

ANDHRA PRADESH HIGH COURT

Income-Tax Officer

Vs.

Official Liquidator (A.P)

Company Application No. 134 of 1973 in Company Petition No. 5 of 1958

(Gopal Rao Ekbote and Chennakesav Reddy, JJ.)

04.03.1974

JUDGMENT

Gopal Rao Ekbote, J.

1. This company application has come to us on a reference made by our learned brother, A. Sambasiva Rao J.
2. The facts in outline are that Sri Ramalingeswara Crushing Mills Company (Private) Ltd. is in liquidation. The Income-tax Officer, B-Ward, Company Circle, Hyderabad, submitted a claim for Rs. 4,028.50 as against the company in liquidation. The said sum is due to the income-tax department in respect of assessment years 1951-52, 1952-53 and 1955-56. Recovery proceedings were initiated to recover the amounts of tax assessed. Properties of the company were attached in 1958. As the winding-up order was passed by the High Court, the recovery proceedings were suspended. Subsequent to the winding-up order, the Income-tax Officer claimed that the said amount due from the company should be accepted as preferential claim and paid.
3. The official liquidator by his order dated November 6, 1973, admitted the claim but declined to treat it as a preferential claim. Relying upon Section 530 of the Companies Act, 1956, he held that the preferential claim is restricted to the amount due and payable within twelve months next before the date of the winding-up order. As the amounts were due 12 months prior to the winding-up order, the preferential claim was rejected.
4. Now, under Section 530(1)(a) of the Companies Act, 1956 (hereinafter called "the Companies Act"), the Government is entitled to priority in respect of arrears of tax owing by a company in liquidation but priority is confined to tax which had become due and payable within 12 months next before the date of the winding-up order. And it is plain that a tax is due and payable only when it has been ascertained, quantified and notified to the assessee with a demand for payment.

5. It is perhaps relevant to notice that before the Companies Act was enacted, a Company Law Committee was constituted. In paragraph 219 of their report, the Committee said :

"In this connection we should like to refer to a memorandum that we received from the Central Board of Revenue, on the question of a priority to be given to Crown demands generally and in particular to arrears of income-tax, super-tax and corporation tax. It was suggested that there should be no time-limit for the preferential payment of those Crown debts and that Section 230 of the Indian Companies Act, 1913, should be amended accordingly. The practical difficulty of giving effect to this suggestion is that it would place a great majority of the unsecured creditors of the company at the mercy of the income-tax authorities, inasmuch as whatever may be the nature of the security on which they may have lent money to a company at the time of the loan, the unforeseeable demands of the income-tax authorities on the company without any time-limit would rank over the claim of such creditors. In these circumstances, it may be extremely difficult for the company to raise capital for its working. In this connection we would draw attention to the provision of Clause (a) of Sub-section (1) of Section 319 of the English Companies Act, 1948, under which arrears of land tax, income-tax, profits tax, excess profits tax or other assessed taxes rank in priority over other debts of a company only if they have been assessed on the company up to a particular date, namely, 5th April prior to the appointment of the liquidator or resolution for the winding-up of the company and do not exceed in amount the whole of one year's assessment. It will be noticed that by comparison, the provision of Clause (a) of Sub-section (1) of Section 230 of the Indian Companies Act, 1913, is much wider and gives much more latitude to the income-tax authorities for, under these provisions, arrears of tax would rank in priority if they have become due and payable within twelve months next before the date on which they are payable irrespective of whether such taxes have been assessed on the company or not. We are aware of the large arrears of income and other taxes which are due by many companies, which are in liquidation, but we would venture to think that the remedy for this unsatisfactory situation is not the conferment of preferential rights without limit to the income-tax authorities under Section 230 of the Indian Companies Act, 1913, but the energetic completion of assessment proceedings and vigorous measures for the collection of the assessed taxes."

6. It is because of this advice of the Committee that Section 530(1)(a) seems to have been enacted. According to this provision, the Government is not entitled to any prerogative, priority or preferential right or treatment, in the administration of assets in the liquidation of a company, save those which are expressly conferred and limited by the provision itself as stated already.

7. If this section had stood alone, there would have been no difficulty in rejecting the claim of the Income-tax Officer solely on the ground that the amount he is claiming had become due and

payable long before the 12 months next prior to the date of winding-up order as the liquidator has done.

8. We have, however, to consider Section 178 of the Income-tax Act, This section was introduced in 1962. Under Section 178(3) the liquidator of any company which is being wound up, whether under the order of a court or otherwise, is bound, within 30 days of his appointment, to give notice to the Income-tax Officer, who in his turn is bound within three months to intimate to the liquidator the estimated amount of the liability of the company. Until the liquidator has set aside an amount to meet the tax liability, he should not part with any of the assets of the company except for paying secured creditors entitled to priority over Government dues.

9. Sub-section (6) of that section gives the section an overriding effect. It provides that :

"The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force."

10. Now, if Section 530(1)(a) of the Companies Act is in any manner contrary to the provisions of Section 178 of the Income-tax Act, then according to Sub-section (6) of Section 178, the said section will have overriding effect. But is there any contrariety ? In our view, there is. While Section 530(1)(a) of the Companies Act restricts the preferential claim to tax due and payable within 12 months next before the winding-up order, Section 178 of the Income-tax Act puts no such restriction on the claim, preferential or otherwise, in regard to the amount of tax due from the company in liquidation. It directs the whole amount due and payable to be set apart. The liquidator is bound under Section 178 to set apart the amount equal to the amount notified by the Income-tax Officer under Sub-section (2) of that section. And it is seen that Sub-section (2) empowers the Income-tax Officer to notify to the liquidator the amount which would be sufficient to provide for any tax which is due, or is likely thereafter, to become payable by the company. Thus, the whole amount is due on account of the tax, irrespective of the fact whether the amount has been due and payable next before 12 months of the winding-up order or at any time prior thereto. Such a notified amount has to be set apart by the liquidator; otherwise, he is personally liable to the extent of the notified amount for the payment of the tax on behalf of the company, if he fails to set aside the amount notified under Sub-section (2) of that section. The section, however, does not expressly say as to what the liquidator has to do with the amount after it is so set aside.

"To set aside" or to "set apart", according to Corpus Juris Secundum, volume 80, page 1, means more than "to designate" and means "to separate to a particular use". In common terminology "set aside" or "set apart" has been held to be synonymous with "appropriate". And the word "appropriate" is said to mean, according to Corpus Juris Secundum, volume 6, page 121, "to set apart or apply to a particular purpose".

11. What must follow is that when the liquidator sets aside the notified amount it is intended for

the specific purpose of that amount to be paid to the Income-tax Officer who has notified the amount.

12. The liquidator was not able to point out to us as to what otherwise happens to the amount after it is set apart by him. He conceded that such an amount cannot be distributed to the creditors. It is not available for distribution. If that is so, then it has to be appropriated towards the tax due for which purpose the amount was required to be set aside. We do not think that the legislature which had the knowledge of the Company Law Committee's report extracted above and of the existence of Section 530(1)(a) of the Companies Act, would have legislated for setting aside the notified amount without having an intention to appropriate the amount towards the tax dues.

13. It is true that Section 178 of the Income-tax Act does not refer to preferential payment. Nor it says that the tax claim of the Government will have priority over the other creditors. Nevertheless, the effect of Section 178 of the Income-tax Act undoubtedly is that the notified amount which shall be set apart by the liquidator is earmarked for the payment of the taxes due. Such an amount shall not be available for distribution amongst the creditors. It is, therefore, immaterial whether we call Section 178 as laying down preferential claims or providing for priority in regard to the payment of the tax due. When once the effect of Section 178 is held to be that the tax amount so set apart shall be utilized for the purpose of payment of the tax by the liquidator, then the limited right of preferential payment conferred on the Income-tax Officer really gets merged in the wider right which Section 178 confers on the Income-tax Officer. The section casts a statutory obligation on the liquidator to set aside the notified amount at the pain of his being held personally liable if he omits to so set aside the amount. We are unable to share the view that Section 178 is enacted for a limited purpose of ensuring that the Government's existing rights and priorities under Section 530(1)(a) of the Companies Act are not defeated by sale of the company's assets or distribution among the creditors or shareholders of the amount who under the Companies Act are not entitled to be paid before the Government. There are no words in Section 178 of the Income-tax Act to read anything of that kind. Sections 530(1)(a) of the Companies Act was enough to achieve that limited purpose. Section 178(6) in such a case was unnecessary. The legislature wanted to protect the taxes and that is why in spite of Section 530(1)(a) of the Companies Act, an obligation is cast on the liquidator under Section 178 of the Income-tax Act.

14. It is, therefore, abundantly plain that Section 178 is a provision which is contrary to Section 530(1)(a) of the Companies Act in the sense that in the ultimate analysis it removes the restriction on the right of preference for Government dues and legislatively directs the liquidator to arrange for the payment of taxes. The result, therefore, is that as per Sub-section (6) of Section 178 of the Income-tax Act, the said section shall prevail over Section 530(1)(a) of the Companies Act.

15. Even if it is assumed that either there is no contrariety between the two provisions or Section 178 has no overriding effect on Section 530(1)(a) of the Companies Act, even then the same result can be reached by another approach. Section 530(1)(a) of the Companies Act gives a limited priority to the Government. It, by implication, means that the Government should stand in the queue with other unsecured creditors to receive the pari passu distribution of the assets of the company. Section 178 of the Income-tax Act which is a subsequent legislation on the same subject, however, casts an obligation on the liquidator to set aside not only the restricted amount of tax referred to in Section 530(1)(a) of the Companies Act but the entire amount of tax due for the purpose of its payment. The subsequent legislation, therefore, submerges the effect of Section 530(1)(a) of the Companies Act. The result of the subsequent legislation is the implied repeal of Section 530(1)(a) of the Companies Act, which provided only for a limited relief for the tax due, and which now has been replaced in altogether a different form but having the effect of setting aside the entire amount of tax due for the purpose of its payment.

16. It is not in dispute that the repeal can either be express or it can be implied. It is well-settled that if the provisions of a later enactment are so inconsistent with or repugnant to the provisions of the earlier one, that the two cannot stand together, the earlier is abrogated by the later. We do not find it possible to construe the two enactments in a way that both would continue to be effective. In our view, the subject of giving limited preference to the tax claim is entirely taken over by the subsequent legislation in effect directing the payment of entire tax due.

17. We are fortified in our view by an unreported decision of the Kerala High Court in A.S. No. 224 of 1968, Application No. 81 of 1968 in B.C.P. No. 5 of 1966 dated 28th June, 1973. A Bench of that High Court held that not only the amount for which preference is given under Section 530 of the Companies Act but the entirety of the income-tax dues of the company including that which may thereafter become payable is covered by Section 178. It was also held that:

"It is difficult, therefore, to give any other meaning to the words 'set aside' under Section 178(3) than that the amount set aside is for the object of meeting the income-tax dues."

18. Our attention, however, was drawn to the decision of the Mysore High Court in *Income-tax Officer v. Official Liquidator*¹, The following observation is sought to be relied on :

"The rule as to priorities in Section 530 of the Companies Act also does not seem to be a matter governed or to any extent affected by Section 178 of the Income-tax Act, 1961, for the simple reason that the two sections deal with two different topics and, therefore, no occasion could arise for the operation of the non-obstante clause contained in Sub-section (6) of Section 178 of the said Act."

19. We have already stated that though Section 178 of the Income-tax Act may not speak of any

priority, we find it difficult to agree with the view that Section 178 of the Income-tax Act and Section 530 of the Companies Act deal with two different topics. We have pointed out as to how Section 178 which was subsequently enacted really covers the same legislative problem. Virtually, Section 178, instead of giving the limited protection by Section 530(1)(a) of the Companies Act, gives the maximum protection in regard to the entire amount of tax dues.

20. We would like to say that it was assumed by the parties that, although Section 178 was enacted long after the amounts in the instant case had become due, still it applied to the present case. It is only on that assumption that we proceeded to deal with the matter.

21. For the reasons given above, we find ourselves unable to agree with the view taken by the official liquidator. We would, therefore, direct the liquidator to set apart and pay off the amount of tax due if an application is filed with him by the Income-tax Officer concerned. We make no provision for costs.

¹[1967] 63 ITR 810, 813 (Mys)