IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.04.2021

PRONOUNCED ON : 26.04.2021

CORAM

THE HONOURABLE **MR.JUSTICE C.SARAVANAN**

W.P.No.31090 of 2015
and M.P.No.2 of 2015

M/s.Ruchi Soya Industries Ltd.,
Through its Authorised Signatory Sh.A.R.Prasad
301, Mahakosh House, 7/5, South Tukoganj,
Nath Mandir Road,
Indore 452 001. .. Petitioner

vs

1.Union of India,
Through the Secretary,
Ministry of Finance, North Block,
New Delhi.

2.The Commissioner of Customs,
In the Office of Commissioner of Customs,
Customs House, Rajaji Salai,
Chennai-1 .. Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorarified Mandamus calling for the relating pertaining of the re-assessment of the subject Bills of Entry No.2606915 and 2606926 both dated 15.09.2015 done by the 2nd

respondents on 22.09.2015 and quash the same as the Notification No.46/2015-Cus Dated 17.09.2015 is not effective and cannot be enforced from 12.09.2015 upon the petitioner and consequently directing the respondents to clear the subject goods on payment of duty @ 7.5% as requested by the petitioner and not to insist upon the petitioner to pay higher rate of duty @ 12.5% for clearance of the subject goods.

For Petitioner : Mr.Rajesh Rawal
Senior Counsel for
M/s.V.Pushpa

For R2 & R3 : M/s.R.Hemalatha
Sr.Standing Counsel

O R D E R

In the present writ petition, the petitioner has challenged the reassessment of the Bill of Entry No. 2606926 dated 15.9.2015. It is the case of the petitioner that the amendment to Serial No. 55 to Notification No. 12/2012-Customs dated 17.3.2012vide Notification No. 46/2015-Customs dated 17.9.2015 which increased the rate of duty from 7.5% to 12.5% cannot be said to have come into force on the date of assessment on 17.3.2012 as per the Section 25 of the Customs Act, 1962 as it stood on the date.

2. The petitioner had filed the above Bill of Entry in advance to clear the consignment of crude palm oil of edible grade in bulk. In the Bill of Entry, the petitioner had proposed to pay Basic Customs Duty (BCD) at 7.5% as per Serial No.55 to Notification No. 12/2012-Customs dated 16.3.2012 as it stood on 15.09.2015.

3. However,after the import and at the time when the said Bill of Entry was taken up for assessment, Serial No.55 to Notification No.12/2012-Customs dated 17.3.2012 was amendedvide Notification No.46/2015-Customs dated 17.9.2015. Serial No.55 to Notification No.12/2012-Customs dated 17.3.2012 increased the rate of Basic Customs Duty (BCD) to 12.5% from 7.5%.

4. It is the contention of the petitioner that as per Section 25 (4) of the Customs Act, 1962 as it stood them every notification issued under Section 25(1) or (2A) of the Customs Act, 1962 comes into force on the date of its issue by the Central Government for publication in the Official

Gazette and also when it is published and offered for sale on the date of its issue by the Directorate of Publicity And Public Relations of the Board, New Delhi.

5. It is submitted that although the notification had been published in the official Gazette on 17.9.2015, the second condition that it was offered for sale on the date of its issue by the Directorate of Publicity And Public Relations of the Board, New Delhi had not been satisfied and therefore the respondents were not justified in imposing the increased rate of duty on the petitioner as per the amended notification.

6. In support of the above submission, the petitioner has filed a copy of reply dated 12.10.2015 from the Central Public Information Officer, Government of India, Department of Publication addressed to one Sh.Pawan Awasthi of the New Delhi to the effect that the copy of the Gazette of India containing Notification No.46/2005-Customs dated 17.9.2015 was received on 21.9.2015 at 3:30 PM at the Kitab Mahal, Sale Counter of the said Department from the Government of India Press,

Mayapuri , Ring Road, New Delhi and was put up to sale to the general public on 21.9.2015.

7. The petitioner has also filed another communication dated 30.10.2015 addressed to same person from C PIO/Officer-in Charge in response to a RTI application dated 12.10.2015 wherein it has been stated as follows:-

> " 1. The date and time of printing the Gazette notification published in the Gazette of India, Extraordinary Part II Section 3 Sub- Section (ii) containing No. 46/2015-Customs dated 17.9.2015 as per the records of Government of India Press, Mayapuri, New Delhi is 17.9.2015 (AN). The copy of record for that day is enclosed for further information
>
> 2. The Printed Gazette was dispatched from the Government of India Press, Mayapuri, New Delhi for sale on 21.9.2015".

8. It is therefore submitted that the notification cannot be said to have come into force on the date of its publication in the official gazette on 19.09.2015. In this connection, reliance is placed on the decision of the Honourable Supreme Court in **Union of India versus Param**

Industries Ltd 2015 (321) ELT 192 (SC) wherein the Court recognised that if the second condition was not satisfied, the notification cannot be said to have come into force.

9. Learned counsel for the petitioner fairly conceded that for a similar imports in West Bengal, the issue has been answered against the petitioner in **Ruchi Soya Industries Ltd. Vs Union of India** 2016 (336) ELT 463 which decision was also affirmed by the Division Bench of the Calcutta High Court in**Ruchi Soya Industries Ltd. Vs Union of India 2017 (350) E LT 201 (Calcutta)** and that the petitioner's appeal in SLP No. 7077 of 2016 has been admitted and that the petitioner has been directed to keep the bank guarantee alive pending disposal of the appeal.

10. He, therefore submitssince the issue has not attained finality and therefore submits this Court can come to an independent conclusion based on the available material regarding the correctness of the reassessment and imposition of the higher rate of Customs Duty on the petitioner in the impugned Bill of Entry.

11. Alternatively, it is submitted that the petitioner was under the provisions of the Insolvency and Bankruptcy Code, 2016during the pendency of the present writ petition.

12. It is submitted that a petition under Section of the aforesaid Code was filed by a Financial Creditor namely Standard Chartered Bank and that the National Company Law Tribunal, Mumbai by an order dated 8/15.12.2017 had ordered a moratorium with effect from 15.12.2017 till the completion of the Corporate Insolvency Resolution process.

13. It is submitted that the National Company Law Tribunal, Mumbai had appointed an Interim Resolution Professional and that the Resolution Professional filed M.A.No.1721/2019 under Section 30 (6) of the aforesaid Code for approval of the Corporate Resolution Plan submitted by a Consortium led by Patanjali Ayurvedic Ltd as Corporate Application as approved by the members of the Committee of Creditors (COC).

14. It is submitted that the Resolution Professional had advertised on 21.12.2017 and called upon the creditors of the petitioner to submit their claims and since the respondent Customs Department did not come forward to participate in the said proceedings before the National Company Law Tribunal, Mumbai, it has lost all its rights as they stood extinguished. Learned counsel for the petitioner submits that thereafter an order was passed on 24.7.2019 by the National Company Law Tribunal, Mumbai whereby the Resolution Plan was approved with certain conditions.

15. Learned counsel for the petitioner has placed reliance on the following decisions of the Court:-.

> " i) Committee of Creditors of Essar Steel India Limited through authorised signatory vs. Satish Kumar Gupta and Others, (2020)8 SCC 531.;
>
> ii) Ultra Tech Nathdwara Cement Ltd., vs. Union of India, through the Joint Secretary and Others, 2020 SCC Online Raj 10972020)37 GSTL 289"

16. A reference was made to an order of [CS1] the National Company Law Tribunal dated 4.9.2019 to state that no party has any right to dictate the terms of the order and that was made clear that while approving the Resolution Plan, the said Tribunal deliberated every aspect of the Resolution Plan in detail and all the claims which were admitted during corporate insolvency resolution plan were being dealt by in terms of the Resolution Plan and anyone who has not filed any claim will not have any right to agitate the same after approval of the resolution plan.

17. In this connection, learned counsel for the petitioner placed reliance on the decision of the Honourable Supreme Court rendered recently in the case of **Committee of Creditors of ESSAR Steel India Ltd versus Sathish Kumar Gupta and others** (2020) 8 SCC 531, wherein the Honourable Supreme Court dealt with the issue relating to rights of an operating creditor. It is submitted that since the respondent customs department was an operating creditor, it lost all its rights.

18. Opposing the prayer in the writ petition, learned counsel for the customs Department submitted that the writ petition was not maintainable as the petitioner has an alternate remedy by way of an appeal before the Appellate Commissioner.

19. It is further submitted that as on date on the very identical issue, the Calcutta High Court has answered the issue against the petitioner and therefore the writ petition is liable to be dismissed on merits.

20. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent customs Department. I have also perused the notification and the documents filed along with the typeset of papers. I have also perused the affidavit filed in support of the present writ petition.

21. Facts are not in dispute. The petitioner has an alternate remedy to file an appeal against the assessment before an Appellate

Commissioner under Section 128 of the Customs Act, 1962 against the reassessment in the impugned Bill of Entry.

22. Considering the fact that the writ petition has been admitted in the year 2015, I do not see any point in relegating the petitioner to work out the remedy before the Commissioner of Customs (Appeals) at this distant point of time straight away without examining the case on merits. The petitioner has also persuaded this court that a final decision may be given on merits as well.

23. I have considered the decision in **Union of India versus Param Industries Ltd** 2015 (321) ELT 192 (SC) cited by the learned counsel. It was rendered in the context of the prevailing practice and the provisions of the Customs Act, 1962 as it stood then. At that point of time, hosting of the notification through the website of theCentral Board of Excise and Customs had not evolved as it was in 2015.

24. Though, section 25 (4) of the Customs Act, 1962 read similarly as it stood when the dispute arose in 2001 in **Union of India versus Param Industries Ltd** 2015 (321) ELT 192 (SC), there was a marked difference in the practice of dissemination of statutory information in 2015.

25. The use of the information technology had changed by leaps and bound since 2001. By 2015, all informations were available at the click of the button of the computer in the website of the Central Board of Excise and Customs which were also physically published in the official Gazette.

26. The answers obtained under the RTI Act also do not dispute that the fact that the amended notification had been published in the Gazette on 17.9.2015.

27. In this case, not only the notification was posted in the website of the Central Board of Excise and Customs on 17.9.2015but

was also published in the official Gazette of Government of India on 17.9.2015. Therefore, the petitioner cannot complain that it was unaware of the change in the rate of duty merely because the sale of official Gazette was purportedly made only on 21.9.2015.

28. After all , the publication of any information in the official Gazette not only signifies its authenticity but also its dissemination to the public. The practice of purchasing printed copies of Gazette publication has been done away over a period of time as the information were made available to the citizens in the official website of the Central Board of Excise and Customs.

29. Thus, the second limb of section 25 (4) of the Customs Act, 1962 requiring publication and offer for sale on the date of receipt issued by the Directorate of Publicity and Public Relation of the Board, New Delhi had been rendered vestigial over a period of time having no useful purpose in the light of the publication of such information in the website.

30. Perhaps taking note of the above provisions of the Information Technology Act, 2000 and the advancement in the use of information technology in the dissemination of information by the Central Board of Excise and Customs, the Union Parliament has also amended section 25(4) of the Customs Act, 1962 vide Finance Act, 2016 to read as under:-

> " (4) Every Notification issued under sub- section (1) or under sub- section (2A), unless otherwise provided, come into force on the date of its issue by the central government for publication in the Official Gazette."

31. In fact, section 4 of the Information Technology Act, 2000 also makes it clear that where any law provides that information or other matter shall be in writing or in the typewritten or **printed form**, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information are matters-

> " (a) rendered or made available in an electronic form;
>
> and
>
> (b) accessible so as to be usable for the subsequent reference."

32. The above two conditions have been satisfied and therefore the argument based on the decision of the Hon'ble Supreme Court in **Union of India versus Param Industries Ltd** 2015 (321) ELT 192 (SC) the facts of the case are to be rejected.

33. In fact, the decision of the Honourable Supreme Court in **Union of India versus Param Industries Ltd** 2015 (321) ELT 192 (SC) has not examined the issue from the perspective of section 4 of the Information Technology Act, 2000. If such information was brought to the notice of the Honourable Supreme Court, the Honourable Supreme Court would have certainly given different verdict.

34. By 2015, an assessee was no longer required to wait to buy the printed copy of the official Gazette from the bazzar or the official says counter of the Government to find out the change in the rate of duty tax after the information were hosted in the official website.

35. In fact, a reading of unamended section 25(4) of the Customs Act, 1962 would also indicate that every notification issued under sub-

section (1) or sub- section (2A) shall unless otherwise provided, come into force on the date of the issue by the Central Government for publication in the official Gazette.

36. Sub-clause (4) of Section 25 of the Customs Act, 1962 as it stood prior to its amendment in 2016 merely enjoined the Central Government also to offer it for sale by the Directorate of Publicity and Public Relations of the Board, New Delhi simultaneously. The said requirement would have suited before the intensive of the information technology in the dissemination of the information.

37. In my view, in 2015, the necessity offering for sale such publication as in the second limb of Sub-clause (4) of section 25 of the Customs Act, 1962 had become redundant and the Parliament has rightly taken note of the same and deleted it,though somewhat belatedly.

38. Before the Calcutta High Court, the Union of India had also filed an affidavit stating that the notification was also published and

offered for sale nonetheless. The court has also taken the view that if the Union's assertion of copies of notification being put up for sale on September 17, 2015 is disbelief, at the highest, would amount to non-compliance of clause (b) which would have no effect on when the notification came into force.

39. Therefore, I am not inclined to take a different stand in this writ petition. Therefore, the present writ petition has to fail based on the arguments advanced that the amending notification came inot force only on 21.9.2015.

40. In the result, I hold that the amended notification came into on the date of its publication in the official Gazette on 17.9.2015 and its publication in the website of the Central Board of Indirect Taxes on the said date.

41. I shall now proceed to examine the 2nd argument of the learned counsel for the petitioner regarding extinguishing of the rights of

the respondent Customs Department to Duty in view of the Insolvency and Bankruptcy proceedings initiated against the petitioner.

42. It is the case of the petitioner that the respondent Customs Department has lost all its rights over the differential duty demanded in view of the corporate resolution plan approved by the National Company Law Board, Mumbai under the provisions of the Insolvency and Bankruptcy Code, 2016.

43. Question to be answered is, whether the "customs duty" payable under the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 is "**an operational debt**" of the petitioner within the meaning of Section 5 (21) of the IBC Code, 2016 and whether the respondent Customs Department is an "operational creditor" within the meaning of Section 5 (20) of the IBC Code, 2016?

44. At the outset, I would like to emphasize that such proceedings initiated at behest of a Financial creditor or an operating

creditor should come in the legitimate way of the Department collecting the taxes due from the petitioner.

45. It should be remembered that Insolvency and Bankruptcy Code 2016 was enacted with a view to provide a speedy mechanism for resolving bankruptcy and insolvency of such person. It is being implemented in a phased manner. The provisions of the Companies Act, 1956 which contained provisions for winding up has been re-grafted into the IBC, 206 with modification.

46. Under the scheme of the IBC, 2016, any "operational creditor " or a "financial creditor" to whom a corporate debtor owes any amount above Rupees One Lakh and above is entitled to file an application for corporate insolvency resolution proceeding against such debtor under Section 9(2) of the IBC, 2016 read with Rule 6 in Form 5 before the NCLT with a fee of Rs.2,000/- accompanied with documents and records as are required under Section 9(3) and under Regulation 7(2).

47. If Corporate Resolution Plan filed by Corporate Applicant is approved by the jurisdictional Company Law Board, the creditors are bound by it.

48. The expression "**operational creditor**" in section 5 (20) and "**operational debt**" in section 5 (21) is defined as follows:-

Section 5(20) of the IBC Code, 2016	**Section 5 (21) of the IBC Code, 2016**
Operational creditor means a person to whom an **operational debt** is owned and includes any person to whom such debt has been legally assigned or transferred;	**Operational debt** means a **claim** in respect of the provision of goods or services including employment or a **debt** in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

49. An "**Operational Debt**" in Section 5 (21) of the IBC Code, 2016."**Operational debt**" includes both a "**claim**" and/or a "**debt**". These, definitions intertwine and interlock with each other. These

expressions have been defined in section 3(6) and 3(11) of IBC, 2016 as follows:-

Section 3(6) of IBC, 2016	**Section 3(11) of IBC, 2016**
"**claim**" means- a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable or secure or unsecured; b) right or remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right it is reduced to judgment, fixed, mature, and mature, disputed, undisputed, secured or unsecured.	"**debt**" means a liability or obligation in respect of the **claim** which is due from any person and includes a **financial debt** and **operational debt.**

50. The expression "**Debt**" in Section 3(11) means a liability or obligation in respect of the "**claim**" which is due from any person and includes a "**financial debt**" and an "**operational debt**.

51. The expression "**claim**" as defined in Section 3(11) of the IBC, 2016, means-

> " a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable or secure or unsecured;
>
> b) right or remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, mature, and mature, disputed undisputed, secure or unsecured."

52. A "**claim**" is a reward for the provision of goods or service or employment. Therefore, "**operational debt**" cannot include a "tax"or "duty" under an enactment.

53. The expression "**claim**" means a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable or secure or unsecured or a right or remedy for breach of contract under any law for the time being in force, if such breach gives right to payment, whether or not such right is reduced in judgment, fixed, mature, disputed, undisputed, secured or unsecured.

54. For a "**claim"** to be an "**Operational Debt**", it should be in respect of the provision of "**goods**" or "**service**" including "**employment**" as is evident from reading first part of the definition of "**operational debt**" in Section 5(11) of IBC,2016.

55. To be a "**debt**" for the purpose of Section 5(21) of IBC, 2016, such a "**debt"** should in respect of payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

56. Under Article 265 of the Constitution of India, no tax shall be levied except by the authority of law. The expression "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly under Article 366 (28) of the Constitution of India.

57. The expression "duty" has been defined in Section 2(15) of the Customs Act, 1962 to means any "duty of customs" leviable under the Act, namely the Customs Act, 1962.

58. Tax as we understand it is a compulsory exaction by the Government. It is a very wide definition which has been employed in Article 366 of the Constitution of India. A tax once determined to be paid in accordance with law is a sovereign debt.

59. Such sovereign debts cannot be altered whether increased or decreased by any authority, whether by the Court or under a private arrangement or as the case may be approved by creditor, shareholders or by the committee of creditors under the Companies Act, 2013 or Insolvency & Bankruptcy Code, 2016. Corporate re-structuring of financial debt under IBC, 2016 does not mean waiver of extinguishing of sovereign debts.

60. "**Operational debt**" is incurred by a "**corporate de**btor"

by failing to meet his liability to pay or clear the "Operational debt" as defined in Section 5(21) of the IBC, 2016. Thus, "**tax**" and duties levied and collected under law can never be treated as "**Operational debt**" as defined in Section 5(21) of IBC, 2016.

61. As an importer, such a person is liable to pay customs duty under Section 12 of the Customs Act, 1962 at the rates specified under the Customs Tariff Act, 1975, or any other law for the time being in force.

62. In **Swiss Ribbons (P) Ltd.** Vs. **Union of India,** (2019) 4 SCC 17 : 2019 SCC OnLine SC 73, the Hon'ble Supreme Court held as under:-

> **" 73.**Under the Code, the Committee of Creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The Committee of Creditors is required to evaluate the resolution plan on the basis of feasibility and viability. Thus, Section 30(4) states:

"**30.Submission of resolution plan**.—

(1)-(3)***

(4) The Committee of Creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

Provided that the Committee of Creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under Section 29-A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of Section 29-A, the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of Section 29-A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of Section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section:

Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ordinance 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code

(Amendment) Ordinance, 2018."

74. It is important to bear in mind that once the resolution plan is approved by the Committee of Creditors and thereafter by the adjudicating authority, the aforesaid plan is binding on all stakeholders as follows:

31. Approval of resolution plan.—(1) If the adjudicating authority is satisfied that the resolution plan as approved by the Committee of Creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan:

Provided that the adjudicating authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation."

82. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the adjudicating authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a Committee of Creditors is constituted (as per the timelines that are specified, a Committee of Creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers

under Rule 11 of NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the parties concerned and considering all relevant factors on the facts of each case."

63. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has been framed by the Insolvency and Bankruptcy Board of India in the exercise of power conferred under the provisions of the IBC, 2016.

64. Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has been amended. The said provision as it stood before and after amendment reads as under:-

Regulation 38 before the amendment on 5-10-2018.	**Regulation 38 after the amendment on 5-10-2018.**
38. Mandatory contents of the resolution plan.— (1) A resolution plan shall identify specific sources of funds that will be used to pay the—	**38.Mandatory contents of the resolution plan.—** (1)The[CS2] amount due to the operational creditors under a resolution plan shall be given priority in

(a) insolvency resolution process costs and provide that the insolvency resolution process costs, to the extent unpaid, will be paid in priority to any other creditor; (b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the adjudicating authority; and (c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan."	payment over financial creditors. (1-A)A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and **operational creditors**, of the corporate debtor."

65. Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 also does not talk about "crown debts" such as taxes and duties. However, recently the Hon'ble Supreme Court recently has given its decision on "taxes" and "duties" which are

crown debts.

66. Thus, a "**debt**" has to be liability or obligation in respect of "**claim"** which is due from any person. It includes a "**financial debt**" and an "**operational debt**.

67. "**Claim**" cannot include tax as we know , tax is a compulsory exaction of amount under law. It cannot be assigned. Under Article 366 (2) of the Constitution of India, "Taxation" includes the imposition of any tax or impost, whether general or local or special, and expression "tax" shall be construed accordingly. Tax though a crown debt is not a "operational debt as it is not arising out of " claim" in respect of the provision of goods or services including employment.

68. The Hon'ble Supreme Court in **Ghanashym Mishra and Sons Vs. Edelweiss Asset Construction,** in its recent decision dated 13.04.2021 in Civil Appeal No.8129 of 2019 has however gives a different view. It was persuaded to accept the contra view in the light of

amendment to the Act in 2019. In paragraph 144, the Court held as follows:-

> " 144. Insofar as, the judgment authored by Deepak Roshan, J. is concerned, the learned Judge has observed, that since the resolution plan was approved by NCLT on 17.4.2018, 2019 amendment to Section 31(1) of I&B Code would not apply to the said plan. **We find, that the finding of the High Court, that the dues owed to the State Government and Central Government would not come within the definition of 'operational debt', is incorrect in law in the light of the view that is taken by us.** So also the finding, that since the order of NCLT is prior to the date on which Section 31(1) of I&B Code was amended, the provisions of Section 31 would not be applicable, also cannot stand in view of the foregoing observations made by us hereinabove."

69. Though it was also never the intention of the Parliament to enact Insolvency and Bankruptcy Code 2016 (IBC, 2016) to have such far reaching impact on the tax administration, the decision of the Hon'ble Supreme Court has held it otherwise.

70. The entire tax administration of the country is now in a pell-mell. All the tax authorities will have to make a beeline before the

National Company Law Tribunal every time to recover tax dues if under any circumstances proceedings are initiated against corporate debtor under the IBC, 2016. This was not the intention when the Act was enacted.

71. Insolvency and Bankruptcy Code (Amendment) Bill, 2019 has changed the Act. This is evident from a reading of the "Statement of Objects and Reasons" of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019. It reads as follows:-

> "The Insolvency and Bankruptcy Code, 2016 (the Code) was enacted with a view to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order or priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India.
>
> 2. The Preamble to the Code lays down the objects of the Code to include "the insolvency resolution" in a time bound manner for maximisation of value of assets in order to balance the interests of all the stakeholders. Concerns have been raised that in some cases extensive litigation is causing undue delays, which may hamper the value maximisation. There is a need to ensure that all

creditors are treated fairly, without unduly burdening the Adjudicating Authority whose role is to ensure that the resolution plan complies with the provisions of the Code. Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different pre-insolvency entitlements, it would adversely impact the cost and availability of credit. Further, views have also been obtained so as to bring clarity on the voting pattern of financial creditors represented by the authorised representative.

3. In view of the aforesaid difficulties and in order to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code. The Insolvency and Bankruptcy Code (Amendment) Bill, 2019, inter alia, provides for the following, namely:–

(a) ……..;

(b) ……..;

(c) ……..;

(d) ……..;

(e) ……;

(f) to amend sub-section (1) of section 31 of the Code to clarify that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law for the time being in force, **such as authorities to whom statutory dues are owed, including tax authorities**;

(g) ……..” [emphasis supplied]”

72. Noting the above, in paragraph No.71, the Court in **Ghanashym Mishra and Sons Vs. Edelweiss Asset Construction** held as under :-

> " 71. Perusal of the SOR would reveal, that one of the prime objects of I&B Code was to provide for implementation of insolvency resolution process in a time bound manner for maximisation of value of assets in order to balance the interests of all stakeholders. However, it was noticed, that in some cases there was extensive litigation causing undue delays resultantly hampering the value maximisation. It was also found necessary to ensure, that all creditors are treated fairly. It was therefore in view of the various difficulties faced and in order to fill the critical gaps in the corporate insolvency framework, it was necessary to amend certain provisions of the I&B Code. Clause (f) of para 3 of the SOR of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019 would amply make it clear, that the legislative intent in amending subsection (1) of Section 31 of I&B Code was to clarify, that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt is owed in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, including tax authorities."

73. The Court extracted the reply of the Finance Minister which reads as under:-

" 72. In the Rajya Sabha debates, on 29.7.2019, when the Bill for amending I&B Code came up for discussion, there were certain issues raised by certain Members. While replying to the issues raised by certain Members, the Hon'ble Finance Minister stated thus:

> "IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but largely, yes, it is IBC. […] There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan. Criminal matters alone would be proceeded against individuals and not company. There will be no criminal proceedings against successful resolution applicant. There will be no criminal proceedings against successful resolution applicant for fraud by previous promoters. So, I hope that is absolutely clear. I would want all the Honble Members to recognize this message and communicate further that this Code, therefore, gives that comfort to all new bidders. **So now, they need not be scared that the taxman will come after them for the faults of the earlier promoters. No. Once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company. So, that is very clear** ……..
>
> (emphasis supplied)"

73. It could thus be seen, that in the speech the Hon'ble Finance Minister has categorically stated, that Section 238 provides that I & B Code will prevail in case of inconsistency between two laws. She also stated, that there was question about indemnity for successful resolution applicant and that the amendment was clearly making it binding on the Government. She stated, that the Government will not make any further claim after resolution plan is approved. So, that is going to be a major sense of assurance for the people who are using the resolution plan. She has categorically stated, that she would want all the Hon'ble Members to recognize this message and communicate further that I&B Code gives that comfort to all new bidders. They need not be scared that the taxman will come after them for the faults of the earlier promoters. She further states, that once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company.

74. The Court further held as follows:-

77. It is clear, that the mischief, which was noticed prior to amendment of Section 31 of I&B Code was, that though the legislative intent was to extinguish all such debts owed to the Central Government, **any State Government or any local authority, including the tax authorities once an approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, 12 (2009) 12 SCC 209 the State/Central Government authorities continued with**

the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the Adjudicating Authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.

86. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under Section 7, there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an on-going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.

87. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. We therefore hold, that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

88. There is another reason, which persuades us to take the said view. Sub-section (10) of Section 3 of the I&B Code defines "creditor" thus:

"(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;"

89. Sub-sections (20) and (21) of Section 5 of the I&B Code define "operational creditor" and "operational debt" respectively as such:

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

90. "Creditor" therefore has been defined to mean 'any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder'.

"Operational creditor" has been defined to mean a person to whom an operational debt is owed and

includes any person to whom such debt has been legally assigned or transferred.

"Operational debt" has been defined to mean a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

91. It is a cardinal principle of law, that a statute has to be read as a whole. Harmonious construction of sub-section (10) of Section 3 of the I&B Code read with sub-sections (20) and (21) of Section 5 thereof would reveal, that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of 'operational debt'. The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of 'operational creditor' as defined under sub-section (20) of Section 5 of the I&B Code. Consequently, a person to whom a debt is owed would be covered by the definition of 'creditor' as defined under sub-section (10) of Section 3 of the I&B Code. As such, even without the 2019 amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term 'creditor' and in any case, by the term 'other stakeholders' as provided in sub-section (1) of Section 31 of the I&B Code.

94. Therefore, in our considered view, the aforesaid provisions leave no manner of doubt to hold, that the 2019 amendment is declaratory and clarificatory in nature. We also hold, that even if 2019 amendment was not effected, still in light of the view taken by us, the Central Government, any State Government or any local authority 35 2018 SCC OnLine Cal. 142would be bound by the resolution plan, once it is approved by the Adjudicating Authority (i.e. NCLT). CONCLUSION

95. In the result, we answer the questions framed by us as under:

> (i) That once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;
>
> (ii) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;
>
> (iii) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued."

75. Though the definition of "Operational Debt" in Section 5(21) of the IBC, 2016 is not intended to include "crown debt" such as

taxes and duties payable to the Government and is distinct from the "claim" and "debt" as defined in Section 3 (6) and 3(11) of the IBC,2016, as mentioned above in the beginning of the discussion on the second part of this order, this Court is bound by the interpretation placed in the above decision of the Hon'ble Supreme Court in **Ghanashym Mishra and Sons Vs. Edelweiss Asset Construction,** and the reasons given therein and in the light of the amendment to the IBC, 2016 in 2019 and in the light of the clarification of the Finance Minister when the 2019 bill was put to discussion in the parliament.

76. This Court therefore partly accepts the contention of the petitioner in so far as issue relating to extinguishment of the rights of the respondent customs department to claim the customs duty in the light of the decision of the Hon'ble Supreme Court in **Ghanashym Mishra and Sons Vs. Edelweiss Asset Construction** referred to *supra.*

77. The case is therefore remitted back the respondent to await clarification to be obtained by the Petitioner from the National

Company Law Board as to whether the Corporate Resolution Plan filed by the Corporate Applicant included the "customs duty" to be paid by the Petitioner on the import under the subject bill of entry.

78. In the light of the discussion, the submission of the petitioner that the amending Notification came into force only 21.9.2015 and not on the date of its publication on 17.9.2015 is rejected.

79. It is answered against the petitioner in the light of the provisions of the Information Technology Act, 2000, the decision of the Calcutta High Court and reasons given in this order.

80. The petitioner shall therefore file an appropriate application before the National Company Law Board and get the issue clarified from the National Company Law Board that the indeed crown debts like the differential " customs duty" payable to the respondent under the subject bill of entry which is the subject matter of

the present writ petition were treated as "operational debt" before it by the " corporate applicant" .

81. The corporate applicant has indirectly taken over the petitioner in their "Corporate Resolution Plan" before the said Tribunal. It is for the petitioner to prove that the "customs duty" payable to the respondent under the subject Bill of Entry was factored by the Corporate Applicant in the Corporate Resolution Plan submitted before the National Company Law Board.

82. The petitioner shall therefore approach the National Company Law Board within a period of 30 days from the date of receipt of copy of this Order and obtain appropriate clarification from the National Company Law Board. Needless to state, the respondent shall be made a respondent and given a notice.

83. The petitioner is given another 150 days to obtain such clarification from the said National Company Law Board. Therefore, during the period of next 180 days from the date of the receipt of this

Order, the respective parties are to maintain status quo as on date as far as demand of duty confirmed under the subject bill of entry is concerned.

84. The respondents shall proceed to recover and/or remit the duty as the case may be at the expiry of 180th day from the date of receipt of this Order. In case, the petitioner produces appropriate clarification from the National Company Law Board within such time, recovery shall be subject to such terms.

85. On the other hand, if the petitioner fails to get any clarification from the National Company Law Board within such time, the respondents shall proceed to recover the amount of duty short paid under the subject bill of entry together with interest from the petitioner in accordance with law.

86. This writ petition stands disposed with the above observations. No cost. Consequently, connected miscellaneous petition is closed.

26.04.2021

Index : Yes / No
Internet : Yes / No
jen/kkd

To

1.Union of India,
Through the Secretary,
Ministry of Finance, North Block,
New Delhi.

2.The Commissioner of Customs,
In the Office of Commissioner of Customs,
Customs House, Rajaji Salai,
Chennai-1

C. SARAVANAN, J.

jen/kkd

Pre-delivery Order in
W.P.No.31090 of 2015
and M.P.No.2 of 2015

26.04.2021