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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 25th September, 2017
Pronounced on : 27th September 2017

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CO.A(SB) 36/2014

COMMISSIONER OF CUSTOMS

..... Appellant

Through : Mr.Amit Bansal and Mr.Akhil
Kulshreshtha, Advs.

versus

OFFICIAL LIQUIDATOR

..... Respondent

Through : Mr.D.Bhattacharya, Adv. for OL
Mr.Anand M.Mishra, Adv. for ex-
management

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is against an order dated 23rd May, 2014 passed by the Official Liquidator whereby the claim of the customs to an extent of Rs.1,46,06,654/- against the respondent company in liquidation was rejected by the Official Liquidator on the ground that the order dated 10.05.2011 was passed by the custom authorities without informing the Official Liquidator of the proceedings pending before it despite the fact that winding up order was passed in this case on 18.08.2008.

2. The claim of the Customs authorities relate to payment of the custom duty of Rs.52.00 Lac along with simple interest @ 15% payable by the respondent company in liquidation from the date of the import till the actual payment, since it had not filed any evidence of fulfilling its export obligations. The penalty of Rs.1.00 Lac was also levied upon the respondent company. This order of the Commissioner Customs was served by speed post at the registered office of the respondent company at S-61, Greater Kailash-II, New Delhi, which on 10.05.2011 admittedly was in possession of the Official Liquidator and hence the Official Liquidator cannot allege that the custom authorities did not inform the Official Liquidator of such duty/penalty levied upon the respondent company. It is further alleged the custom authorities were never in the know of the respondent company having gone in liquidation.

3. It is further alleged by learned counsel for customs that they had made a claim before the Official Liquidator and the Official Liquidator vide its letter No.3773 dated 04.05.2011 had informed the office of the Commissioner of Customs as under:-

“Sir,

With reference to your letter dated 26-04-2011 address to M/s Attar filte Ltd S-61, Greater Kailash Part-II New Delhi-48 in this connection I am to state that M/s Attar Filte Ltd was ordered to be wound up by the Hon’ble High Court of Delhi vide its order dated 18/08/2008 and the Official Liquidator attached to this Hon’ble Court has been appointed as its

Provisional Liquidator with direction to take charge of assets, records and books of accounts of the respondent company.

The official liquidator has no assets of the Company (in liqn) till date. No claim has been invited by this office, if you have any due against the Company, you can file the Claim in Form No 66 of the Companies Act, 1956, as and when the claim will be invite by this office through newspaper.

Further I am to inform that the ex-director of the Company Sh Vicky Jain has not filed the Statement of Affairs of the Company (in liqn) till date. The Liquidation proceeding are going on against the Ex-director of the Company (in liqn). The next date of hearing of this case 22-09-2011 before the Hon 'ble High Court of Delhi.

*(SANJAY YADAV)
DY. OFFICIAL LIQUIDATOR
DELHI HIGH COURT”*

4. The Official Liquidator also wrote a letter No.3720 dated 07.12.2013 to the office of Commissioner of Customs and it reads as under :

“Sir

With reference to your claim in form No 66 filed on 22-07-2013 to this office I am to say that, on examination of your claim it is observed that there is no supporting documents pertaining to your claim. You are therefore requested to provide the following documents at the earliest.

1 Copy of detailed computation of your claim as mentioned in your affidavit with proof of debt along with break up (Including of the duty and penalties amount)

2 Certified copy of the order wherein penalties amounting of Rs 1,00000/- are levied as mentioned in your form No 66.

Further to say that in case no response/reply received within 14 days from date of receipt of the letter your claim shall be treated as rejected.

Yours faithfully

*DY.OFFICIAL LIQUIDATOR
DELHI HIGH COURT*

5. Thereafter the office of the Commissioner of Customs wrote to the Official Liquidator its letter No.23506 dated 26.12.2013 as under :

“Sir,

Subject: In the matter of M/s Attar Filte Ltd. (In Liqn.) in CP No. 216/07- Reg;

Please refer to your office reference No. CO.LIQN/TC-III/3720 dated 17.12.2013 on the above subject.

As desired detailed computation chart of interest as on date with break up (including of the duty and penalties amount) and certified copies of the Adjudication Order wherein penalties and Duty amount levied/confirmed are mentioned is enclosed herewith for information please.

Further, your kind attention is invited to the claim of Customs Department in this case for Rs.1,46,06,654/- (Duty Rs.52,00,000/- + Interest of Rs.93,06,654/- &. Penalty of Rs. 1,00,000/-) calculated upto 10.07.2013) filed by the department.

Further, the interest on the above said duty calculated as on date i.e. from 07.07.2000 to

31.12.2013 arrived Rs.1,05,30,000/- (@ 15% per annum as per Adjudication Order). You are, therefore, requested to consider our claim of Rs.1,58,30,000/- (Customs Duty Rs.52,00,000/- + Interest of Rs.1,05,30,000/- & Penalty of Rs. 1,00,000/-).

Yours faithfully,

Deputy Commissioner of Customs (Recovery)”

6. However despite calling for the claim in proper format supported by documents, strangely enough, the Official Liquidator rejected the claim on the plea that it was not informed of the proceedings before the Commissioner of Customs and hence could not contest the levy of duty/penalty upon the respondent.

7. In *S.V.Kondaskar, Official Liquidator and Liquidator of the Colaba Land & Mills Co. Ltd. V. V.M.Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Anr.* AIR 1972 SC 878 the Court held as under :-

“9. Turning now to the Income-tax Act, it is noteworthy that section 148 occurs in Chapter XIV which beginning with section 139 prescribes the procedure for assessment and section 147 provides for assessment or reassessment of income escaping assessment. This section empowers the Income-tax Officer concerned subject to the provisions of sections 148 to 153 to assess or asses escaped income While holding these assessment proceedings the Income-tax Officer does not, in our view, perform the functions of a court as contemplated by section 446(2) of the Act Looking at the legislative history and the scheme of the Indian Companies Act particularly the language

of section 446 read as whole, it appears to us that the expression 'other legal proceeding' in sub-section (1) and the expression legal proceeding in sub-section (2) convey the same sense and the proceedings in both the subsections must be such as can appropriately be dealt with by the winding-up court. The Income-tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and reassessment of income-tax with which alone we are concerned in the present case. The fact that after the amount of tax payable by an assessee has been determined or quantified its realization from a company in liquidation is governed by the Act because the income-tax payable also being a debt has to rank pari passu with other debts due from the company does not mean that the assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can fly be started or continued with the leave of the liquidation court u/s 446 of the Act. The liquidation court, in our opinion cannot perform the functions of Income-tax Officers while assessing the amount of tax payable by the assessee even if the assessee be the company which is being wound up by the court. The orders made by the Income-tax Officer in the course of assessment or reassessment proceedings are subject to appeal to the higher hierarchy under the Income-tax Act. There are also provisions for appeals to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income-tax. It would lead to anomalous consequences if the winding-up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income-tax. The argument on behalf of the appellant by Shri Desai is that the winding-up court is empowered in its discretion to decline to transfer the assessment proceedings in a

given case but the power on the plain language of section 446 of the Act must be held to vest in that court to be exercised only if considered expedient We are not impressed by this argument. The language of section 446 must be so construed as to eliminate such starting consequences as investing the winding-up court with the powers of an Income-tax Officer conferred on him by the Income-tax Act, because, in our view, the legislature could not have intended such a result.

10. The argument that the proceedings for assessment or reassessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income Tax Act, unacceptable. We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have fall power to scrutinize the claim of the revenue after income-tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of income-tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation At that stage the winding-up court can fully safeguard the interests of the company and its creditors under the Act Incidentally, it may be pointed out that at the bar no English decision was brought to out notice under which the assessment proceedings were held to be controlled by the winding-up court On the view that we have taken, the decisions in the case of Seth Spinning Mills Ltd (In Liquidation) and the Mysore span silk Mills Ltd (In Liquidation), do not seem to lay down the correct rule of law that the Income-tax Officers must obtain leave of the winding-

up court for commencing or continuing assessment or reassessment proceedings.”

8. Further in *Sales Tax Officer, Central Circle, New Delhi V. Byford Ltd.* (1984) 55 CompCas 204 (Delhi) this Court held as under :

“20. The same here. The recovery proceedings can be stayed by the company judge. But not the penalty proceedings. It would be starting to hold that the powers of the company judge are much wider under s. 391 than when acting as a winding up court under s. 446(2). In so far as income-tax and sales tax are concerned the powers are the same. He has no jurisdiction over them. Exclusive jurisdiction vests in the authorities created by the I.T. Act and the Sales Tax Act. The jurisdiction of the company court is ousted except when recovery proceedings are started and those authorities lay their hands upon the estate of the company.”

9. Since the facts of the present case, are similar to the facts of the cases cited above, hence once after inviting claim of the custom authority; asking it to file it in proper format with documents, the Official Liquidator should not have rejected it on grounds that it ought to have been given an opportunity to contest the custom duty/penalty levied upon the respondent company by Custom authorities; the duty/penalty having been levied upon the respondent company under the provisions of Section 117 of the Customs Act, 1962 by following a procedure established by law. Hence, the impugned order dated 23.05.2014 passed by the Official Liquidator needs to be set aside and the claim filed by the Custom authorities need to be considered and examined as per law

by the Official Liquidator.

10. Directions are issued accordingly and the appeal is disposed of in terms of above.

YOGESH KHANNA, J

SEPTEMBER 27, 2017

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