

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH

**CA-666/2019 in
(IB)-250(ND)/2017**

In the matter of

**Ms. Pooja Bahry
Liquidator of the Corporate Debtor
59/27 Prabhat Road,
New Rohtak Road,
New Delhi- 110005**

.....Liquidator/Applicant

AND

In the matter of

M/s Shree Ram Lime Products Pvt. Ltd.

..... Operational Creditor

V/s

**Gee Ispat Pvt. Ltd.
A-28, Sector-19,
Rohini
New Delhi- 110085**

.....Corporate Debtor

SECTION: 60(5) of IBC, 2016

Order delivered on 22.10.2019

Present:

**SMT. INA MALHOTRA, HON'BLE MEMBER (J)
MR. L.N. GUPTA, HON'BLE MEMBER (T)**

Present for the Petitioner: Ms. Pooja Bahry, Ms. Pooja Mahajan &
Ms. Mahima Singh, Advocates

Present for the Respondent: Ms. Lakshmi Gurung, Standing
Counsel for IT Deptt.

ORDER

PER SMT. INA MALHOTRA, MEMBER (J)

CA-666/2019 has been filed by the Id. Liquidator under Section 60(5) of the Insolvency & Bankruptcy Code, 2016, praying for directions/clarifications in respect of certain steps required to be taken after liquidating the assets of the Corporate Debtor. Vide order dated 05.10.2018, liquidation of the assets of the Corporate Debtor had been directed as no resolution of the business of the Corporate Debtor was proposed. Vide the present application, the Id. Liquidator, Ms. Pooja Bahry, submits that the secured creditors had relinquished their charge over all properties of the Corporate Debtor which were mortgaged with them, upon which steps were taken by her to sell the same.

2. As per averments, auctions were held and a sum of Rs. 16,31,20,000/- has been realised so far. The liquidator proposes to proceed with distribution of the amounts in accordance with the waterfall mechanism prescribed in Section 53 of the Code. However, she is faced with the issue as to whether capital gains tax would be attracted on sales of such secured assets to be included as liquidation cost. If so, she would be required to first make provision for the capital gains and accordingly after deduction of the amount, the balance shall be distributed amongst the claimants. The short point for clarification required by the Id. Liquidator therefore is whether in the present case she is required to deposit the capital gains and include it as liquidation costs to be defrayed in the first instance.

3. On notice being issued to the Income Tax Department, Ms. Lakshmi Gurung, Id. Counsel appearing for them has of course claimed that the capital gain has to be deposited first as per the Income Tax Act. She submits that all dues towards realisable taxes

have to be remitted in the first instance in the Liquidation process as per the provision of Section 178 of the IT Act and no exception can be carved out in cases under the Insolvency & Bankruptcy Code. Reliance has been placed on various judgments which have clearly ordained that capital gain tax is payable on sales whether the liquidation is voluntary or involuntary. Reliance is also placed on specific provisions for deduction of tax under Section 194 IA, mandating the purchaser of the property to deduct an amount equal to 1% of the sale consideration at the time of making payment and deposit it with Government as TDS.

4. To adjudicate the point in reference, we note that as per the provisions of Section 52 of the Code, a secured creditor has the option to:

a. Relinquish their security to the liquidation estate of the Corporate Debtor and allowed liquidator to sell the Secured Assets and apply the proceeds as per the liquidation waterfall under Section 53 of the Code

b. Realise its security interest in the manner specified in this section.

5. In the present case had the secured creditors chosen option (b) they could have applied the entire proceeds received to recover their debts (without deduction on account of any capital gains tax) as tax on capital gains is not liable to be paid by the banks. However, instead of realising the Secured Assets on their own they have opted for proceeding under Section 52(a). The secured creditors of the Corporate Debtor have relinquished their security to the liquidator who proceeded to sell the Secured Assets in terms of the Code and the

Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("Liquidation Regulations").

6. Given the facts of the case we do not find favour with the arguments advanced on behalf of the Income Tax Department. This Bench is of the opinion that upon realisation of the liquidated estate of the Corporate Debtor, it has to be disbursed in accordance with the waterfall mechanism as per Section 53 of the Code which provides for disbursement as under :-

Section 53.

Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:

- (a) The Insolvency Resolution Process costs and the liquidation costs paid in full;*
- (b) The following debts which shall rank equally between and among the following:-*
 - (i) Workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and*
 - (ii) Debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52.*
- (c) Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;*
- (d) Financial debts owed to unsecured creditors;*
- (e) The following dues shall rank equally between and among the following:*
 - (i) Any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;*

(ii) Debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(F) any remaining debts and dues;

(g) preference shareholders, if any; and

(H) equity shareholders or partners, as the case may be

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

7. Section 53(1)(e) provides for the liability towards government dues. As per Section 238 of the Code, the provisions of the Code shall have an overriding effect on any other enactment. The dues towards Government, be it tax on Income on or sale of properties, would qualify for being an operational debt and has to be dealt with accordingly. The provisions of Section 178 of the Income Tax Act have also been amended in view of the provisions of the Insolvency & Bankruptcy Code.

8. Further, the asset liquidated are those released by the secured creditors under the Code. A secured creditor is entitled to effect sale under the SARFAESI Act and appropriate the entire amount towards its dues, without any liability to first pay the capital gain. It is only upon residual liquidity that the distribution of the assets has to be made according to the Operational Creditors (in this case the tax authorities) in terms of the provisions of Section of the Code. If the capital gain is first to be provided for, and then be included as liquidation cost, it would create an anomalous situation in the Secured Creditor getting a lesser remittance than what they could have realised

had they not released the security into the common corpus. It is for this purpose that the provision of Section 178 of the Code has been amended giving priority to the waterfall mechanism over government dues.

9. We therefore hold that the tax liability arising out of the sale shall be distributed in accordance with the provisions of Section 53 of the Code. The applicability of Section 178 or 194 IA of the IT Act will not have an overriding effect on the water fall mechanism provided under Section 53 of the Code, which is a complete code in itself, and the capital gain shall not be taken into consideration as the liquidation cost.

10. That apart, we are also unable to comprehend what capital gains would accrue when the extremely stressed assets of the Corporate Debtor are being liquidated and the situation presumably gives way to larger capital losses.

Sd -

(L.N. Gupta)
Member (T)

Sd -

(Ina Malhotra)
Member (J)