



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (LODG.) NO. 18790 OF 2024**

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Pr. Commissioner of Income-tax-6,
Mumbai

.. Petitioner

Versus

1. National Company Law Tribunal, Mumbai
[Through the Registrar]

2. Swiber Offshore (India) Pvt. Ltd.
[PAN : AALCS0628Q]

.. Respondents

Mr. Akhileshwar Sharma, for Petitioner.

Mr. Amir Arsiwalla, a/w. Mr. Abdullah Qureshi and Ms. Malvika Sachin i/b India Law LLP, for Respondent No. 2.

**CORAM: B. P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.**

Date : October 25, 2024

P. C.

1. The present petition is filed by the Principal Commissioner of Income-tax-6, Mumbai impugning the Order dated 22nd February, 2023 passed by the National Company Law Tribunal, Mumbai (“**NCLT**”) in M.A. No. 884 of 2018 in C.P./IB/ 51/MB/2017, (Rajeev Mannadiar, Liquidator Vs. Deputy Commissioner of Income Tax, in the matter between M/s. Global Marine

Supply Co., Petitioner/Operational Creditor Vs. Swiber Offshore (India) Pvt. Ltd., Corporate Debtor).

2. The operative part of the impugned order is reproduced below:

(a) The Assessment Order and Penalty Order dated 26.12.2017 and 27.06.2018, respectively, passed by the Respondents, are set aside as these have been passed during the moratorium allowed under the IBC.

(b) This Bench also directs that the eligible IT refund amounts due to the CD for AY 2014-15, AY 2015-16 & FY 2015-16 but not released by IT Dept in view of the continuation of above Penal proceedings, to be released to the Corporate Debtor.

3. The Income Tax Authority who passed the aforesaid Assessment Order and the Penalty Order is the Assessing Officer working under the administrative supervision of the Petitioner.

4. The facts in brief are that Respondent No. 2 is an assessee under the Income Tax Act, 1961 (“**The Act**”) and filed its Return of Income u/s. 139(1) of the Act for Assessment Year 2014-15 on 8th November 2014 declaring a loss of Rs. 28,38,574/- and claiming refund of taxes paid for a sum of Rs. 66,71,390/-. An Assessment Order for Assessment Year 2014-15 was passed by the Assessing Officer on 31st

November 2016 u/s 143(3) of the Act which resulted in refund of Rs. 66,71,390/-. Out of the said refund, an amount of Rs. 3,87,250/- was adjusted against the pending demand for AY 2012-13 during the CIRP of Respondent No.2.

5. For the Assessment Year 2015-16, Respondent No. 2 filed its Return of Income u/s. 139(1) of the Act on 27th November, 2015 declaring a loss of Rs. 6,89,38,943/- and claiming refund of taxes paid for a sum of Rs. 1,43,28,702. The Assessment Order for Assessment Year 2015-16 was passed on 26th December, 2017 u/s. 143(3) of the Act which resulted in a demand and no refund. Further, on 27th June, 2018, the Assessing Officer passed a Penalty Order u/s 271 (1)(c) r.w.s. 274 for Assessment Year 2015-16 imposing a penalty of Rs. 3,66,95,945/-.

6. For the Assessment Year 2016-17, Respondent No. 2 did not file any Return of Income, although u/s 139(1) of the Act, Respondent No.2 was mandatorily required to file a Return of Income. The Assessing Officer passed an Assessment Order on 26th May, 2023 u/s

147 read with Section 144 of the Act for the Assessment Year 2016-17 which resulted in tax demand of Rs. 999,60,67,560/-

7. Meanwhile, a Company Petition bearing C.P. No. 51/I & BP/NCLT/MAH/2017 was filed u/s 9 of the Insolvency & Bankruptcy Code 2016 (“**IBC**”) against Respondent No. 2. The said Company Petition came to be admitted by an order dated 31st March, 2017 passed by the NCLT, and consequently moratorium u/s 14 of the **IBC** was declared by the NCLT. Subsequently, by an order dated 26th April, 2018 passed by the NCLT, Respondent No. 2 was ordered to be liquidated and the liquidator was directed to issue a public announcement under Regulation 12 of the IBBI (Liquidation Process) Regulation 2016.

8. The Liquidator moved a miscellaneous application being M.A. No. 884 of 2018 IN C.P./IB/ 51/MB/2017 before the NCLT seeking a direction to the Assessing Officer under the Act to release the refund claimed in the Return of Income for the Assessment Years 2014-15, 2015-16 and 2016-17. The NCLT, for the reasons recorded, allowed the

said misc. application filed by the Liquidator and passed the impugned order.

9. The Counsel for the Petitioner, on instructions from the Assessing Officer, submitted that against the refund of Rs. 66,71,390/- determined for the Assessment Year 2014-15, an amount of Rs. 3,87,250/- was adjusted against the pending demand for AY 2012-13 and the balance sum of Rs. 62,84,140/- alongwith interest would be shortly released to Respondent No. 2. The counsel for Respondent No. 2 submits that, in the facts of the present case, the entire refund amount has to be released with interest as no part of it could be adjusted against any pending demand after the CIRP commenced.

10. The counsel for the Petitioner submits that the Assessing Officer is not prevented from passing Assessment Order under the Act and relies upon the judgement of the Apex Court in Sundaresh Bhatt, Liquidator for ABG Shipyard v. Central Board of Indirect Taxes and Customs¹. He further submitted that Respondent No. 2/ Corporate Debtor is not entitled for any refund for the Assessment Years 2015-16

¹ (2023) 1 SCC 472

and 2016-17. He submitted that in the present case, the Company Petition was admitted u/s 9 of the IBC on 31st March, 2017. The refund claimed in the Return of Income is nothing but the TDS amounts paid by various deductors on behalf of Respondent No. 2/ Corporate Debtor. For the Assessment Year 2015-16, the TDS has been paid on or before 31st March, 2015 and for the Assessment Year 2016-17, the TDS has been paid on or before 31st March, 2016. In other words, the TDS had been paid much before 31st March, 2017, i.e., the date on which the Company Petition was admitted u/s. 9 of the IBC. He relies on section 199 of the Act which reads as under:

Credit for tax deducted.

199. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.

(2) Any sum referred to in sub-section (1A) of section 192 and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made.

(3) The Board may, for the purposes of giving credit in respect of tax deducted or tax paid in terms of the provisions of this Chapter, make such rules as may be necessary, including the rules for the purposes of giving credit to a person other than those referred to in

sub-section (1) and sub-section (2) and also the assessment year for which such credit may be given.

11. The Counsel for the Petitioner submits that TDS is nothing but tax paid by an assessee. The taxes already paid before the date on which the Company Petition was admitted u/s 9 of the IBC is not required to be refunded.

12. The Counsel for Respondent No. 2 submits that the real grievance of the liquidator of Respondent No. 2 is not with the assessment *per se*, but the adjustment of the claim of the revenue after assessment against the TDS which had been deposited prior to the CIRP and which was claimed as a refund. The NCLT, according to him, has rightly held that Respondent No. 2 / Corporate Debtor would be entitled for refund claimed in the Return of Income for the Assessment Year 2015-16 and Assessment Year 2016-17. He further submits that if the Petitioner submits a claim to the liquidator based upon the Assessment Orders, the same shall be processed in accordance with law.

13. Detailed arguments were advanced on 22nd October, 2024 by the Counsel representing the Petitioner and Respondent No. 2. The

Learned Counsel for Respondent No. 2 sought an adjournment to consider whether Respondent No. 2 can at all claim the amount of TDS received by the revenue prior to the imposition of the moratorium under section 14 of the IBC, treating the amount deposited as an “asset” of Respondent No. 2.

14. Today, when the matter is called out, Mr. Arsiwala conceded that a combined reading of Sections 4, 143, 199, 205, and 237 of the Act demonstrates the legislative scheme and intent that any amount paid to the department as TDS is tax actually “collected” by the Revenue and credited to the assessee, and therefore, such amount cannot be an “asset” of that assessee. If it cannot be an asset, it would follow that the amount cannot be claimed or recovered by a liquidator of the assessee by taking resort to proceedings under section 60 (5) of the IBC.

15. Having heard the parties, we agree with the contention of the counsel for Respondent No.2 that, as far as Assessment Year 2014-15 is concerned, in the facts of the present case, no part of the refund can be adjusted against any pending demand after the moratorium has commenced. The entire refund amount would form part of the

liquidation assets of the corporate debtor. The Petitioner is at liberty to lodge their claim before the liquidator which will be decided in accordance with the provisions of the IBC.

16. We, however, find that the effect of the impugned order for the Assessment Years 2015-16 and 2016-17 is that the Petitioner will have to refund the taxes already paid by Respondent no. 2 prior to the date on which Company Petition was admitted u/s 9 of the IBC. We agree with the Counsel of the Petitioner that in view of the provisions as contained in section 199 of the Act, TDS has to be treated as tax paid on behalf of an assessee. The TDS was paid much before the date the Company Petition was admitted u/s. 9 of the IBC. In the scheme of the IBC and the Income Tax Act, the Corporate Debtor is not entitled for the refund of any tax paid in the past or recovered on or before the date of the moratorium u/s 14 of the IBC.

17. In the present case, as noted above, the taxes for the Assessment Years 2015-16 and 2016-17 were paid much before the date on which the Company Petition u/s 9 of the IBC was admitted. The demand that is arising in the assessment order and the penalty order for the

Assessment Years 2015-16 and 2016-17 is after taking into account the taxes/TDS already paid. The Petitioner is rightly not enforcing such demand. However, the Petitioner cannot be directed to refund the taxes/TDS already paid prior to the date on which the Company Petition u/s 9 of the IBC was admitted.

18. If the impugned order passed by the NCLT is upheld, then the Assessment Order would stand quashed and set aside. The Petitioner would consequently be liable to refund the sum claimed in the Return of Income and that too of TDS already collected. The Counsel for the Petitioner relies upon the order of the Hon'ble High Court of Kerala at Ernakulam passed on 30th January, 2024 in WP (C) No. 39185 of 2022 (*Deputy Commissioner (Works Contract) Vs National Company Law Tribunal, Kochi*). The assessment for the year 2015-16 of Kerala Value Added Tax was completed vide Order dated 25th February, 2021, determining total liability to be Rs. 11,76,35,628.70. The said Assessment Order was set aside by the National Company Law Tribunal, Kochi. After discussing in detail the provisions of the IBC and, the law laid down by the Apex Court, the Hon'ble Kerala High Court has come to the following conclusion in para 6 of its judgement:

6 *This Court finds the impugned order passed by the National Company Law Tribunal, Kochi Bench, as preposterous and untenable. The Company Law Tribunal has no power and authority under the IBC to declare an assessment order as void ab initio and non est in law. Such an order only reflects the competence of the persons who are manning such an important Tribunal. The Order shows the lack of basic understanding of the law. Instead of considering the application by the 2nd respondent for permission to file an appeal against the assessment order, the National Company Law Tribunal, Kochi Bench, has assumed the jurisdiction of the Constitutional Court to declare the assessment order as void ab initio.*

19. We respectfully agree with the above view of the Hon'ble High Court of Kerala at Ernakulam.

20. Therefore, the present petition is disposed of on the following terms:

- (a) The impugned order dated 22nd February, 2023 passed by National Company Law Tribunal, Mumbai in M.A. No. 884 of 2018 IN C.P./IB/ 51/MB/2017 (*Rajeev Mannadiar, Liquidator Vs. Deputy Commissioner of Income Tax, in the matter between M/s. Global Marine Supply Co., Petitioner/ Operational Creditor Vs. Swiber Offshore (India) Pvt. Ltd., Corporate Debtor*) is hereby quashed and set aside.

- (b) As a necessary consequence, I.A. No. 2502/2023 (for execution of the impugned order) and Contempt Application No. 8 of 2024 (for contempt of the impugned order) pending before the National Company Law Tribunal, Mumbai Bench, no longer survive and the same are rendered infructuous.
- (c) The Petitioner is directed to release the amount of Rs. 66,71,390/-, being the income tax refund determined for AY 2014-15, alongwith interest within a period of four weeks from the date of uploading of this order on the website of this Court. The Petitioner shall not make any adjustment against any past pending demand, when making such refund.
- (d) There shall be no order as to costs. However, there shall be no order as to costs.
21. The present petition is disposed of accordingly.

22. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.]

[B. P. COLABAWALLA, J.]