tax Department had, on 07.06.2017, raised claims to the tune of Rs. 50,23,770/-. The said claim was fully and finally settled at ₹ 4,00,000/- in terms of the Resolution Plan. The impugned notice does not disclose any reason as to why the claim raised through the impugned notice has not been included in the aforesaid claim before RP. Of course, there could be a case where the statutory authority was precluded from raising claim in the CIRP proceedings because of fault attributable to the Corporate Debtor, viz; where the assessment of previous year has been escaped because of suppression of fact by the assessee and that the suppressed fact has been noticed subsequently by the Assessing Officer leading to issuance of notice under Section 148 of the Act subsequent to approval of the Resolution Plan. However, impugned notice being silent on this point, this Court is unable to gather the reasons for not raising the claim earlier before the Resolution Professional or the Adjudicating Authority.

21. We may add here that the Explanation to Section 147 of the Income Tax Act, 1961 creates a deeming fiction of cases where the income chargeable to tax has escaped assessment. Clause (a) deals with a situation where no return of income has been furnished by the assessee although his total income exceeded maximum amount which is not chargeable to income tax. Clause (b) deals with a situation where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowances or relief in the return. There are other Clauses also that would indicate the reasons for escaping the assessment. The point is, once the public announcement is made under the IBC by the Resolution Professional calling upon all concerned, including the statutory bodies, to raise claim, it would be expected from all the stakeholders to diligently raise their claim. The Income Tax authorities in that sense, ought to have been diligent to verify the previous years' assessment of the Corporate Debtor as permissible under the law and to raise the claim in the prescribed form within time before the Resolution Professional. In the present case, the Income Tax Authorities failed to do so and therefore, the claim stood extinguished.

22. As stated earlier, there could be a contingency where statuary claim is raised after the approval of the Resolution Plan, owing to receipt of information of the Corporate Debtor having suppressed certain facts while filing returns of the previous years, which then could not be a part of the Resolution Plan. To counter such a situation, the statutory authorities will have to explore the possibility of raising such claims before the Resolution Professional or Adjudicating Authority, as the case may be, by requesting to make certain provisions for payment of statutory claims in the Resolution Plan. Whether to accept such claim is a matter that should be left to the COC, the Resolution Professional or the Adjudicating Authority. However, in absence of any such claim having been made and dealt with by the Resolution Professional and in absence of any provision to settle such claim in the Resolution Plan, such claim could not be raised subsequently. In that sense, the Petitioner is correct in contending that the impugned notice could not have been issued by the Assessing Officer.

23. The Income Tax Authority or the Legislature may also explore possibility to make necessary provisions to overcome such situation by lending circular under Rules or by way of an Amendment in the Income Tax Act, 1961, in line with the section

44(6) of the Maharashtra Value Added Tax, Act, 2002, which provides as under;

> "*44. Special provision regarding liability to pay tax in certain cases:*
>
> *(6) Subject to the provisions of the Companies Act, 2013, where any tax or other amount recoverable under this Act from a private company, whether existing or wound up or under liquidation, for any period, cannot be recovered, for any reason whatsoever, then, every person who was a director of the private company during such period shall be jointly and severally liable for the payment of such tax or other amount unless, he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the said company.*"

We did not come across any such provision under the Income Tax Act, 1961 nor did the parties before us informed of its existence.

24. We, accordingly, record our answer in the negative to the question framed.

25. So far as the preliminary objection of maintainability of the petition is concerned, the law is well settled, which also is reflected in ***Ghanashyam Mishra's case*** (supra). In paragraph 137 of the Hon'ble Supreme Court's judgment, it has been held that the *alternate remedy would not operate as a bar for invoking jurisdiction under Article 226 of the Constitution of India in at least three contingencies, namely,*

> *(1) where the writ petition has been filed for the enforcement of any of the Fundamental Rights;*

(2) where there has been a violation of the principle of natural justice; and
(3) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

26. We find that the impugned notice falls under category – 3 above. Accordingly, the preliminary objection is rejected.

27. We hold that both the Petitions are maintainable. Both the Petitions are allowed. The impugned notices dated 25.03.2021 and 24.03.2021 are hereby quashed and set aside.

28. Rule is made absolute in the above terms. No costs.

JUDGE **JUDGE**

Prity