

**THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 296/Chd/Hry/2019

**Under Section 9 of Insolvency and
Bankruptcy Code, 2016**

In the matter of:

Giesecke&Devrient MS India Private Limited

Plot No.218, Block A,
Okhla Industrial Area,
Phase I, New Delhi-110020
And corporate office at:
1107, Lodha Supremus, Senapati Bapat Road,
Lower Parel (West), Mumbai-400013

...Petitioner-Operational Creditor

Vs.

ZTE Telecom India Private Limited

Tower B, Building No. 10, 6th Floor,
DLF Cyber City, Phase-II
Gurgaon, Haryana-122001
CIN No. U32204HR2003PTC035635

...Respondent-Corporate Debtor

Judgement delivered on: 20.02.2023

**Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr. Subrata Kumar Dash, Member (Technical)**

For the Petitioner- 1). Mr.Pancham Surana, Advocate
Operational Creditor : 2). Mr. Sarvesh Jain, Advocate

For the Respondent-
Corporate Debtor : Mr. Vijay Kaundal, Advocate

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC' / 'Code'), by **Giesecke &**

Devrient MS India Private Limited (for brevity ‘Operational Creditor’ / ‘Petitioner’), with a prayer to initiate Corporate Insolvency Resolution Process (**CIRP**) in case of **ZTE Telecom India Private Limited (for brevity ‘Corporate Debtor’ / ‘Respondent’)**.

2. The Corporate Debtor, namely, ZTE Telecom India Private Limited, is a Company incorporated on 09.12.2003 under the provisions of the Companies Act, 1956 with CIN No. U32204HR2003PTC035635 with its registered office at Tower B, Building No. 10, 6th Floor, DLF Cyber City, Phase-II Gurgaon, Haryana-122001. Hence, the territorial jurisdiction lies with this Adjudicating Authority. Copy of the master data of the corporate debtor is attached with the main petition and marked as Annexure A-1.

3. The facts of the case, briefly, as stated in the petition are that the corporate debtor and India Telecom customer executed a contract under which the corporate debtor was appointed to install, supply, render services, etc. for fixed or mobile digital telecommunication network. The master agreement was executed between the corporate debtor and the operational creditor wherein the operational creditor was engaged as a sub-contractor to perform the obligations of corporate debtor towards the customer. Thereafter, three supplementary agreements were executed between the parties to execute work and services. The corporate debtor was under obligation to make payments of all applicable taxes on the invoice amount, including but not limited to the Service Tax for services provided. However, the Operational Creditor till date had not received any payment towards the service tax total amounting to Rs.40,37,816/- (Rupees Forty Lakhs Thirty Seven Thousand Eight Hundred and Sixty Only).

4. It is submitted by the petitioner in Form 5, Part IV that the amount claimed to be in default total amount is Rs. 40,37,816/- (Rupees Forty Lakhs Thirty Seven Thousand Eight Hundred and Sixty Only). The default occurred on 20.11.2017 i.e. when the operational creditor informed the corporate debtor through email (Annexure-A) that it has already deposited the Service Tax amount with the tax authorities for the invoices raised by the operational creditor. Copy of working competition of operational debt (Annexure A-3), master service agreement dated 17.09.2015 (Annexure-A4), Supplementary agreements (Annexure A-5), invoices (Annexure A-9), bank account statements (Annexure A-13), are attached with the main petition.

5. A demand notice is stated to be issued by the operational creditor on 14.02.2019 and the same has been delivered to the corporate debtor via registered post. The postal receipts and the tracking report are attached at Annexure-10 of the petition. The corporate debtor gave a reply dated 01.04.2019 to demand notice wherein it was stated that the corporate debtor was making payments from time to time which fact had never been disputed by the petitioner. vide email dated 25th September 2017 informed petitioner about the status of the 8 invoices and also that 4 invoices were rejected for various technical reasons and 1 invoice was not received by the corporate debtor. After the rejection of 4 invoices, it was agreed between the parties that the corporate debtor shall release fresh Purchase Orders under the GST regime for 2016-17, the petitioner would further release fresh invoices under the GST regime and the same shall be submitted by the petitioner to the respondent for payment. The respondent uploaded on the

portal fresh Purchase Orders under the GST regime and informed the petitioner vide email dated 20.11.2017. Further, the petitioner informed via email that it had already submitted 15% Service Tax component for the cancelled/rejected invoices (ST Invoices) raised earlier under the Service Tax regime before 30.06.2017 and requested the respondent to provide a workaround for the tax component. The respondent vide email dated 23.11.2017 stated that the petitioner was not required to take 18% tax as mentioned under the GST regime as the petitioner can adjust only 15% and the remaining 3% would be borne by the respondent against the fresh invoices released under the GST regime. Vide email dated 20.12.2017, the petitioner was informed that the service tax paid against the unaccounted invoices was not a cost to the petitioner and same can be carried forward to the GST regime within six months from the appointed date i.e. 01.07.2017. There were 45 days from the date of submission of the original Service Tax Return. Since, there was a technical issue with the ST invoices, due to which the ST invoices were cancelled. Therefore, there is no amount left due and payable.

6. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The affidavit of service was filed vide diary No. 4318 dated 26.08.2019. The corporate debtor has filed reply vide diary No.5457 dated 10.10.2019, wherein it is stated that no debt was payable by the corporate debtor to the operational creditor. The invoices raised against the services availed had been paid of. The operational creditor admitted receiving the payment. The invoice bearing No. DL 3169010007 was never raised. The details such as the date, TIN No.

and signature are different on invoices from what have been submitted by this operational creditor to the corporate debtor. Different invoices are attached with the petition and are neither signed nor stamped. There is a pre-existing dispute between the parties, which can be established from the communications exchanged between the parties from an e-mail dated 25.09.2017, 22.11.2017, 20.11.2017, 29.11.2017, 20.12.2017 and 09.09.2018. The operational creditor itself mentioned that there was no outstanding amount as per the audit dated 08.01.2019.

7. The rejoinder was filed vide Diary No. 5658 dated 16.10.2019, wherein it is stated that the corporate debtor till date has not paid the service tax. The operational creditor subsequent to his work raised the invoices to the corporate debtor along with the amount of service tax which was required to be paid on or before the due date which is the 5th day of the succeeding month from the date of issuance of the invoice. The invoice No. DL 3169010007 relates to the work of the South Zone. The emails exchanged between the parties were in respect of concern raised by the operational creditor regarding payment of service tax amount. The e-mails dated 30.11.2017, 01.02.2018, 02.02.2018 and 09.08.2018 by the corporate debtor clearly infer that the corporate debtor were confirming the liability of service tax due on them and also suggested issued GST invoices be released and pending service tax amount be adjusted by the corporate debtor. Though there was no liability of the operational creditor to charge the GST amount but the operational creditor has to issue the GST invoices in order to recover the amount due on account of service tax which was already deposited in the government account but in vain, since the corporate

debtor neither adjusted the amount of service tax amount by issuing PO for service tax nor released the service tax amount and the operational creditor had to deposit the amount of GST to the government department since received otherwise huge penalty could be levied upon non-deposition of GST amount by GST department. The corporate debtor had not paid the entire amount of service tax raised on invoices generated which were due and the same is admitted by the corporate debtor vide their series of e-mails.

8. The short written submissions have been filed by the petitioner-operational creditor vide Diary No.00581/3 dated 29.07.2022 and by the respondent-corporate debtor vide diary No.00581/4 dated 29.11.2022.

9. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

10. The first issue for consideration is whether the demand notice in dated 14.02.2019 was properly served. The demand notice was delivered to the corporate debtor via registered post. The postal receipts and the tracking report are attached at Annexure-10 of the petition. The corporate debtor gave reply dated 01.04.2019 to demand notice. Therefore, the demand notice was duly served upon the corporate debtor.

11. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. It is deposed by the petitioner by way of affidavit that the operational creditor had received baseless, bogus and sham notice of dispute under Section 8(2) relating to the Operational Debt. The corporate debtor had rejected the demand of the operational creditor raising the false dispute of incorrect invoices and refused to make the payment of the Operational Debt against the pending invoices.

A reference is made to Article 3 of the Supplementary Agreement between the corporate debtor and the operational creditor on price and payment terms, the relevant para is extracted below for clarity:-

“3.2. The price in accordance with, “Pricing & Payment Terms” in the SOW is exclusive of all the applicable taxes, the taxes and duties including but not limited to Service Tax, WCT, excise and VAT shall be as applicable”.

It is therefore an undisputed fact that the corporate debtor was under an obligation to pay the service tax and GST dues to the tune of Rs. 40,37,816/- (Rupees Forty Lakhs Thirty Seven Thousand Eight Hundred and Sixty Only) under the terms of the contract. We also noticed the fact that the operational creditor was forced to make the payments to the GST department on behalf of the Corporate debtor in order to avoid the imposition of heavy penalties which would have further strained the resources of the operational creditor. The decision dated 20.03.2019 of the **Hon’ble National Company Law Appellate Tribunal in the case of Amitabh Roy v. Master Development Management (India) Private Limited & Anrs. Company Appeal (AT) (Insolvency) No. 274 of 2022** relied upon by the corporate debtor deals with non-payment of TDS under the provisions of the Income Tax Act, 1961 and not with the issue of non-payment of admitted dues under an Agreement. In contrast, we beneficially refer to the following decision of the **Hon’ble National Company Law Appellate Tribunal in the case of Pr. Director General of Income Tax (Admn. & TPS) v. M/s. Synergies Dooray Automotive Ltd. & Ors. in Company Appeal (AT) (Insolvency) No. 205 of 2017** decided on 20.03.2019, in support of the contention that the statutory dues arising out of the existing laws in a case of the operational company

have a direct nexus with the operation of the company and come in within the meaning of operational debt. The relevant extract is as below:-

“29. 'Operational Debt' in normal course means a debt arising during the operation of the Company ('Corporate Debtor'). The 'goods' and 'services' including employment are required to keep the Company ('Corporate Debtor') operational as a going concern. If the Company ('Corporate Debtor') is operational and remains a going concern, only in such case, the statutory liability, such as payment of Income Tax, Value Added Tax etc., will arise. As the 'Income Tax', 'Value Added Tax' and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including 'Income Tax', 'Value Added Tax' etc. come within the meaning of Operational Debt”.

12. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 14.02.2019 attached as (Annexure 10) was duly served on the corporate debtor. However, the period of limitation would begin from the date of default i.e. 20.11.2017 i.e. when the operational creditor vide email (Annexure-A) informed the corporate debtor that it has already deposited the Service Tax amount with the tax authorities for the invoices raised by the operational creditor. This application was filed vide Diary No. 2313 on 07.05.2019 and was re-filed on 30.05.2019 vide Diary No.274. Therefore, this Adjudicating Authority finds that this application is filed within limitation.

13. We have gone through the contents of the application filed in Form 5 and find the same to be complete. As discussed above, there is a total

unpaid operational debt (in default) principal amount of Rs. 40,37,816/- (Rupees Forty Lakhs Thirty Seven Thousand Eight Hundred and Sixty Only). Copies of working competition of operational debt (Annexure A-3), master service agreement dated 17.09.2015 (Annexure-A4), Supplementary agreements (Annexure A-5), invoices (Annexure A-9), bank account statements (Annexure A-13), are attached with the main petition. Accordingly, the petitioner proved the debt and the default, which is more than Rupees one lakh (prior to the amendment in threshold limit of one crore vide notification No. S.O.1205(E) dated 24.03.2020) by the respondent-corporate debtor.

14. It is noted that the corporate debtor has failed to payback the aforesaid amount due as mentioned in the statutory notice till date. Thus, the conditions under Section 9 of the Code stand satisfied. It is evident from the aforesaid discussed facts that the liability of the corporate debtor is established. Accordingly, the petitioner proved the debt and the default, which is above the threshold limit.

15. In the present petition all the aforesaid requirements have been satisfied. It is seen that the petition preferred by the petitioner is complete in all respects. The material on record clearly goes to show that the respondent committed a default in payment of the claimed operational debt even after the demand made by the petitioner. In view of the satisfaction of the conditions provided for in Section 9(5)(i) of the Code, we admit the petition for initiation of the CIR Process in the case of the Corporate Debtor, **ZTE Telecom India Private Limited** and also direct moratorium to take effect and appoint Interim Resolution Professional as below.

16. In Part-III of Form No. 5, no Interim Resolution Professional (IRP) has been proposed by the petitioner. The Law Research Associate of this Tribunal has checked the credentials of Mr. Naresh Kumar Aggarwal and there is nothing adverse against him. In view of the above, we appoint Mr. Naresh Kumar Aggarwal, Registration No. IBBI/IPA-001/IP-P-02116/2020-21/13274, E-mail: nareshaggarwal375@gmail.com, Mobile No.+91-9001792390, the Interim Resolution Professional with the following directions:-

- i.) The term of appointment of Mr. Naresh Kumar Aggarwal shall be in accordance with the provisions of Section 16(5) of the Code; subject to his written consent to be filed within 7 days of this order;
- ii.) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor etc. as provided in Section 18 (1) (f) of

the Code. The Interim Resolution Professional is directed to prepare a complete list of the inventory of assets of the Corporate Debtor;

iii.) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in accordance with the Code of Conduct governing his profession and as an Insolvency Professional with high standards of ethics and moral;

iv.) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;

v.) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;

vi.) The Suspended Board Of Directors is directed to give complete access to the Books of Accounts of the corporate debtor maintained under section 128 of the Companies Act. In case the books are

maintained in the electronic mode, the Suspended Board of Directors are to share with the Resolution Professional all the information regarding Maintaining the Backup and regarding Service Provider kept under Rule 3(5) and Rule 3(6) of the Companies Accounts Rules, 2014 respectively as effective from 11.08.2022, especially the name of the service provider, the internet protocol of the Service Provider and its location, and also the address of the location of the Books of Accounts maintained in the cloud. In case accounting software for maintaining the books of accounts is used by the corporate debtor, then IRP/RP is to check that the audit trail in the same is not disabled as required under the notification dated 24.03.2021 of the Ministry of Corporate Affairs. The statutory auditor is directed to share with the Resolution Professional the audit documentation and the audit trails, which they are mandated to retain pursuant to SA-230 (Audit Documentation) prescribed by the Auditing and Assurance Standards Board ICAI. The IRP/Resolution Professional is directed to take possession of the Books of Account in physical form or the computer systems storing the electronic records at the earliest. In case of any non-cooperation by the Suspended Board of Directors or the statutory auditors, he may take the help of the police authorities to enforce this order. The concerned police authorities are directed to extend help to the IRP/RP in implementing this order for retrieval of relevant information from the systems of the corporate debtor, the IRP/RP may take the assistance of Digital Forensic Experts empanelled with this Bench for this purpose. The Suspended Board of Directors is also

directed to hand over all user IDs and passwords relating to the corporate debtor, particularly for government portals, for various compliances. The Interim Resolution Professional is also directed to make a specific mention of non-compliance, if any, in this regard in his status report filed before this Adjudicating Authority immediately after a month of the initiation of the CIRP.

vii.) The Resolution Professional is directed to approach the Government Departments, Banks, Corporate Bodies and other entities with request for information/documents available with those authorities/institutions/others pertaining to the corporate debtor which would be relevant in the CIR proceedings. The Government Departments, Banks, Corporate Bodies and other entities are directed to render the necessary information and cooperation to the Resolution Professional to enable him to conduct the CIR Proceedings as per law.

viii.) The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the operational position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days of filing the report of constitution of the Committee; and

ix.) The Interim Resolution Professional is directed to send a regular progress report to this Tribunal every fortnight.

17. We declare the moratorium in terms of sub-section (1) of Section 14 of the Code, as under:-

- 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 Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 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.

18. It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, if any, shall not be terminated or suspended or interrupted during the moratorium period. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any operational

sector regulator and to a surety in a contract of guarantee to a corporate debtor.

19. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

20. The petitioner is directed to deposit an amount of ₹80,000/- (Rupees Eighty Thousand Only) with the Interim Resolution Professional to meet the immediate expenses of the CIRP within two weeks. The same shall be fully accountable by Interim Resolution Professional and shall be reimbursed by the Committee of Creditors (CoC) to the petitioner to be recovered as the CIRP cost.

21. A copy of this order be communicated to both the parties. The learned counsel for the petitioner shall deliver a copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this order to the Interim Resolution Professional at his email address forthwith.

22. This petition is accordingly admitted.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

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

February 20, 2023

VN/TB