



**NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH (COURT-I), CHANDIGARH**

IA No. 1786/2024

In

CP (IB) No. 97/Chd/Hry/2018

(Admitted Matter)

**Under section 7 of the Insolvency
and Bankruptcy Code, 2016**

IN THE MATTER OF:

Oriental Bank of Commerce

.....Applicant/Financial Creditor

Versus

Isolux Corsan India Engineering and Construction Private Limited

.....Respondent/Corporate Debtor

AND

IN THE MATTER OF INTERLOCUTORY APPLICATION NO. 1786/2024

**Under section 33(5) read with section
35(1)(k) read with section 60(5) of the
Insolvency and Bankruptcy Code, 2016
read with Rule 11 of the National
Company Law Tribunal Rules, 2016**

CA Rajeev Bansal, Liquidator of

Isolux Corsan India Engineering & Construction Private Limited

Regn. No. IBBI/IPA-001/IP-P00226/2017-18/10425

Registered address: 2163A, Shri Nagar Colony, Jagadhri,

Yamunanagar-135001

...Applicant/ Liquidator

Order delivered on: 12.11.2024

Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)

HON'BLE MR. UMESH KUMAR SHUKLA, MEMBER (TECHNICAL)

Present:

For the Applicant/ Liquidator: Ms. Nivedita Chauhan, Ms. Komal Singh and
Ms. Archistha Singh, Advocates



Per: SH. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
SH. UMESH KUMAR SHUKLA, MEMBER (TECHNICAL)

ORDER

This Interlocutory Application (hereinafter referred to as the “**IA**”) has been filed under section 33(5) read with section 35(1)(k) read with section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**” or “**Code**”) read with Rule 11 of the National Company Law Tribunal Rules, 2016 (hereinafter referred to as the “**NCLT Rules**”) seeking the liberty and prior approval/ ratification of this Adjudicating Authority towards defending the interests of Corporate Debtor by way of filing reply/ Application(s)/ other such pleadings as may be required on behalf of the Corporate Debtor in the Income Tax Appeal No. 162 of 2021 titled as ‘The Principal Commissioner of Income Tax Faridabad vs. M/s Isolux Corsan India- C&C JV’ (hereinafter referred to as the “**IT Appeal**”) and to initiate other incidental, ancillary and consequential proceedings thereto.

2. The brief facts of the case, as stated in the application are given below-

- (i) Vide a Joint Venture Agreement dated 22.01.2011 executed by and between Isolux Corsan India Engineering & Construction Private Limited (hereinafter referred to as the “**Corporate Debtor**”) and C&C Constructions Limited (hereinafter referred to as the “**C&C**”), a Joint Venture namely, ICI-C&C JV (hereinafter referred to as the “**Assessee**” or “**JV**”) was formed.
- (ii) The said Assessee was engaged in a road construction project during the financial year 2011-12, for which it had made ‘advance



progressive billing' to the tune of Rs.71,40,75,685/-. The Assessee had also received Rs.84,79,59,184/- as 'mobilization advance' from its client (presumably the owner of the said projects). The client of the Assessee had deducted and deposited the TDS on these 'advance progressive billing' and 'mobilization advance'. The revenue earned by the Assessee from execution of road project, was recognized as per the percentage of completion method (hereinafter referred to as the "**POCM**") as prescribed in Accounting Standard-7 (hereinafter referred to as the "**AS-7**") issued by The Institute of Chartered Accountants of India (hereinafter referred to as the "**ICAI**"). Hence the progressive billing and mobilization advance amount was only received by the Assessee, but not earned as revenue as per POCM in AS-7.

- (iii) Income Tax Return (hereinafter referred to as the "**ITR**") was filed by the Assessee on 28.09.2012, whereby, a loss of Rs.10,40,788/- was declared, which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the "**IT Act**"). Further, the Assessee filed the Profit & Loss Statement, recognizing Rs.26,20,14,771/- as Revenue as per AS-7, along with Form-26AS, wherein the gross receipt was shown as Rs.182,40,49,640/.
- (iv) The case of the Assessee was selected by Computer Assisted Scrutiny Selection (hereinafter referred to as '**CASS**') for scrutiny and in the said assessment proceedings, the Assessing officer had vide Assessment Order dated 17.03.2015 observed that as per the



Form-26AS, gross receipts were shown as Rs.1,82,40,49,640/-, but revenue recognized by the Assessee in the Profit & Loss Account was reflected as Rs.26,20,14,771/- as per AS-7 and that the Assessee had claimed TDS on entire receipts. Thus, the Assessing Officer had held that since the Assessee had not declared the advance billing and mobilization advance amounting to Rs.156,20,34,389/-, the TDS as claimed by the Assessee, amounting to Rs.3,12,40,697/- was not allowed in terms of Section 199 of IT Act and Rule 37BA of Income Tax Rules 1962 (hereinafter referred to as '**IT Rules**'). True copy of the above Order of Assessing officer has been attached with the IA as Annexure-2.

- (v) The Assessment Orders were challenged before the Commissioner of Income Tax, Gurgaon (hereinafter referred to as the "**CIT**") vide Appeal number 53/15-16 on 17.04.2015. However, the CIT vide Order dated 22.02.2017 in the said Appeal affirmed the order of the Assessing Officer and rejected the demands of the Corporate Debtor. True copy of the above Order of CIT has been attached with the IA as Annexure- 3.
- (vi) The Assessee challenged the CIT Order dated 22.02.2017 before the Income Tax Appellate Tribunal, New Delhi Bench, 'C' Bench (hereinafter referred to as the "**ITAT**"), vide ITA No. 2901/DEL/2017. The ITAT passed an ex parte order dated 03.02.2020, in favour of the Assessee, whereby, directions were issued to the Assessing Officer to verify whether the income has




been recognized in subsequent Assessment Years and if found correct, credit of TDS should be given thereon. True copy of the above order has been attached with the IA as Annexure-5 and the relevant excerpt of the above Order is as below:

“10. We have carefully perused the orders of the authorities below The Assessing Officer has not made any adverse inference in so far as the method of accounting employed by the assessee is concerned and has accepted that the assessee is consistently following POCM for recognizing income from construction contracts as prescribed in Accounting Standard-7 issued by Institute of Chartered Accountants of India which is mandatory accounting standard.

11. We find that in its reply the assessee has specially mentioned that since it is following POCM it has offered for tax the income on which it has claimed TDS during the year in subsequent years on the basis of revenue recognized as per the consistent method of accounting followed by the assessee as per POCM.

12. We find that there is no mention of any such income offered in subsequent Assessment Years nor it has been verified by the Assessing Officer. Therefore, in the interest of justice and fair play we restore this issue to the file of the Assessing Officer. The Assessing Officer is directed to verify whether the income has been recognized in subsequent Assessment Years and if found correct credit of TDS should be given accordingly.”

- (vii) Thereafter, Income Tax Appeal has been filed by the Income Tax Department before the Hon'ble High Court for the States of Punjab & Haryana at Chandigarh against the ITAT Order filed by Assessee (ICI-C&C JV). It was listed for the first time on 22.08.2021, where on notice of motion was issued and the same was adjourned for hearing on 12.01.2023. Thereafter, on account of non-service of notice to the Assessee, the directions were issued to the PCIT on 12.01.2023 as well as on 22.08.2023 to issue notice to the Assessee after furnishing correct address and accordingly, the



matter was adjourned for hearing on 26.02.2024. Thereafter, the matter was listed on 26.02.2024 and 24.04.2024.

- (viii) Meanwhile, Corporate Insolvency Resolution Process (hereinafter referred to as the “**CIRP**”) was initiated against the Corporate Debtor vide Order dated 11.10.2018 passed by this Tribunal in the captioned Petition. Subsequently, the liquidation proceedings were also initiated against the Corporate Debtor vide Order dated 06.02.2020 passed by this Tribunal in C.A. No. 1079 of 2019 in CP (IB) No. 97/CHD/HRY/2018 and the Applicant was appointed as its Liquidator.
- (ix) In between, the CIRP was also initiated against C&C Constructions Limited vide Order dated 14.02.2019 passed by the NCLT, Special Bench, New Delhi in C.P. No. IB-1367(PB)/2018 titled as ‘ICICI Bank Limited vs. C&C Constructions Ltd.’. True copy of the above Order has been attached with the IA as Annexure-4. Subsequently, the liquidation process was also initiated vide Order dated 07.10.2022 passed by Hon'ble NCLT, New Delhi Bench in I.A. (IB) No. 2235/2021 in C.P No. IB-1367(PB)/2018 and Mr. Navneet Kumar Gupta was appointed as its Liquidator. The copy of the above order has been attached with the IA as Annexure-6.
- (x) In the interim, the Applicant became aware of the said proceedings, and accordingly, a Vakalatnama was filed on behalf of the Applicant on 01.07.2024 so as to procure the records of the said Appeal.



- (xi) As a consequence to the legal proceedings by the Income Tax Department, the Applicant is duty bound to defend the interest of the Corporate Debtor and in order to do the same, the Applicant is duty bound to approach this Adjudicating Authority seeking prior/ ex post facto approval to pursue the aforesaid Appeal.

3. This Adjudicating Authority, vide order dated 22.08.2024, directed the counsel for the Applicant to file copy of liquidation order and to clarify whether in the order of liquidation, it is mentioned that the liquidator under section 33(5) of the Code is authorised to relevant permission or not.

4. The Applicant filed Compliance Affidavit vide diary no. 02596/01 dated 02.09.2024, which was taken on record vide this Tribunal Order dated 19.09.2024. It has been submitted by the Applicant in the Compliance Affidavit that:

- (i) This Tribunal vide Order dated 06.02.2020 had appointed the Applicant as the Liquidator of the Corporate Debtor and had passed directions qua strict compliances to be undertaken in terms of the IBC and the IBBI (Liquidation Process) Regulations, 2016 by the Applicant. The relevant excerpts of the Liquidation Order dated 06.02.2020 in C.A No. 1079 of 2019 (concerning the clarification sought by this Tribunal vide Order dated 22.08.2024) is as below:

“23. It is directed that all the directions/requirements and provisions of chapter III of the code and liquidation process regulations, 2016 shall be strictly complied with. Some of the directions are as under-

- i) That as per section 33(5) of the code and subject to section 52 of the code,*



no suit or other legal proceedings shall be instituted against the corporate debtor;

Provided that a suit or other legal proceedings may be instituted by the liquidator on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority;

ii) That the provisions of sub-section (5) of section 33 of the code shall not apply to legal proceedings in relation to such transactions as may be notified by the central government in consultation with any financial sector regulator”

- (ii) Section 35(1) of the IBC starts with the words 'Subject to the directions of the Adjudicating Authority', meaning thereby that the powers and duties of the Liquidator is subject to the directions of the Adjudicating Authority. Section 35(1)(k) of the IBC has been reiterated below:

"35. Powers and duties of- liquidator.

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely.

.....

(k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or behalf of the corporate debtor;

Upon perusal of the Liquidation Order dated 06.02.2020 passed by this Tribunal, it has been observed that the authorization to exercise the duty u/s 35 of the IBC has not been expressly/ separately granted to the Applicant/ Liquidator in the said Order. In the light of the above-mentioned Order, it is being clarified that the Applicant/ Liquidator is duty bound to comply with the provisions under Section 33(5) r/w 35(1)(k) of the IBC and hence, has approached this Tribunal under extreme caution, for seeking its prior approval/ ratification towards defending the interests of the Corporate Debtor by way of filing reply/ Applications(s) and



other such pleadings as may be required on behalf of the Corporate Debtor in the Income Tax Appeal and to initiate other incidental, ancillary and consequential proceedings thereto to safeguard and protect the interest of the Corporate Debtor undergoing liquidation.

- (iii) There exists a potential recovery by way of refund of Rs.3,12,40,697/- along with interest, in case, the Hon'ble High Court adjudicates the said appeal in favour of the Assessee (Corporate Debtor) or there is adjudication in favour of the Corporate Debtor in any incidental and consequential proceedings.

5. We have heard the counsels for Applicant and perused the documents placed on record carefully.

6. As per sub-section (5) of section 33 of IBC, after a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor. It is noted that:

- (i) The IT Appeal before the Hon'ble High Court of Punjab & Haryana at Chandigarh is against the ITAT an ex parte order dated 03.02.2020 passed in favour of the Assessee, which is against the CIT Order dated 22.02.2017, which was challenged by the Assessee. The relevant extract of CIT order which is reproduced below:

"The appellant has relied on a number of case laws as referred to above. All the case laws relied upon by the appellant are decisions given by Tribunals



whereas the decision in the case of Smt. Pusha Vijoy (Supra) has been given by the Hon'ble Kerala High Court. Keeping in view the principles of judicial discipline, in the case of contradictory decisions on the same issue, the decision of the superior authority has to be followed. Accordingly, it is held that the appellant is entitled to credit of TDS deducted only in the AY in which income, from which taxes deducted, is assessable to tax. The disallowance of TDS credit made by the AO is accordingly confirmed. This ground of appeal is dismissed."

- (ii) The above IT Appeal is against M/s Isolux Corsan India- C&C JV, which is joint venture formed vide a Joint Venture Agreement dated 22.01.2011 executed by and between the Corporate Debtor and C&C Constructions Limited. Thus the Appeal is not against the Corporate Debtor.
- (iii) Although the Corporate Debtor is one of the Joint Venture partners of the Assessee, but the Assessee and Corporate Debtor are separate legal entities. **As the Assessee is a separate legal entity than the Corporate Debtor, it apparently does not justify giving the approval to the Corporate Debtor to defend the IT Appeal against the Assessee.**

7. As per section 53 of the Code, the proceeds from the sale of the liquidation assets forming part of the liquidation estate shall be distributed in the order of priority. Section 36 of the Code defines the liquidation estate and provides the assets, which are to be included/ not included in liquidation estate. **It is not clear, how the TDS refund amount received to the Assessee, if there is success in defending the IT Appeal, can be included in the liquidation estate.**

8. Further, Regulation 31A of the Insolvency and Bankruptcy Board of



India (Liquidation Process) Regulations, 2016 (hereinafter referred to as the “Liquidation Process Regulations”) has been inserted vide IBBI notification dated 25.07.2019 much before the order of liquidation and as amended upto 12.02.2024 vide Notification No. IBBI/2023-24/GN/REG112, dated 12th February, 2024 (w.e.f. 12.02.2024) reads as under:

31A. Stakeholders’ consultation committee

(1) The liquidator shall constitute a consultation committee, comprising of all creditors of the corporate debtor, within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on matters relating to-

.....;

(g) continuation or institution of any suits or legal proceedings by or against the corporate debtor;

.....

(6A) In all cases where the liquidator proposes to continue or initiate any legal proceeding, he shall, **after presenting the economic rationale for the proposal, seek the advice of the consultation committee.**

.....

(9) The consultation committee shall advise the liquidator, by a vote of not less than sixty-six percent of the representatives of the consultation committee, voting.

Explanation: For the purpose of this sub-regulation, the term ‘voting’ shall mean voting cast by the representatives of the consultation committee.

(10) The advice of the consultation committee shall not be binding on the liquidator:

Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing and submit the records relating to the said decision, to the Adjudicating Authority and to the Board within five days of the said decision; and include it in the next progress report.

It is noted that **the IA has been filed on 12.08.2024, which is after the insertion of 31A(1)(g) and 31A(6A)** vide Notification No. IBBI/2023-24/GN/REG112, dated 12th February, 2024, but **the Applicant, nowhere in the IA, has stated that whether he has consulted the Stakeholders’**



Committee after presenting the economic rationale for the defending the IT Appeal and whether or not, the Stakeholders' Committee has advised to defend the IT Appeal and whether the IA has been filed based on the advice of the Stakeholders' Committee.

9. Keeping in view the facts and circumstances as mentioned in the application, the present **I.A. No. 1786/2024 is dismissed and disposed of accordingly.**

10. However the liberty is granted to the Applicant to put up the matter in the Stakeholders' Committee with full facts and come with the fresh Application, if advise so by the Stakeholders' Committee, giving proper justification for defending the IT Appeal as discussed in this Order.

**Sd/-
(Umesh Kumar Shukla)
Member (Technical)**

**Sd/-
(Harnam Singh Thakur)
Member (Judicial)**

November 12, 2024
Vansh