

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(IN INSOLVENCY)

WEDNESDAY, THE 9TH DAY OF FEBRUARY 2022

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

APPLN.Nos.35 & 36 of 2021

in

I.P. No.77 OF 2002

I.P.NO.77 OF 2002:-

In the matter of the Presidency Towns
Insolvency Act, III of 1909 and In the
matter of T.L.V.Estates and others
... Debtors

Jayesh N. Parekh,
residing at No.28,
Mookkathal Street,
Chennai-600 007.

... Petitioning Creditor

-Versus-

1. M/s.T.L.V.Estates,
carrying on business at
No.142/9, Purasawakkam High Road,
Akshaya Flat Basement, Chennai-600 010.
2. Mrs.T.R.Bhuvaneswari,
residing at No.142/9, Purasawakkam High Road,
Akshaya Flat Basement, Chennai-600 010.
3. Murugan,
residing at No.G-103, 9th Street,
Behind Chinthamani, Anna Nagar East,
Chennai.

4. T.R.Srinivasan,
residing at No.G-103, 9th Street,
Behind Chinthamani,
Anna Nagar East, Chennai. ... Debtors

(2nd Debtor representing herself and
the estate of the deceased Ranganathan
and Debtors 3 & 4 representing the
estate of the deceased Ranganathan)

APPLN.Nos.35 & 36 of 2021:-

T. R.Bhuvaneswari,
No.180-A, First Floor,
3rd Main Road, Natesan Nagar,
Virugambakkam,
Chennai – 600 092. ...Applicant/2nd Debtor

-Vs-

1. The Official Assignee,
High Court, Chennai.
2. The Commissioner of Income Tax – TDS,
Income Tax Building, Chennai – 34.
3. The Deputy Commissioner of Income Tax,
Range – 9, Kannammai Building,
Mount Road, Chennai – 6. ...Respondents

Appln.No.35 of 2021:-

Application praying that this Hon'ble court be pleased to waive the
interest in full and order immediate release of the entire amount of

Rs.2,42,27,764/- pertaining to AY 2008-2017 (excluding AY 2011 – 2012), held in fixed deposits by Official Assignee towards interest demand from Income Tax dept along with accrued interest to the Petitioner, without further delay.

Appln.No.36 of 2021:-

Application praying that this Hon'ble court be pleased to direct the Income Tax department to refund the excess tax remitted by the 1st Respondent in March 2018 amounting to Rs.4,00,000/- to the Petitioner without further delay.

The above Applications coming on this day before this court for hearing in the presence of Mr.T.R.Rajagopal, Senior Counsel Assisted by Mrs.P.Veena Suresh, Advocate for the Applicant in both Applications; Mr.N.V.Balaji assisted by Mrs.Uma, Official Assignee, the 1st Respondent in both Applications; and of Mr.Karthik Ranganathan, Standing Counsel for Income Tax Department assisted by Mr.S.Rajesh Advocate herein; and upon reading the Judges Summon and affidavit of T.R.Bhuvaneswari, filed in both Applications; and this Court having observed that the relevant assessment orders were not assailed either by the Official Assignee or the ex-insolvent and since the assessment orders have not been challenged, the tax liability on the basis thereof cannot be interfered with by this court and the ex-insolvent/ assessee was not in a position to remit income tax and took

all possible measures to procure payment of tax and the debatable nature of and legitimate doubts regarding the tax liability of the estate of an insolvent, the assessee is entitled to a waiver of interest and penalty as regards non-payment of advance tax and as regards capital gains tax, the sum of Rs.1,37,03,299/- should carry interest at 6% per annum from 29.07.2011, which is the date of sale, up to 29.03.2016, which is the date of remittance of tax thereon and excluding the aforesaid interest claim, as regards the remaining interest claims for assessment years 2008 – 2009 to 2016 – 2017, interest liability should be computed from the last date for payment of tax in the relevant assessment year up to the date of payment at the same rate of 6% per annum and

it is ordered as follows:-

1. That the Income Tax Department be and is hereby directed to recompute the interest liability on the amounts remitted in respect of the respective assessment years by calculating the same at the rate of 6% per annum instead of 1% per month from 29/07/2011 as the case may be, without levying compound interest, penalty or interest or penalty for non-payment of advance tax or for delayed filing of returns, and make a revised demand on such basis on the Official Assignee.
2. That upon receipt thereof, the Official Assignee be and is hereby

directed to pay the said sum within a period of 30 days from the date of receipt of such revised demand notice.

3. That the Official Assignee be and is hereby further directed to pay the surplus, if any, after discharging the aforesaid liability to the Applicant/ex-insolvent.
4. That the Application No.35 of 2021 in I.P.No.77 of 2002 be and is hereby disposed.
5. That the Application No.36 of 2021 in I.P.No.77 of 2002 be and is hereby dismissed.
6. That there shall be no order as to costs.

WITNESS, THE HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI, ACTING CHIEF JUSTICE, HIGH COURT AT MADRAS, AFORESAID THIS THE 9TH DAY OF FEBRUARY 2022.

Sd./-

ASSISTANT REGISTRAR

Original Side – I

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DATED THIS THE DAY OF 2022.

MANAGER

INSOLVENCY OFFICE

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PK
25/01/2022

HIGH COURT, MADRAS

APPLN.NOS.35 & 36 OF 2021
IN
I.P. No.77 of 2002

THE HON'BLE MR.JUSTICE
SENTHILKUMAR RAMAMOORTHY

DECREE DATED: 09/02/2022

FOR APPROVAL:25/02/2022

APPROVED ON : 25/02/2022

COPY TO:-

1 .THE OFFICIAL ASSIGNEE
HIGH COURT, MADRAS.

2. Mr.Karthik Ranganathan,
Income Tax Department,
5/9, Ist Floor, Ashoka Street,
Sriram Colony, Alwarpet,
Chennai – 600 018.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(IN INSOLVENCY)

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The above Applications coming on this day before this court for hearing in the presence of Mr.T.R.Rajagopal, Senior Counsel Assisted by Mrs.P.Veena Suresh, Advocate for the Applicant in both Applications; Mr.N.V.Balaji assisted by Mrs.Uma, Official Assignee, the 1st Respondent in both Applications; and of Mr.Karthik Ranganathan, Standing Counsel for Income Tax Department assisted by Mr.S.Rajesh Advocate herein; and upon reading the Judges Summon and affidavit of T.R.Bhuvaneswari, filed in both Applications; and

the court made the following order:-

The ex-insolvent has filed two applications seeking: (i) waiver of interest in full and for the immediate release of the sum of Rs.2,42,22,764/- held in fixed deposits by the Official Assignee towards the interest demand of the Income Tax Department; and (ii) to direct the Income Tax

Department to refund the excess tax remittance by Respondent in March 2018 amounting to Rs.4,00,000/- to the Petitioner without further delay.

2. On a petition by a creditor, the Applicant was adjudged as an insolvent by order dated 26.11.2002 in I.P.No.77 of 2002. Pursuant thereto, the Official Assignee took charge of the estate of the Applicant. Thereafter, the assets of the Applicant were identified. The present application primarily concerns an immovable asset which was sold by auction in the year 2011. Such sale took place pursuant to orders of this Court. Prior thereto, by letter dated 09.01.2007, the Applicant informed the Official Assignee that capital gains may accrue from the sale of the assets, and that capital gains tax should be paid in respect thereof. However, the Official Assignee did not take any steps in such regard. In those circumstances, the Applicant filed Application No.433 of 2009 to direct the Official Assignee to remit capital gains tax so as to avert interest and penalty liabilities in respect thereof. Application No.433 of 2009 was disposed of by this Court by directing the Official Assignee to set apart 20% of the insolvent's share of the sale proceeds from the sale of the relevant immovable asset towards capital gains tax. On the basis of the said order, 20% was initially parked in a Reserve Bank of India account and subsequently transferred to an interest bearing account pursuant to order dated 01.03.2013 in Application No.304 and 305 of 2012.

3. By notices issued between 16.03.2015 and 22.02.2016, the Income Tax Department informed the Official Assignee that the income tax liability of the estate of the insolvent had not been discharged. Eventually, ex-parte assessment orders in respect of assessment years 2008 – 2009 to 2018 – 2019 were issued. Upon obtaining the permission of this Court, the Official Assignee remitted tax on 29.03.2016, as regards assessment years 2008 – 2009 to 2013 – 2014; on 15.12.2016, as regards the assessment year 2014 – 2015; on 21.12.2016, as regards assessment years 2015 – 2016 and 2016 – 2017; and, on 15.03.2018, as regards assessment years 2017 – 2018 and 2018 – 2019. In the present application, the focus is on the demand for interest and, in particular, interest on capital gains tax of Rs.1,37,03,299/- in respect of the assessment year 2011 – 2012, which was paid on 29.03.2016. The Income Tax Department issued a demand notice on 05.01.2017 claiming interest under Sections 234A, 234B and 234C of the Income Tax Act, 1961 (the I-T Act) for delayed filing / remittance of tax returns/advance tax. An aggregate sum of Rs.2,42,27,764/- is claimed towards interest. The Applicant seeks waiver of such interest.

4. The question whether the request for waiver of interest should be made before the statutory forum under the I-T Act or before this Court was considered by the Division Bench of this Court in O.S.A.Nos.91 to 93 of 2016. By order dated 20.04.2016, this Court held that the application for

waiver of interest may be decided by this Court by resorting to Section 7 of the Presidency Towns Insolvency Act, 1909 (the Insolvency Act) by taking into account the quantum of funds available and the distribution made. The operative portion of the said order is as follows:

"20. In view of the above, the original side appeals are allowed, the order of the learned judge is modified to the effect that the Official Assignee need not go before the Central Board of Direct Taxes praying for waiver of interest. The Insolvency Court itself can consider the question of waiver of interest in terms of the power conferred under Section 7 and in the light of the provisions of the Income Tax Act, together with the quantum of funds available and the distribution already made. We are fortified with a view taken by us by a decision of the Supreme Court in *Johrilal vs. Bhanwari* (AIR) 1977 SC 2202, which arose in terms of Section 4 of the Provincial Towns Insolvency Act, 1920, which is *in pari materia* with Section 7 of the Presidency Towns Insolvency Act. No costs. Consequently, the above M.Ps. are closed."

5. Oral submissions were made on behalf of the Applicant by Mr.T.R.Rajagopal, senior counsel, assisted by Mrs.P.Veena Suresh, learned counsel; on behalf of the Official Assignee by Mr.N.V.Balaji, learned counsel; and on behalf of the Income Tax Department by Mr.Karthik Ranganathan, learned standing counsel.

6. The Applicant contended that she is entitled to waiver of interest because her estate was under the control of the Official Assignee when the asset was brought to sale or when the tax liability accrued, as the case may be. Consequently, she was not in a position to remit income tax. Therefore, she informed the Official Assignee in January 2007 to remit capital gains tax arising out of the sale of immovable assets. Since the Official Assignee did not act on her request, she filed Application No.433 of 2009 for a direction to the Official Assignee to remit tax. An order was issued on the said application to deposit 20% of the sale proceeds of the immovable asset into an interest bearing fixed deposit account so as to discharge the tax liability. Thus, it is stated that the Applicant took all reasonable measures to ensure that the tax liability was discharged promptly. Therefore, it is contended that the Applicant should not be put to loss by being asked to pay interest or penalty for the failure of the Official Assignee to discharge the tax liability within a reasonable time. The Applicant referred to the judgment of the Division Bench of this Court and pointed out that this Court has the jurisdiction to grant a waiver of interest.

7. The first submission on behalf of the Official Assignee was that the Official Assignee is not a representative assessee as per the I-T Act. Consequently, the Official Assignee cannot be held liable for payment of income tax. As regards the sale of the immovable assets, it was pointed out

that the first asset was sold during the assessment year 2007 – 2008. The said sale was not subjected to tax, and the relevant period of limitation expired. The second asset was sold on 29.07.2011. However, it was treated as a sale made in the financial year 2010 – 2011, which corresponds to the assessment year 2011 - 2012. Upon the sale of the second asset, a sum of about Rs.8,02,80,000/- was the share of the ex-insolvent which was reduced to Rs.7,90,21,712.80 after adjusting expenses. After issuing a notice to the Official Assignee, an assessment order dated 10.03.2016 was issued. As per the said assessment order, the principal capital gains tax was computed as Rs.1,37,03,299/-. Although the asset was sold in July 2011 and the sale proceeds were received thereafter, the Income Tax Department has computed interest from 01.08.2008 and not from the date of sale. Pursuant to the order passed by this Court in Application No.433 of 2009, it is stated that 20% of the sale proceeds were remitted into a fixed deposit account. However, the Official Assignee states that the fixed deposit receipts are not available. The principal tax liability was discharged on 29.03.2016.

8. The Official Assignee further contends that the Income Tax Department issued a circular on 28.01.2019. Only after such circular was issued, the Official Assignee could apply for and obtain a permanent account number (PAN) in respect of the estate of an insolvent.

Consequently, it was contended that the Official Assignee cannot be held liable for payment of tax or interest thereon when it was not even feasible for the Official Assignee to obtain PAN until January 2019.

9. On the contrary, the Income Tax Department submitted that the income tax liability of the ex-insolvent relates to the assessment years 2008 – 2009 up to 2018 – 2019. In most years, the income tax liability arises out of interest income. However, as regards the assessment year 2011 – 2012, the income tax liability arises out of the sale of an immovable asset. The I-T Act provides for interest liability at the rate of 1% per month or 12% per year for delayed remittance of tax. On such basis, the aggregate liability of Rs.2,42,27,764/- was arrived at.

10. According to the Income Tax Department, the Official Assignee cannot contend that there is no income tax liability. Upon the assessment order being issued, income tax was remitted, albeit belatedly, by the Official Assignee. The relevant assessment orders were not challenged. Therefore, it was contended by the Income Tax Department that the scope of the present proceeding is confined to the request for waiver of interest.

11. On the issue of waiver of interest, it was contended that this Court directed the Official Assignee to park 20% of the sale proceeds of the property in an interest bearing fixed deposit account so as to meet the income tax liability. This order was passed in the year 2011. Consequently,

interest has accrued on the sum deposited by the Official Assignee. In spite of the income tax liability accruing in the year 2011, the Income Tax Department has been deprived of its dues. Therefore, it would be completely inequitable to waive interest. Indeed, it was contended that the Official Assignee should not resist the claim for interest. If the insolvent is granted a waiver of interest, it would amount to unjust enrichment.

12. The Income Tax Department also contended that the ex- insolvent should have obtained the PAN much earlier and not in the year 2016. In support of these contentions, the Income Tax Department relied upon the following judgments:

(i) Tushin T. Mehta v. CCIT, Chennai – II (2019) 108 taxmann.com 257 (Madras).

(ii) CIT, Delhi v. Insilco Ltd (2010) 190 taxmann 306 (Delhi)

(iii) CIT, Delhi v. Bhagat Construction Co. (P.) Ltd., (2015) 60 taxmann.com 3334 (SC)

(iv) Kakadia Builders (P.) Ltd v. Income Tax Officer Ward (2019) 103 taxmann.com 53 (SC).

13. In view of the rival contentions, at the outset, it is necessary to record the undisputed facts. The Applicant was adjudged as an insolvent on 26.07.2002 in I.P.No.77 of 2002. Upon discharging liabilities to creditors, by order dated 13.07.2018, the Applicant was discharged as an insolvent. In course of insolvency, the relevant immovable asset of the Applicant was

sold on 29.07.2011. The sale proceeds were received around that time. By order dated 28.04.2011, in Application No.433 of 2009, 20% of the insolvent's share of sale proceeds of Rs.7,90,21,712.80 was directed to be deposited in an interest bearing fixed deposit account by the Official Assignee. Notices were issued by the Income Tax Department to the Official Assignee between 16.03.2015 and 22.02.2016, and separate assessment orders were issued in respect of each assessment year from 2008 – 2009 to 2018 – 2019. The total income tax liability on such account is a sum of Rs.2,87,77,158/-. This liability was discharged in full. As regards the assessment years 2008 – 2009 to 2013 – 2014, the principal tax liability was paid on 29.03.2016. As regards the assessment year 2014 – 2015, the principal tax liability was paid on 15.12.2016. As regards the assessment years 2015 - 2016 and 2016 – 2017, the principal tax liability was discharged on 21.12.2016. As regards the assessment years 2017 – 2018 and 2018 – 2019, the principal tax liability was discharged on 15.03.2018. The interest claim relates to the assessment years 2008 – 2009 to 2016 – 2017. The largest interest claim is for the assessment year 2011 – 2012, and such claim is for a sum of Rs.1,64,02,848/-. The aggregate interest claim is for a sum of Rs.2,42,27,764/-.

14. Much of the confusion arises out of the fact that the estate of an insolvent is ordinarily not subject to income tax because the monetary value of such estate is typically insufficient to meet the liabilities of the relevant insolvent. On perusal of the provisions of the I-T Act and, in particular, the definitions of assessee and representative assessee, as contained therein, the status of the Official Assignee is unclear to say the least because it is debatable as to whether the Official Assignee would qualify as an assessee. The definition of representative assessee also does not appear to include the Official Assignee within its ambit. Indeed, the Income Tax Department appears to have been conscious of this ambiguity. In order to redress the same, the circular dated 28.01.2019 was issued. However, such circular may have compounded the problem inasmuch as it opened up the scope for contending that there was no tax liability prior to the said date. Another dimension to this debate is whether an alleged liability arising after the commencement of insolvency should be reckoned in insolvency proceedings or whether it is limited to prior liabilities. For purposes of this application, it is not necessary to record findings in respect of the income tax liability of the estate of an insolvent because the Official Assignee has remitted tax on the dates indicated in the earlier paragraphs. More importantly, the relevant assessment orders were not assailed either by the Official Assignee or the ex-insolvent. Since the assessment orders have not

been challenged, the tax liability on the basis thereof cannot be interfered with by this Court. Therefore, the application for refund is liable to be rejected and it is sufficient to focus on the request for waiver of interest.

15. There is considerable merit in the contention of the ex- insolvent / applicant that she took all reasonable measures to discharge her tax liability. The letter dated 09.01.2007 from the Applicant is on record. By such letter, the Applicant categorically informed the Official Assignee that income tax liability, including capital gains tax liability, is likely to accrue when the assets comprising the estate are sold. The Applicant provided her PAN and requested the Official Assignee to remit the tax. Since the Official Assignee did not accede to her request, the Applicant filed Application No.433 of 2009 seeking a direction to the Official Assignee to pay tax. Eventually, 20% of the sale proceeds were set apart towards tax liability.

16. Nonetheless, the admitted position is that the tax liability was discharged on three dates, with the first of such dates being 29.03.2016. As a result, the Income Tax Department was deprived of the money although the tax liability accrued in the year 2011 as regards capital gains tax from the sale of the immovable asset. Therefore, the request of the Income Tax Department is reasonable from its perspective. On this issue, it should be noticed, however, that the Income Tax Department calculated interest erroneously from the year 2008 although the sale proceeds were received

only in 2011. To that extent, the computation and, consequently, the interest claim of the Income Tax Department is unreasonable.

17. Another significant aspect, which was adverted to earlier, is that there is considerable confusion with regard to the liability of the Official Assignee to pay income tax. In the case at hand, income tax was eventually paid under PAN CJLPB1177R, which appears to have been issued by the Income Tax Department in the name of the assessee in the year 2016. It is unclear as to why PAN ACUPB7532Q, which had been obtained by the ex-insolvent/Applicant on 06.05.1999, was not used for the above purpose.

18. From the foregoing discussion, the position that emerges is that the Income Tax Department has a reasonable basis to claim interest inasmuch as the sale proceeds were deposited into an interest bearing account. However, the claim is made at the rate of 12% per annum. Besides, the claim is made from the year 2008 onwards, which is clearly untenable. Given the fact that 20% of Rs.7,90,21,712.80, which is about Rs.1,58,04,342.60, was remitted into an interest bearing account in the year 2013 vide order dated 01.03.2013 in Application No.304 & 305 of 2012, such deposit would have earned at least 6% per annum as interest. Moreover, if an analogy were to be drawn from Rule 23 of the II Schedule to the Insolvency Act, which applies to interest on debts due as of the commencement of insolvency, the maximum rate specified therein is 6% per

annum. Therefore, as regards capital gains tax, the sum of Rs.1,37,03,299/- should carry interest at 6% per annum from 29.07.2011, which is the date of sale, up to 29.03.2016, which is the date of remittance of tax thereon. Excluding the aforesaid interest claim, as regards the remaining interest claims for assessment years 2008 – 2009 to 2016 – 2017, interest liability should be computed from the last date for payment of tax in the relevant assessment year up to the date of payment at the same rate of 6% per annum. Ordinarily, the assessee would also be liable to pay interest and penalty for non-payment of advance tax. However, on account of the following reasons: the ex-insolvent/ assessee was not in a position to remit income tax; she took all possible measures to procure payment of tax; and the debatable nature of and legitimate doubts regarding the tax liability of the estate of an insolvent, the assessee is entitled to a waiver of interest and penalty as regards non-payment of advance tax.

19. The Income Tax Department is directed to recompute the interest liability on the amounts remitted in respect of the respective assessment years by calculating the same at the rate of 6% per annum instead of 1% per month from the dates specified or indicated above, as the case may be, without levying compound interest, penalty, or interest or penalty for non-payment of advance tax or for delayed filing of returns, and make a revised demand on such basis on the Official Assignee. Upon receipt thereof, the

Official Assignee is directed to pay the said sum within a period of 30 days from the date of receipt of such revised demand notice. The Official Assignee is further directed to pay the surplus, if any, after discharging the aforesaid liability to the Applicant/ex- insolvent.

20. Application No.35 of 2021 is disposed of on the above terms. Application No.36 of 2021 is dismissed for reasons set out earlier. There shall be no order as to costs.

WITNESS, THE HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI, ACTING CHIEF JUSTICE, HIGH COURT AT MADRAS, AFORESAID THIS THE 9TH DAY OF FEBRUARY 2022.

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