

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 258 of 2024**

**[Arising out of the Impugned Order dated 22.11.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench in I.A. No. 2968/(MB)/2022 in CP (IB) No. 2295/NCLT/MB/2018]**

**In the matter of:**

**Avil Menezes**

**Liquidator of Sunil Hitech and Engineers Limited**

Having office at:

106, 1st Floor, Kanakia Atrium 2,  
Cross Road A,  
Behind Courtyard Marriott, Chakala,  
Andheri East, Mumbai City,  
Maharashtra – 400 093.

...Appellant

**Versus**

**Principal Chief Commissioner of  
Income Tax, Mumbai**

Having office at:

M.K. Road, New Marine Lines  
Mumbai, Maharashtra – 400 020.

...Respondent

**Present :**

For Appellant : Mr. J. Rajesh, Mr. Dhruvad Vaghani, Mr. Jaitegan Singh Khurana, Mr. Aniket Mukherjee and Mr. Arslaan, Advocates.

For Respondent : Mr. Abhishek R. Mishra, Advocate.

## **J U D G M E N T**

**(Hybrid Mode)**

**[Per: Barun Mitra, Member (Technical)]**

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 22.11.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-I) in I.A. No. 2968/(MB)/2022 in CP (IB) 2295/NCLT/MB/2018. By the impugned order, the Adjudicating Authority has dismissed I.A. 2968 of 2022 filed by the Appellant-Liquidator seeking return of Income Tax refund amount of two previous assessment years to the liquidation estate of the Corporate Debtor-Sunil Hitech and Engineers Ltd.

**2.** The Learned Counsel for the Appellant, Shri J. Rajesh making his submissions submitted that the Corporate Debtor was admitted into Corporate Insolvency Resolution Proceedings ('**CIRP**' in short) on 10.09.2018. Later, the Corporate Debtor was admitted into liquidation by the Adjudicating Authority on 25.06.2019 and the Appellant was appointed as the Liquidator of the Corporate Debtor. Following the appointment as Liquidator, a public announcement was made on 01.07.2019 inviting claims from the creditors in the liquidation process in terms of Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ('**Liquidation Regulations**' in short).

**3.** Submission was made that on vetting the Annual Information Statement ('**AIS**' in short) of the Corporate Debtor, it came to the notice of the Liquidator

that the Corporate Debtor was entitled to receive Income Tax Refund ('ITR' in short) for the A.Y. 2021-2022 for an amount of Rs.5.84 cr. and interest thereon amounting Rs.11.46 lakhs. It was also noticed by the Liquidator that the above ITR amount was adjusted on 12.11.2021 by the Respondent against Income Tax demand for A.Y. 2010-2011 for Rs.2.98 cr. and for A.Y. 2011-2012 amounting Rs.2.85 cr. It has also been contended by the Appellant – Liquidator that the Corporate Debtor was also entitled to receive ITR of Rs.60.79 lakhs for A.Y. 2020-2021 and that the said amount had also been adjusted by the Respondent against pre-CIRP Income Tax dues.

4. The Learned Counsel for the Appellant pointed out that the ITR amount could not have been adjusted by the Respondent towards Income Tax dues and that the said amount should have formed part of the liquidation estate of the Corporate Debtor. It was asserted that in terms of Section 36(3)(b) of the IBC, assets which may or may not be in possession of the Corporate Debtor also constitute part of the liquidation estate and hence the ITR amount available with the Respondent did not belong as such to the Respondent but belonged to the stakeholders and therefore should form part of the liquidation estate. Hence, the Liquidator had rightly requested the Respondent to return the refund amount so that the same could be distributed amongst the stakeholders in terms of Section 53 of IBC. In support of their contention, the Learned Counsel for the Appellant has relied on the judgment of this Tribunal in ***Devarajan Raman vs Principal Commissioner Income Tax, (Mumbai-1) in Company Appeal (AT) (Insolvency) No. 977 of 2023*** that the Income Tax Department did not have the right to adjust past income tax demands with tax refunds since the ITR amount fell under the asset of the Corporate Debtor.

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5. It has also been contended by the Appellant that Section 33(5) of the IBC provides that once a liquidation order has been passed, no suit or other legal proceedings shall be instituted by or against the Corporate Debtor. In the present case, since the liquidation order had already been passed by the Adjudicating Authority, recovery of income tax dues by invoking Section 245 of the Income Tax Act was illegal and improper.

6. It was also emphatically asserted that in view of the non obstante clause and over-riding provision of the IBC as contained in Section 238, the right of set-off of the Respondent – Income Tax Department was subject to the manner of set-off as prescribed under Regulation 29 of the Liquidation Regulations. In support of their contention, reliance was placed upon the judgment of Hon'ble Supreme Court in the case of ***Principal Commissioner of Income Tax Vs Monnet Ispat and Energy Ltd. (2018) 18 SCC 786*** which held that Section 238 of IBC over-rides anything inconsistent contained in any other enactment including Income Tax Act, 1961.

7. Further contending that the Respondent–Income Tax Department is an Operational Creditor, it was argued by the Learned Counsel for the Appellant that the Respondent was required to file their claim with the Liquidator in Form D in accordance with Regulation 18 of Liquidation Regulations for recovery of dues in the requisite form and could not have suo-moto adjusted or set-off the ITR amount against past dues. The Respondent was bound to inform the Liquidator regarding any adjustment/set-off being made by them against purported dues. Emphasis was laid on the fact that the Respondent had erred in not filing any claim with the Liquidator despite the Liquidator having invited claim from all stakeholders through public announcement.

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8. It is also the contention of the Appellant that for the Respondent to make adjustment of the ITR, it should have followed the due process as laid down under the IBC. In support of their contention, the Learned Counsel for the Appellant relied on the judgment of the Hon'ble Supreme Court in the matter of ***Sundaresh Bhatt, Liquidator of ABG Shipyard Vs Central Board of Indirect Taxes and Customs in CA No. 7667 of 2021*** wherein it was held that once moratorium is imposed in terms of Section 33(5) of the IBC, the Customs Department enjoyed limited jurisdiction to assess and determine the quantum of tax dues but did not have the power to initiate recovery of those dues.

9. It was further pointed out that merely having a right to set-off does not automatically lead to having a charge over the property. Section 245 of the Income Tax Act does not expressly create a charge or a security interest. The language of Section 245 of the Income Tax Act does not indicate any such charge to have been created. It is also their contention that the finding of the Adjudicating Authority that the right to set-off under Section 245 of the Income Tax Act creates a charge is perverse as it is opposed to the scheme of IBC which recognises set-off and security interest as separate and distinct concept.

10. Refuting the contentions raised by the Appellant, the Learned Counsel for the Respondent, Shri Abhishek R. Mishra submitted that the dues of the Income Tax come under the ambit of security interest. It was also contended that the definition of secured creditor in IBC does not exclude government or governmental authority and hence the act of the Respondent for set-off was lawful. It was pointed that Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is created and such security interest can be created by operation of law. The Respondent has relied upon the **Company Appeal (AT) (Insolvency) No. 258 of 2024**

judgment of this Tribunal in ***Principal Commissioner of Income Tax and other Vs M/s Assam Company India Ltd*** in **CA(AT)(Ins) No. 241 of 2022** to hold that the dues of the Income Tax Department are government dues and hence the Income Tax Department is a secured creditor. It is also been contended that since the dues of the Income Tax Department – Respondent are secured dues and have been availed by invoking Section 245(1) of the Income Tax Act wherein the Respondent has security interest, the provision of Section 238 of IBC would not apply. It was also pointed out that as required under Section 245(1) of the Income Tax Act, a notice for set-off was issued to the Corporate Debtor and to that extent there has been no breach of the procedure prescribed for set-off under the Income Tax Act. It was also stated that the set-off was rightly done by the Respondent in accordance with Regulation 37 of Liquidation Regulations.

**11.** We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

**12.** From the facts of the present case, it is clear that the Income Tax Department – Respondent appropriated the ITR amount on 12.11.2021 by adjusting/setting-off the same against pre-CIRP income tax dues. This act of appropriation by way of set-off/adjustment was clearly undertaken after commencement of liquidation proceedings on 25.07.2019. The first question for our consideration is therefore whether such continuation of pending proceedings is permissible after liquidation orders have been passed.

**13.** To analyse this issue, we may begin with perusing the relevant statutory provisions of moratorium as contained in the IBC during CIRP and during liquidation.

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**14.** The relevant excerpts of moratorium on institution or continuation of pending suits or proceedings during CIRP as contained in Section 14 of the IBC which appears in Chapter II of Part II thereof is as follows:

**14. Moratorium.**

*(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--*

*(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*

*(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*

*(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*

*(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

*Explanation.--For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;*

*(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:*

*Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.*

**15.** The provision of moratorium in respect of suits and legal proceedings during liquidation process as contained in Section 33(5) of IBC which appears in Chapter III of Part II of IBC is as extracted hereunder:

**33. Initiation of liquidation.**

*(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).*

*(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:*

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

**16.** From a reading of the above statutory provisions, it becomes clear that liquidation process comes into effect upon the failure to come up with a resolution plan or on a resolution plan not being approved by the Adjudicating Authority consequent upon which the Adjudicating Authority further passes the liquidation order under Section 33(4) of the IBC. The proviso to Section 14(4) of IBC also clarifies that moratorium ceases to have effect on receipt of approval of resolution plan or on passing of an order of liquidation. In the present facts of the case, on the order of liquidation having been passed, the moratorium placed under Section 14 came to an end. Instead, a fresh moratorium in terms of Section 33(5) of IBC came into place.

**17.** Thus, while moratorium under Section 14 applies to CIRP, Section 33 applies to moratorium in a liquidation process. A close examination of these two statutory provisions would reveal that both these sections are however entirely distinct in their sweep and application. In terms of the language employed in Sections 14 and 33 of IBC, while Section 14 prohibits both institution and

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continuation of pending suits or proceedings against the Corporate Debtor, Section 33(5) of IBC is only a bar on the institution of new suits during the liquidation process though the proviso to Section 33(5) further provides that if a fresh suit or legal proceeding is to be instituted, the Liquidator is required to obtain specific permission and prior approval of the Adjudicating Authority. There is however clearly no mention of any bar or embargo on continuation of pending suits or proceedings during the process of liquidation. In terms of Section 33(5) of the IBC, the moment liquidation proceedings commence, there would be a bar only in respect of fresh suits/proceedings while pending suits/proceedings can continue. The Liquidator can therefore continue to pursue or defend any already existing proceeding without having to seek any permission from the Adjudicating Authority in terms of Section 35(1)(k) of IBC. In other words, though Section 33 contains provisions similar to Section 14 contemplating stay on suits/proceedings during liquidation, however, the reach and gamut of stay under Section 33 differs from Section 14 in that there is no moratorium on continuation of suits/proceedings already instituted earlier.

**18.** To answer the question delineated at para 12 above, we hold that the words ‘continuation of pending suits or proceedings’ is consciously omitted in Section 33(5) of IBC in contrast to Section 14 of IBC where it is explicitly stated that moratorium applies both to the institution of suits or proceedings or the continuation of pending law suits or proceedings against the Corporate Debtor. Thus, to our minds, there is no bar in a suit or a legal proceeding continuing along with liquidation proceedings as pending suits or legal proceeding have not been included within the scope of moratorium under Section 33(5) of IBC. Having come to the above conclusion, we can safely conclude that the **Company Appeal (AT) (Insolvency) No. 258 of 2024**

Respondent was legally entitled to continue with the Income Tax assessment proceedings during the liquidation process.

**19.** This brings before us the second set of issues for consideration as to whether the Respondent is a secured creditor having security interest under Section 245 (1) of the Income Tax Act, 1961 and whether there was any infirmity in the suo-motu action of the Respondent in appropriation of the ITR amount and in setting-off the said amount against the tax arrears of pre-CIRP period determined during the liquidation proceedings. As both these issues are closely intertwined, we will endeavour to deal with them together.

**20.** When we come to the impugned order, we find that the Adjudicating Authority after adverting attention to Regulation 37 of Liquidation Regulations, Section 3(31) of IBC and Section 245 of the Income Tax Act, 1961 held that the Income Tax Department acquires a statutory right to set off the ITR amount against taxes in arrears under any proceedings. Basis this finding, Adjudicating Authority did not find any infirmity in the action of the Income Tax Department in appropriation of refunds determined during the liquidation proceedings against the tax arrears of pre-CIRP period. The relevant extracts of the impugned order are as placed hereunder:

*“4. We have heard the Counsel and perused the material available on records.*

*4.1. We find that the Income Tax Department has appropriated the refunds on 12.11.2021, and the Liquidation proceedings commenced in the case of Corporate Debtor on 25.07.2019, which implies that the refunds were appropriated towards income tax demand due from the Corporate Debtor after commencement of liquidation proceedings.*

*4.2. Regulation 37 of the IBBI (Liquidation Process) Regulations 2016 provides that "A secured creditor who seeks to realize its security interest*

*under section 52 shall intimate the liquidator of the price at which he proposes to realize its secured asset".*

*4.3. The security interest is defined in Section 3(31) of the Code as "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person."*

*4.4. Section 245 of the Income Tax Act, 1961 provides that –*

*"(1) Where under any of the provisions of this Act, a refund becomes due or is found to be due to any person, the Assessing Officer or Commissioner or Principal Commissioner or Chief Commissioner or Principal Chief Commissioner; as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this sub-section.*

*(2) Where a part of the refund is set off under the provisions of sub-section (1), or where no such amount is set off,' and refund becomes due to a person, and the Assessing Officer, having regard to the fact that proceedings for assessment or reassessment are pending in the case of such person, is of the opinion that the grant of refund is likely to adversely affect the revenue, he may, for reasons to be recorded in writing and with the previous approval of the Principal Commissioner or the Commissioner; as the case may be, withhold the refund up to the date on which such assessment or reassessment is made."*

*4.5. From the provisions of Section 245 of the Income Tax Act 1961, find that the Income Tax Department acquires a statutory right to set off the refunds determined in relation to any proceedings against the taxes in arrears under any proceedings. Accordingly, we are of considered view that the Income Tax Department acquires security interest in terms of section 245(1) of Income Tax Act, 1961, on determination of refund in liquidation proceedings, in terms of section 3(31) of the Code, as section 3(31) also includes charge as well as encumbrances.*

*4.6. We further find that the Section 245(1) of the Income Tax Act, 1961 mandates prior notice, which is issued by the Income Tax Department on the log in account of each assessee. Accordingly, we do not find any infirmity in the action of the Respondent in appropriation of refunds determined during the liquidation proceedings against the tax arrears of pre-CIRP period, as such set-off has taken place during the Liquidation proceedings, wherein the right of set-off is available to the Creditors.”*

**21.** Assailing the impugned order, it is the case of the Appellant that the action taken by the Respondent to make recovery of Income Tax demand by way of adjustment/set-off of ITR amount by invoking Section 245 (1) of the Income Tax Act, 1961 was beyond the provision of law and hence legally improper. Section 245 could not have been applied in the present case since Section 238 of the IBC endows the IBC with over-riding powers. It is also the case of the Appellant that the recovery of income tax dues, if any, of the Respondent had to abide by the procedure laid down by the IBC in the Liquidation Regulations which the Respondent clearly failed to comply with. The Respondent not having followed the mandatory procedure prescribed by the IBC acted unlawfully in adjusting the ITR amount without having filed any claim before the Liquidator though the Liquidator had published the public announcement inviting claims from the stakeholders of the Corporate Debtor. It is also canvassed that the ITR amount was part of the liquidation estate of the Corporate Debtor and by wrongful adjustment of the ITR against pre-CIRP income tax dues, the rights of other stakeholders of the Corporate Debtor stood violated.

**22.** Per contra, in affirmation of the impugned order, it has been the case of the Respondent that in terms of Section 52 of IBC, a secured creditor is allowed realization of security interest in liquidation proceedings. It has also been contended that the Income Tax Department being a Governmental authority is **Company Appeal (AT) (Insolvency) No. 258 of 2024**

a secured creditor and in support this contention, reliance has been placed on the judgement of this Tribunal in ***Principal Commissioner of Income Tax Vs Assam Company India Ltd in CA(AT)(Ins) No. 241 of 2022*** ('Assam Company' in short).

**23.** We find that in this judgment, reliance was placed on the judgement of the Hon'ble Supreme Court in ***State Tax Officer vs. Rainbow Papers Limited- Civil Appeal No. 1661 of 2020*** to claim that the Income Tax Department being a Government authority is a secured creditor and entitled to realise security interest. However, we are of the view that this judgement does not assist the Respondent in view of a subsequent judgment of the Hon'ble Supreme Court in ***Paschimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat Pvt. Ltd. & Ors. in C.A. No. 7976 of 2019***, wherein it has been held that the ratio of the Rainbow Papers supra has to be confined to the facts of that case. In the Rainbow Papers case, the Operational Creditor was held to be a secured creditor on the basis of relevant statutory provisions of Gujarat Value Added Tax, 2003. However, in terms of the provisions of the Income Tax Act including Section 245 thereof, there is no such basis to claim in the case of the Income Tax Department to be a secured Operational Creditor. Further the language of Section 245 (1) of the Income Tax Act does not create any charge or security interest in favour of the Respondent. The creation of a charge by operation of law must be apparent from the express words of the statute. Hence, the ***Assam Company judgement supra*** judgment does not come to the aid of the Respondent in the present case. It also flows therefrom that the Adjudicating Authority had erred in holding that the

Respondent – Income Tax Department had acquired security interest in terms of Section 245 (1) of the Income Tax Act, 1961.

**24.** We now proceed to answer the adjunct issue as to whether there was any infirmity in the action of the Respondent in appropriation of the ITR amount and in setting-off the said amount against the tax arrears of pre-CIRP period determined during the liquidation proceedings. We have already indicated in the preceding paragraphs that there is no bar in a suit or a legal proceeding continuing along with liquidation proceedings as pending suits or legal proceeding have not been included within the scope of moratorium under Section 33(5) of IBC. The question that arises next is that if the Respondent was legally entitled to continue with the Income Tax assessment proceedings during the liquidation process, does the principle of set-off and the associated accounting principle of netting-of become applicable on the ITR amount determined during the liquidation proceedings.

**25.** We find that there is no restriction, prohibition or embargo placed by the IBC on the principle of set-off during liquidation proceedings. In fact, the right of set-off is available to the Respondent as maybe noticed at Regulation 29 of Liquidation Regulations, which is as reproduced below:

*“29. Mutual credits and set-off. Where there are mutual dealings between the corporate debtor and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate debtor or to the other party.*

*Illustration: X owes Rs. 100 to the corporate debtor. The corporate debtor owes Rs. 70 to X. After set off, Rs. 30 is payable by X to the corporate debtor.”*

Clearly therefore, the concept of set-off in the liquidation process stands on the premise of mutual credits and dealings undertaken the between the parties. In **Company Appeal (AT) (Insolvency) No. 258 of 2024**

this context, we must add here that there is a clear distinction between the facts of the case of **Raman judgement supra** and the facts of the present case. In the **Raman judgement**, set off was claimed while Corporate Debtor was undergoing CIRP and for reasons of set-off being claimed prior to passing of liquidation order, it was held to be contrary to law. However, in the present case, the set-off has been claimed after passing of the liquidation order which is legally permissible under Chapter III Part II of IBC. Hence the Raman judgement does not come to the aid of the Appellant in asserting that set-off was not permissible and the entire ITR amount should have become part of the liquidation asset of the Corporate Debtor.

**26.** However, what is under contention is whether on completion of assessment proceedings during liquidation, the Respondent-Income Tax Department could avail of the set-off automatically, on its own, by adjusting against pre-CIRP dues. In this regard we may refer to the **Sundaresh Bhatt judgement supra** wherein the Hon'ble Apex Court has held that while statutory authorities can take steps to determine the tax, interest, fines or any penalty which is due, it cannot enforce a claim for recovery of the tax due during the period of moratorium. Extending the ratio of this judgement, we hold that the Income Tax authority enjoys limited jurisdiction of continuing with assessment proceedings and in determining the quantum of Income Tax dues but does not enjoy the jurisdiction and power to suo motu initiate recovery of dues or execute their claim unilaterally by adjusting the ITR amount with past tax dues.

**27.** Furthermore, a set-off is a concept which entails setting-of monetary cross-claims between parties which results in producing a certain balance sum. The precept of set-off in liquidation proceeding would therefore mean adjusting **Company Appeal (AT) (Insolvency) No. 258 of 2024**

a smaller claim owed to the Respondent against a still larger claim payable to the Respondent. However, while applying the principle of set-off, it must be kept in mind that no creditor ends up getting share disproportional to their dues.

**28.** All claimants in the liquidation process are required to stake claims for distribution of proceeds of sale in consonance with Section 53 of IBC. Filing of claims for set-off is also mandated by Liquidation Regulations and cannot be bypassed. Thus, in the present case, for recovery of the tax amount as determined in the assessment proceedings by set-off against ITR, it was also required of the Respondent to submit their claims in terms of the laid down procedure. They are required to file their claim with the Liquidator for recovery of the dues in the requisite form. The Income Tax Department by unilaterally adjusting the ITR amount cannot put itself in a better footing than what is permissible as their claim in the distribution matrix.

**29.** Thus, while the Adjudicating Authority has been partially correct in allowing the principle of set-off in the liquidation proceedings but partially incorrect in allowing the suo-motu set-off without the claims having been filed by the Respondent before the Appellant-Liquidator in terms of the Liquidation Regulations. Thus, to answer the question raised in para 18 above, we are of the considered view that there has been a clear infirmity on the part of the Respondent in unilaterally and suo-motu appropriating the ITR amount by setting-off the said amount against the tax arrears of pre-CIRP period determined during the liquidation proceedings.

**30.** We take notice that there is no material on record to show that the Adjudicating Authority while passing the impugned order has considered what amount was due to the Respondent in the context of Income Tax pre-CIRP dues **Company Appeal (AT) (Insolvency) No. 258 of 2024**



for adjustment/set-off of ITR as against what was due to them as their claim under the liquidation proceedings. In the given circumstances, we feel it appropriate to remand the matter back to the Adjudicating Authority to examine afresh the quantum of set-off of ITR against pre-CIRP tax dues which has been allowed to the Respondent as against their claim entitlement in the liquidation proceedings. On revisiting the matter, in the event it is found by the Adjudicating Authority that the ITR amount set off by the Respondent – Income Tax Department exceeds their claim entitlement in the liquidation proceedings, the Respondent may be directed to refund the excess amount so adjusted, within a reasonable period to be decided by the Adjudicating Authority, which sum, may thereafter be added to the liquidation estate of the Corporate Debtor. If, however, the ITR amount adjusted by the Respondent is found to be less than their claim entitlement, the ITR adjustment so made will hold ground and remain undisturbed with the caveat that balance if any shall stand extinguished since the Respondent did not file their claims before the Liquidator in the liquidation proceedings. The appeal is disposed of in the above terms. Parties shall bear their own costs.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Mr. Barun Mitra]**  
**Member (Technical)**

**[Mr. Arun Baroka]**  
**Member (Technical)**

**Place: New Delhi**

**Date: 12.07.2024**

Ashok Kumar

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