

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 72/KB/2023

*A Petition filed under Section 10 of the Insolvency and Bankruptcy Code, 2016
read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016.*

IN THE MATTER OF:

**M/s Jayam Vyapaar Private Limited
[CIN: U51219WB1994PTC064381]**

... Applicant/Corporate Applicant.

Date of Hearing: October 13, 2023.

Date of Pronouncement: November 09, 2023.

CORAM:

SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)

SHRI ARVIND DEVANATHAN, MEMBER (TECHNICAL)

Appearance:

For Applicant: Ms. A. Rao, Adv. and Mr. S. Tibrewal, Adv.

ORDER

PER Arvind Devanathan, Member (Technical):

- 1.** This Court is congregated through hybrid mode.
- 2. Brief facts of the case:**
 - 2.1.** Jayam Vyapaar Pvt. Ltd., the Corporate Applicant herein has filed this instant application under Section 10 of Insolvency and Bankruptcy Code (for brevity "IBC") on 25.03.2023 to initiate the Corporate Insolvency Resolution Process (for brevity "CIRP").
 - 2.2.** The Corporate Applicant was assessed to the Income Tax for the assessment year 2012-13 on 25.03.2015 for an amount of Rs. 2,86,44,540/- as demand of tax along with applicable Interest and penalties in terms of assessment order passed by the Income Tax Officer, Ward 1(2) Kolkata.
 - 2.3.** Against this order an appeal was filed before the Commissioner of Income Tax (Appeals) Kolkata. CIT (Appeals) passed an order on 18.12.2018 dismissing the appeal. Appellate Authority has confirmed the demand of Income tax raised in the assessment order and while doing so, found that the Income has escaped tax due to money laundering. Placing reliance on

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a similar case where the Hon'ble High Court discussed the issue in detail with reference to Money laundering, the Appellate Authority dismissed the appeal filed by the applicant.

- 2.4.** There is nothing on record to suggest that the order of the Appellate Authority has been challenged before the Income Tax Appellate Tribunal (for brevity "ITAT") Therefore, the order of the Appellate Authority has become final and, consequently, the **date of default** of Income Tax payment would be **18.12.2018** if not the date of the assessment order, which is 25.03.2015. However, it is shown as continuing liability in the books of accounts as on 31-03-2022.
- 2.5.** The corporate applicant has not been able to pay the tax demand and consequently filed this application in the year 2023 for initiating CIRP.

3. Ld. Counsel for the applicant:

- 3.1.** Ld. Counsel for the applicant submits that the corporate applicant has been making losses for several years leading to erosion of net worth substantially.
- 3.2.** The Ld. Counsel further submits that CD is not able to pay the Operational Creditor which in this case is, the Income Tax Department to the tune of Rs. 2,86,44,540/- for the demand raised in the year 2016 apart from applicable interest and penalties.
- 3.3.** The Ld. Counsel took us through the Special Resolution passed by the corporate applicant for the purpose of filing the application under Section 10 of IBC passed in the Annual General Meeting held on 29.11.2021.
- 3.4.** Ld. Counsel also took us through the list of shareholders and the percentage of voting in favour of the Insolvency resolution through Section 10 of IBC.
- 3.5.** The Ld. Counsel submits that the provision for Income Tax demand mentioned above was made in the financials for the year 2021-22 and, therefore, this application has been filed within the time limit prescribed under the IBC and hence prayed for admission.

4. Analysis and findings:

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- 4.1. We have perused the records filed before us and found that the operational debt (Income Tax Demand) became payable on 18.12.2018 pursuant to an order passed by CIT (Appeals) Kolkata.
- 4.2. This is because no appeal has been filed against the order of CIT(A) before ITAT or any other forum and hence the Income Tax Demand has become final on **18.12.2018**.
- 4.3. Therefore, the date of default has to be 18.12.2018 and not in the year 2022 as claimed by the Ld. Counsel for the applicant, just because the provision for the liability was made in the financial year 2021-22.
- 4.4. Strangely, till **31.03.2021** the amount due to the Income Tax Department mentioned above was shown as a **contingent liability** in the audited balance sheet of the corporate applicant.
- 4.5. For the year ending 31.03.2022 they have provided the Income Tax Demand as a liability in the balance sheet. The Corporate Applicant should have made a provision in the year in which the Income Tax Demand became final by virtue of not filing an appeal against the order of CIT(A) dated 18.12.2018, which would be the financial year 2018-2019. However, it is shown as liability in the books of accounts as on 31-3-2022 and therefore we take this application to have been filed within the time limit.
- 4.6. When that being the case, this application appears to have been filed basically to avoid Income Tax liability, particularly when there is a finding that the Income has escaped tax due to money laundering which could lead to recovery from Directors of the company in terms of Section 179 of the Income Tax Act.
- 4.7. Thus, after bare perusal of this instant application along with the documents filed, we are of the view that this application is not for the resolution of the corporate applicant's insolvency but to scuttle the efforts of the Income tax department in their pursuit of recovery of the dues and it is a settled position of law that this Adjudicating Authority is not a recovery Tribunal. The corporate applicant with a fraudulent and malicious intention has filed this

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application under Section 10 of IBC. Hence, we are of the view that it is a fit case to invoke Section 65 of IBC. We are supported by the judgment passed by the Hon'ble NCLAT in the case of *Monotrone Leasing (P.) Ltd. v. PM Cold Storage (P.) Ltd. Company Appeal (AT)(Insolvency) No. 99 of 2020* reported in MANU/NL/0460/2020 that:

“28. Section 65 of the Code provides for penal action for initiating Insolvency Resolution Process with a fraudulent or malicious intent or for any purpose other than the resolution. However, the same cannot be construed to mean that if a petition is filed under section 7, 9 or 10 of the Code without any malicious or fraudulent intent, then also such a petition can be rejected by the Adjudicating Authority on the ground that the intent of the Applicant/Petitioner was not resolution for Corporate Insolvency Resolution Process. As the proceedings under IBC are summary, in nature, it is difficult to determine the intent of the Applicant filing an application under-section 7, 9 or 10 of the Code unless shown explicitly by way of documentary evidence. This situation may arise in specific instances where a petition is filed under IBC specifically with a fraudulent or malicious intent.”

(Emphasis Added)

- 4.8.** Hence, we impose a penalty of **Rs. One Lakh only** upon the Corporate Applicant. The Applicant is directed to deposit the penalty amount to the **“Prime Minister’s National Relief Fund” (PMNRF) within 10 days** and delaying of payment of the penalty amount beyond 10 days shall be carrying a rate of **10%** per annum from the date of pronouncement to the date of payment.
- 4.9.** Hence, the application filed on 27.03.2023 by the Corporate Applicant under Section 10 of IBC is **not maintainable and therefore dismissed**.
- 5.** Certified copies of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

Arvind Devanathan
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 09th Day of November, 2023.

Bose, R. K. [LRA]/ AR_Steno