

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

IA(IBC)/84/KOB/2023

IN

IBA/38/KOB/2019

*(Under Section 60(5) read with Section 35(1)(n) of the
IBC, 2016)*

In the matter of:

**M/s. Albanna Engineering (India) Private
Limited**

Memo of Parties:

Mr. Vinod Balachandran, Liquidator pf M/s. Albanna Engineering (India) Pvt. Ltd. having a registered office at 70/1909, Asoka Road, Kaloor, Kochi- 682 017. Email:- vinod@vinodbalachandran.org.

... Applicant.

-Vs-

1. M/s. Bharat Petroleum Corporation Ltd., Kochin Refinery represented by its Executive Director, Ambalamugal P.O., Ernakulam District, Kerala- 682 302. Email: maniphs@bharatpetroleum.in., saurabhiraut@bharatpetroleum.in.

2. M/s. Albanna Engineering LLC., Post Box No. 7323, Dubai, UAE, having its project office at XIV/98 M, MNB Business HUBFL, Room No. 3, Ambattu, Ambalamugal P.O., Ernakulam- 682 302. Represented by its Power of Attorney Holder Mr. Sreekumar S., Email:-

sree1963@gmail.com.,

albannae@emirates.net.ae.

... Respondents.

Order delivered on: 15.09.2023

Coram:

Hon'ble Member (Judicial) : TMT. Justice (Retd.) T. Krishna Valli.

Hon'ble Member (Technical): Shri. Shyam Babu Gautam.

Appearances:

For the Applicant : Mr. Dharam Suresh, Adv.,
Mr. K.B. Arun Kumar, Adv.

For the Respondent No. 1 : Mr. Raja Kannan, Adv.,
Mr. Pranoy Harilal, Adv.

For Respondent No. 2 : None appeared.

ORDER

Per: Shyam Babu Gautam (Member Technical)

1. The present application is filed by the Applicant/Liquidator under Section 60(5) read with Section 35(1)(n) of IBC, 2016 for the following relief: -
 - Direct the 1st Respondent to make the payment of Rs.9,01,18,242.45/- being the invoice value on behalf of the 2nd Respondent to the bank account of Liquidator within a period fixed by this Tribunal with no deductions for Income Tax TDS, GST, TDS and penal recovery,
2. The Brief facts of the case are as follows: -

3. The Corporate Debtor is a 100% subsidiary of 2nd Respondent. M/s. Albanna Engineering LLC, Dubai, UAE ("LLC"). The 2nd respondent undertook a contract for mechanical works of VGO HDT unit for Integrated Refinery Expansion Project with the 1st Respondent M/s. BPCL-Kochi Refinery vide PO- 4504660618 dated. 19.05.2014. The 2nd Respondent entered into an agreement with the Corporate Debtor agreeing that out of the amount received by the 2nd Respondent from the 1st Respondent M/s. BPCL Kochi, 7% will be retained by the 2nd Respondent and the balance will be given to the Corporate Debtor for sub-contractor services for the above-mentioned project.
4. M/s. Sanghvi Movers (operational creditor) filed the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Code" for brevity) against M/s Albanna Engineering (India) Pvt. Ltd. This Adjudicating Authority vide order dated 25.10.2019 passed in IBA/38/KOB/2019 admitted the Corporate Debtor in CIRP and Interim Resolution Professional was appointed. Later the Committee of Creditors meeting held on 25.11.2019 appointed the IRP as Resolution Professional of the Corporate Debtor. Afterward in MA/25/KOB/2020 this Adjudicating Authority directed the 1st Respondent to treat the assets of Respondent No.2 and all that was receivable by Respondent No. 2 from Respondent No. 1 as the assets of Corporate Debtor for the purpose of CIRP.

5. Since no Resolution Plan was received by the RP till completion of CIRP, RP filed an application bearing No IA(IBC)/147/KOB/2021 or liquidation of the Corporate Debtor. On 02.12.2021 this Adjudicating Authority passed an order of liquidation of the Corporate Debtor and appointed Mr. Vinod Balachandran (RP) as the Liquidator.
6. Thereafter the Applicant/Liquidator filed an IA(IBC)/33/KOB/2022 under Section 60(5), 53 read with 35(n) of IBC, 2016 with a prayer to direct the Respondent No.1 to transfer Rs. 25,13,38,078/- deposited by way of fixed deposit and interest accrued thereon till date and Rs. 5,46,08,871/- (being the approx. value of the final invoice to be submitted by Respondent No. 2 to Respondent No. 1) to the account of liquidator. This Adjudicating Authority vide order dated 18.05.2022 directed Respondent No. 1 to liquidate the fixed deposit and transfer the said amount along with Rs. 5,46,08,871.37/- (Rupees Five Crore Forty-Six Lakh eight thousand eight hundred seventy-one and thirty- seven paise) retained by the Respondent pursuant to the direction of this Adjudicating Authority to the account of the Applicant/Liquidator bank account bearing No. 4271002110005708 with Punjab National Bank. Cochin Branch for utilizing the said amount for the distribution of assets in accordance with Section 53 of the Code, 2016 within two weeks from the date of receipt of the order.

7. The Respondent No. 1 has officially intimated that Income Tax and GST TDS will be deducted on the final invoice raised which was opposed by the Applicant on the ground that, this Adjudicating Authority in its various orders has categorically stated that, this final invoice amount is the asset of the Corporate Debtor and as per ruling of Hon'ble NCLAT no TDS should be deducted for the company which is in liquidation. The Respondent No. 1 insists upon the deduction of TDS at the rate of 43.68% (which is applicable to foreign companies) even though payment is being to an Indian company in Liquidation.
8. The Applicant/Liquidator stated that the final invoice amount and the amount withheld by Respondent No. 1 on behalf of Respondent No. 2 comes to Rs.9,01,18,242.45/- and Rs. 82,46,324/- respectively.
9. The Applicant further stated that he has made enquires with Power of Attorney Holder of Respondent No. 2 regarding the contractual deductions (penal recoveries) claimed by Respondent No.1 (amounting to Rs. 4,24,69,188) to which the Power of Attorney Holder has replied that Respondent No. 2 till the date of communication of final invoice amount has never been informed nor received any communication stating as to what these deductions relate to with Respondent No. 2. Respondent No. 1 has made these deductions as per its own will and without assigning an opportunity to the Respondent No. 2 to reply to the said

deductions. The penal deduction allegedly made by the 1st Respondent is without any basis.

10. On 10.07.2023, the 1st Respondent filed its reply statement and stated that the Central GST Department, State GST Department as well and Income Tax Department are necessary parties to this Application. Therefore, this Application is liable to be dismissed for non-joinder of necessary parties.
11. The Respondent No. 1 further stated that in MA/25/KOB/2021, this Adjudicating Authority directed the 1st Respondent to invoke both the Bank Guarantees provided by AELLC and to keep the proceeds in an interest—bearing fixed deposit with itself in the name and style of “Bharat Petroleum Corporation Limited-Account Albanna Engineering”. Pursuant to this, the proceeds of the Bank Guarantees were received by the 1st Respondent and the said proceeds were deposited in an interest-bearing fixed deposit in the name and style of “Bharat Petroleum Corporation Limited - Account Albanna Engineering”. Thereafter in IA(IBC)/33/KOB/2022, this Adjudicating Authority directed the Applicant to transfer the Bank Guarantee amount and the final bill amount to the account of the Liquidator, for utilizing the same for distribution of assets in accordance with Section 53 of the Code. Accordingly, the Bank Guarantee amount of Rs. 25,13,38,078/- and interest accrued therein (in terms of Fixed Deposit No.

8056938243- 0) was transferred by the 1st Respondent to the bank account of the Applicant/Liquidator on 01.07.2022.

12. It is stated that the sum of Rs. 5,46,08,871.37/- was the tentative amount arrived upon after considering the applicable contractual and statutory deductions as well as contractual withholdings in respect of the contract between the 1st Respondent and the 2nd Respondent. The said amount was subject to reconciliation and internal approvals including the requirements of a valid Lower TDS Certificate (for 6%) and submission of GST Tax Invoices. The said requirements were duly communicated to the Applicant by the 1st Respondent on 19.02.2020.
13. It is further stated that on receipt in IA(IBC)/33/KOB/2022, the 1st Respondent requested the 2nd Respondent to submit the original GST final invoices for both the contracts along with the Lower TDS Certificate under Sections 195/197 of the Income Tax Act, 1961, in order to process the final bill amount to be transferred to the Applicant. In response to this the 2nd Respondent issued a letter dated 27.06.2022 stating that they are ready to raise the final GST invoices, however, being a foreign company, they have to obtain a reduced tax deduction certificate from the IT Department to avoid deduction of TDS at 40% from BPCL and that they had already filed application with the Income Tax Department and are expecting to receive the lower TDS deduction certificate within the

next 30 days and hence BPCL should not proceed with processing the invoices until the said documents are submitted by AELLC.

14. The 2nd Respondent has not been able to submit the required Lower TDS certificate and GST invoices to the 1st Respondent, till date. This is despite the numerous requests and reminders issued by the 1st Respondent. On 05.01.2023, the 1st Respondent had informed the 2nd Respondent that BPCL would be constrained to process the final bill without the lower TDS certificate and GST invoices in the event that the 2nd Respondent is unable to provide the required documents. Despite the issuance of the number of communications, the situation remains the same and the 2nd Respondent has been unable to provide the Lower TDS Certificate and GST invoices. It is further stated that this application has been filed by the Applicant seeking the issuance of directions to the 1st Respondent to make the payment of Rs. 9,01,18,242.45/- being the invoice value on behalf of the 2nd Respondent to the bank account of the Liquidator with no deductions for income tax, TDS, GST TDS and penal recoveries, cannot be countenanced.

15. On 21.07.2023, the 2nd Respondent filed a reply statement and stated that the 2nd Respondent has no objection to allowing this application.

FINDINGS: -

16. We have heard the arguments of the learned counsel for the Applicant and learned counsel for the 1st Respondent at length and

perused the entire case records/documents. We have also gone through the evidence on record. In order to arrive at a decision in the matter, we have gone through the decision rendered by the Hon'ble NCLAT in ***Om Prakash Agrawal Vs. Chief Commissioner of Income Tax (TDS) & Anr (Company Appeal (AT) (Insolvency) No. 624 of 2020***) wherein the Appellate Tribunal held that: -

“21. As per Section 194 IA of the IT Act 1% TDS is recovered on priority to other creditors of the transferor, which is partial capital gain tax, whereas, Section 53(1)(e) of the Code in waterfall mechanism provides that the Government dues comes fifth in order of priority. Thus, in regard to recovery of the Government dues (Including Income Tax) from the Company in Liquidation under the Code, there is inconsistency between Section 194IA of the IT Act and Section 53(1) (e) of the Code therefore, by virtue of Section 238 of the Code, Section 53(1) (e) of the Code shall have overriding effect on the provisions of the Section 194 IA of the IT Act. Otherwise also Section 53 starts with a non-obstante clause, whereas Section 194 IA of the IT Act, does not start with a non-obstante clause, and it would necessarily be Company Appeal (AT) (Insolvency) No. 624 of 2020 subject to overriding effect of the Code and therefore, there was no requirement to amend the Section 194 IA of the IT Act.

24. Thus, it is clear that when the Company is wound up under the orders of Court or otherwise the return shall be verified by the Liquidator referred to in Sub-Section 1 of Section 178 of the IT Act, during corporate insolvency resolution process under Section 7, 9 or 10 of the Code, the return shall be verified by the Insolvency Professional appointed by the Company Appeal (AT) (Insolvency) No. 624 of 2020 Adjudicating Authority. However, there is no such provision in the IT Act, Code or IBBI (Liquidation Process Regulation, 2016) that the

Liquidator of the Company in Liquidation under the Code is required to file Income Tax Return. For filing of return, the financial statements are required to be annexed but the Code/IBBI (Liquidation Process Regulation 2016) does not assign a duty on the Liquidator to prepare financial statements. Chapter III of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 provides powers and functions of liquidator, Regulation 5 & 6 of the Regulations is reproduced below:

"Regulation 5-5. Reporting. (1) The liquidator shall prepare and submit:

(a) a preliminary report;

(b) an asset memorandum;

(c) progress report(s);

(d) sale report(s);

(e) minutes of consultation with stakeholders; and

(f) the final report prior to dissolution to the Adjudicating Authority in the manner specified under these Regulations. (2) The liquidator shall preserve a physical as well as an electronic copy of the reports and minutes referred to in sub-regulation (1) for eight years after the dissolution of the corporate debtor. (3) Subject to other provisions of these Regulations, the liquidator shall make the reports and minutes referred to sub-regulation (1) available to a stakeholder in either electronic or physical form, on receipt of

(a) an application in writing;

(b) costs of making such reports and minutes available to it; and

(c) an undertaking from the stakeholder that it shall maintain confidentiality of such reports and minutes and shall not use these to cause an undue gain or undue loss to itself or any other person.

6. Registers and books of account.

(1) Where the books of account of the corporate debtor are incomplete on the liquidation commencement date, the liquidator shall have them completed and brought up-to-date, with all convenient speed, as soon as the order for liquidation is passed. (2) The liquidator shall maintain the following registers and books, as may be applicable, in relation to the liquidation of the corporate debtor, and shall preserve them for a period of eight years after the dissolution of the corporate debtor-

(a) Cash Book;

(b) Ledger;

(c) Bank Ledger;

(d) Register of Fixed Assets and Inventories;

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(e) Securities and Investment Register;

(f) Register of Book Debts and Outstanding Debts;"

25. We are of the view that the Liquidator of a Company in liquidation under the Code is not required to file Income Tax Return, then there is no question of claiming refund of TDS deducted under Section 194 IA of the IT Act.

26. As per chapter XIX of the Act, 'Refunds' has been dealt with at length vide Section 237, 239 and 245 of the IT Act. The same is reproduced below for clarity:

"237. Refunds (1) If any person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess.

Section 239- Every claim for refund under this Chapter shall be made in the prescribed form and verified in the prescribed manner.

27. All these reflect that this is a cumbersome process to take refund from Income Tax Department and hence Code and IBBI (Liquidation Process) Regulation 2016 is silent on the subject of filing of Income Tax Return as Code provides for a time bound period for completion and maximization of value of assets and cease of doing business.”

17. In the light of the order passed by the Hon’ble NCLAT in ***Om Prakash Agrawal Vs. Chief Commissioner of Income Tax (TDS) & Anr (Company Appeal (AT) (Insolvency) No. 624 of 2020*** whereby the Hon’ble NCLAT set aside the impugned order of the NCLT and has made directions to the Income Tax Department to refund the TDS deposited by the purchaser to the liquidator. The Hon’ble NCLAT has clarified the jurisprudence around the interplay of the provisions between the 194 IA of IT Act and Section 53 (1) (e) of the Code in the context of deduction of TDS. While making the observation of apparent inconsistency in the order of priority of payment of TDS under the two sections; the appellate tribunal by virtue of the overriding effect of Section 238 of the Code has rightly held that the TDS, being an advance capital gain tax will be recovered in priority of creditors as stipulated under the waterfall mechanism of the Code wherein the government dues are ranked fifth in priority of creditors.
18. To sum up, we are of the considered opinion that there is no such provision in the IT Act, IBC or IBBI (Liquidation Process)

Regulation, 2016 that the Liquidator of the Company in Liquidation under the IBC is required to file Income Tax Return. For filing of the return, the financial statements are required to be annexed but the IBC and IBBI (Liquidation Process) Regulation, 2016 does not assign a duty on the Liquidator to prepare financial statements. Therefore, the deduction of TDS made by the 1st Respondent is arbitrary and illegal.

19. In the result, this Bench direct the 1st Respondent to make a payment of Rs. 9,01,18,242.45/- (Nine Crore One Lakh Eighteen Thousand Two Hundred Forty-Two Rupees and Forty-Five Paise Only) to the bank account of the Applicant/Liquidator within 30 days from the date of receipt of this order. With the aforesaid observation, **IA(IBC)/84/KOB/2023 is allowed** and disposed of.
20. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.
21. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.
22. File be consigned to records.

Sd/-

**SHYAM BABU GAUTAM
(MEMBER TECHNICAL)**

Sd/-

**T KRISHNA VALLI
(MEMBER JUDICIAL)**

Signed on this the 15th day of September, 2023.