

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

Comp. App. (AT) (Ins.) No. 1215 of 2022

In the matter of:

Office of the Assistant Commissioner of Central Tax & Anr.Appellants
Vs.

Mr. Rakesh Singala, ...Respondent
Liquidator of M/s. Apple Industries Ltd.

For Appellants: Advocate Samiksha Godiyal, Advocate Shivalika Rudra Batla and Advocate Nakul Rajan

For Respondent: Advocate Anand Bajpai, Advocate Ravi Kaul

JUDGMENT
(4th January, 2023)

Ashok Bhushan, J.

This Appeal has been filed against the order dated 16.09.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court-II) allowing IA 1842/ND/2021 filed by the Liquidator. The Adjudicating Authority directed the Appellant who was Respondent in the Application to refund the amounts of Rs.25,46,588/- and Rs.1,08,797/- to the liquidation account of the Corporate Debtor.

2. Necessary facts which need to be noticed for deciding this Appeal are:-

2.1. Corporate Insolvency Resolution Process (CIRP) proceedings were initiated against the Corporate Debtor- 'M/s. Apple Industries Limited'. The

Adjudicating Authority directed the Corporate Debtor for liquidation. In the liquidation proceeding, the liquidator filed an Application IA No. 1842/ND/2021 praying following reliefs:-

- “a) direct the Respondents to release/refund the unlawful payment withheld amount INR 1,08,797/- & INR 25,46,588/- @18% per annum immediately and not to act arbitrarily and support the ongoing Liquidation Proceedings u/s 33(2) of the IBC, 2016 r/w Regulation 32(e) or 32(f) of the IBBI (Liquidation Process) Regulations, 2016.*
- b) award the heavy cost in favour of the Applicant/ Liquidator and against the Respondents for the unlawful attempt to cause prejudice to the rights of the creditor & corporate debtor i.e. hindering the process.*
- c) pass any other order as deem fit and proper to this Hon’ble Tribunal.”*

2.2. The amounts which were claimed to be refunded were amounts to be paid by the Corporate Debtor in response to proceeding initiated under the Central Excise Act, 1944. The order confirming the demand of Rs.25,46,588/- was set aside by the CESTAT, Hyderabad by order dated 06.11.2019 granting consequential relief to the Corporate Debtor. The CIRP proceedings were initiated against the Corporate Debtor on 13.03.2019 and order of liquidation was passed on 13.02.2020. With regard to the amount of Rs.1,92,289/- which was amount for pre-deposit amount, the Corporate Debtor became entitled to make an Application to refund the deposit pursuant to order dated 27.09.2019. In pursuance of the order dated 06.11.2019, the Corporate

Debtor was entitled to file an Application for refund. Section 11B of the Central Excise Act, 1944 provides for 'claim for refund of duty and interest'. Under sub-section (1) of Section 11B, any Application for refund of duty is to be made before the expiry of one year from the relevant date. The Liquidator has made an Application for refund of the excise duty on 31.12.2020 after expiry of period of one year from the order dated 06.11.2019. With regard to refund of the amount of Rs.1,08,797/-, no Application was made by the Liquidator. The Adjudicating Authority, after hearing the parties, by the impugned order allowed the Application IA 1842/ND/2021 filed by the Liquidator and issued following direction:-

“20. Accordingly, we hereby direct the Respondents to refund both the amounts of Rs.25,46,588/- and Rs.1,08,797/- to the Liquidation Account of the Corporate Debtor within 15 days from today.”

2.3. The Adjudicating Authority took the view that the provisions of Section 11B of the Central Excise Act, 1944 are inconsistent with Section 33 of the IBC, 2016 and by virtue of Section 238 of the IBC, the provisions of IBC will have overriding effect. In paragraphs 17 & 18 of the impugned order, following observations have been made by the Adjudicating Authority:-

“17. Although the Liquidator has not applied for refund within the statutory period of 1 year as per Section 11B of Central Excise Act but in out considered view, this cannot stand as an impediment for including the amount of

Rs.25,46,588/- in the Liquidation Estate Assets of the Corporate Debtor.

18. In our considered view, the provisions of Section 11B of Central Excise Act are inconsistent with Section 33 of IBC 2016 and by virtue of Section 238 of IBC 2016, the provisions of IBC 2016 will have the overriding effect over the other laws being inconsistent with it. For the sake of convenience, the provision of Section 238 of IBC 2016 is reproduced below:-

“238. Provisions of this Code to override other laws.

“The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

3. Learned Counsel for the Appellant challenging the order contends that the observations of the Adjudicating Authority that provisions of Section 11B of the Central Excise Act, 1944 are inconsistent with Section 33 of the IBC, 2016 and by virtue of Section 238 of the IBC shall stand overridden is not the correct interpretation of the statute. There is no inconsistency in Section 33 of the IBC and Section 11B of the Central Excise Act, 1944. It is submitted that the provisions of Section 11B are mandatory and for every refund, an Application has to be necessarily made as per the statute. No Application made for refund of Rs.25,46,588/- having been filed beyond one year was not maintainable and thus, refund was rightly refused by the statutory authority. With regard to the amount of Rs.1,08,797/-, no Application has ever been

made by the Liquidator. It is submitted that the direction by the Adjudicating Authority to refund the aforesaid amounts is erroneous and deserves to be set aside. It is submitted that the statutory authorities are bound by the provisions of Section 11B and could not have allowed the refund in disregard the provisions of Section 11B.

4. Learned Counsel appearing for the Liquidator refuting the submissions of the Learned Counsel for the Appellant submits that it is the duty of the liquidator to recover and realize all assets and dues of the Corporate Debtor. The aforesaid two amounts became due to the Corporate Debtor to be refunded, hence, the liquidator was entitled to refund. It is further submitted that during the period 15.03.2020 to 28.02.2022 due to COVID-19 suspension of limitation was allowed by order of the Hon'ble Supreme Court, hence, the Application which was filed by the liquidator for refund of the amount of Rs.25,46,588/- could not have been rejected as barred by time. Learned Counsel for the Liquidator has also referred to Section 33(5) of the IBC and it is submitted that there has to be Moratorium after liquidation order has been passed. It is further submitted that the provisions of the IBC shall prevail over any other law.

5. We have considered the submissions of the Counsel for the parties and perused the record.

6. The first question which needs to be considered is as to whether the provisions of Section 11B of the Central Excise Act, 1944 are inconsistent with Section 33 of the IBC so as to be overridden by virtue of provisions of

Section 238 of the IBC. We need to first notice the relevant statutory provisions in this regard. Section 11B of the Central Excise Act, 1944 as follows:-

“SECTION 11B. Claim for refund of duty. — (1)

Any person claiming refund of any duty of excise may make an application for refund of such duty to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :]

[Provided further that] the limitation of [one year] shall not apply where any duty has been paid under protest.

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(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund : Provided that the amount of duty of excise as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –

- (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;*
- (b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Commissioner of Central Excise];*
- (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;*
- (d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;*
- (e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;*
- (f) the duty of excise borne by any other such class of applicants as the Central Government*

may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything any judgment, decree, order or direction of the to the contrary contained in Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under proviso to sub-section (2) shall be laid before each clause (f) of the first House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of any notification issued under clause (f) of doubts, it is hereby declared that the first proviso to sub-section (2), including any such notification approved or modified under sub-section

(4), may be rescinded by the Central Government at any time by notification in the Official Gazette.]”

7. We now notice the provisions of Section 33 as well as Section 238 of the IBC:-

“33. Initiation of liquidation. -

(1) Where the Adjudicating Authority, -

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30;

or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein,

it shall -

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation;

and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors [approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

[Explanation. – For the purpose of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.]

(3) Where the resolution plan approved by the Adjudicating Authority 3[under section 31 or under sub-section (1) of section 54L,] is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii), (iii) of clause (b) sub-section (1).

(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,

(6) the provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.”

“238. Provisions of this Code to override other laws.- *The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*

8. Section 33(5) of the IBC on which reliance has been placed by the Learned Counsel for the Liquidator provides that 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.

9. We do not find any conflict with Section 33 (5) and Section 11B. Section 11B is enabling provision which entitles the Corporate Debtor to make an Application for refund of duty. The Moratorium which becomes operative after liquidation order has been passed is for the purpose for protecting the Corporate Debtor from any legal proceeding. Present is not a case where any legal proceeding has been initiated against the Corporate Debtor under the Central Excise Act, 1944. Present is a case where for refund, to which the Corporate Debtor is entitled, whether the Application is required to be made by the Corporate Debtor in accordance with the Central Excise Act, 1944 or not. The statutory provision of the Central Excise Act, 1944 does not contemplate automatic refund of any duty to which company may be entitled. Section 11B of the Central Excise Act, 1944 contemplates a procedure for availing refund and we do not see any inconsistency in Section 11B of the Central Excise Act, 1944 with Section 33(5) of the IBC. Section 238 of the IBC provides that the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

10. The principle as to when a statute shall be inconsistent/repugnant to other statute has been laid down by the Hon'ble Supreme Court in "**M. Karunanidhi vs. Union of India and Another- (1979) 3 SCC 431**". In paragraph 35, following has been laid down:-

“35. *On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:-*

- 1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.*
- 2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.*
- 3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.*
- 4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.”*

11. We do not see any inconsistent or irreconcilable provision in Section 33 of the IBC in reference to Section 11B of the Central Excise Act, 1944.

12. Learned Counsel for the Liquidator has relied on the judgment of this Appellate Tribunal in **“Mr. Raghu K S & Ors. vs. Mr. R. Subramaniakumar-Company Appeal (AT) (Ins.) No. 538 of 2021”** where it has been reiterated that Section 238 of the IBC gives IBC overriding effect over other enactments. There cannot be any dispute that IBC has overriding effect over other

enactments but the key words which have to be noticed in Section 238 are **“notwithstanding anything inconsistent therewith contained in any other law for the time being in force”**. Thus, only inconsistent provisions are overridden. We, thus, do not find any provision in Section 11B inconsistent with any provisions of the IBC. We, thus, do not approve the view taken by the Adjudicating Authority that the provisions of Section 11B are inconsistent with Section 33 of the IBC.

13. Now we come to the second question as to whether the Application filed by the Liquidator for refund of the amount of Rs.25,46,588/- was filed beyond time. As noted above, the order entitling refund was passed on 06.11.2019, the period of one year was to be availed till 05.11.2020 whereas the Application which has also been brought on record as Annexure A-2 indicate that Application was filed on 31.12.2020. The submission on which the Learned Counsel for the Respondent has made to support the Application is that by order of the Hon'ble Supreme Court passed in *Suo Motu Writ Petition (Civil) No. 03 of 2020* there shall be extension of the limitation. The Hon'ble Supreme Court taking *suo motu* cognizance of the situation arising out of the challenge faced by the country on account of the COVID-19 has passed an order on 23.03.2020 which is to the following effect:-

“This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/appeals/all other proceedings within the period of

limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).

To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.

This order may be brought to the notice of all High Courts for being communicated to all subordinate Courts/Tribunals within their respective jurisdiction.

Issue notice to all the Registrars General of the High Courts, returnable in four weeks.”

14. The period was extended till 28.02.2022 under which the benefit of extension of limitation was granted by orders passed in the same Writ Petition subsequently by the Hon’ble Supreme Court dated 08.03.2021 as well as 23.09.2021. The submission of the Learned Counsel for the Appellant is that the benefit of the order of the Hon’ble Supreme Court is not to be extended to the period of filing of application as provided in Section 11B. When we look

into the provisions of Section 11B (1), the period of one year has been provided for filing Application for refund. Section 11B of the Central Excise Act, 1944 is a special statute which provides a particular period of limitation for making an Application for refund. The order passed by the Hon'ble Supreme Court was passed in exercise of jurisdiction under Article 142 of the Constitution of India and the order specifically covered petitions /applications /suits /appeals /all other proceedings. The submission of the Counsel for the Appellant is that the expression "all other proceedings" should be interpreted *ejusdem generis* and application under Section 11B is "not other proceeding". We do not find any substance in the submission when the order clearly mentions that "Application" for which limitation is prescribed in special statute the present case shall be obviously covered by the Hon'ble Supreme Court's order. We, thus, are satisfied that the order of the Hon'ble Supreme Court dated 23.03.2020 read with subsequent orders extend the benefit of limitation for liquidator to file an Application under Section 11B. Hence, the Application dated 31.12.2020 has to be treated within time. We, thus, are of the view that the Company was fully entitled for refund of the amount of Rs.25,46,588/- and for the above reason, we uphold the direction issued by the Adjudicating Authority for refund of the amount of Rs.25,46,588/-.

15. Now we come to the direction with regard to Rs.1,08,797/-. Admittedly, no Application has been filed by the Liquidator for refund of the said amount. There being no claim for the refund in accordance with law, the Central Excise department is not obliged to refund the said amount and the direction of the

Adjudicating Authority to direct for refund of the said amount cannot be upheld.

16. In view of the foregoing discussion, we partly allow this Appeal. The direction of the Adjudicating Authority to the Respondent of the Application (Appellant herein) to refund the amount of Rs.25,46,588/- is upheld whereas the direction for payment of Rs.1,08,797/- is set aside.

Parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

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

Anjali/nn