

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
(through web-based video conferencing platform)**

**IA No.460/2020
in
CP (IB) No.174/Chd/CHD/2018
(admitted)**

In the matter of:

Small Industries Development Bank of India (SIDBI)
....Petitioner-Financial Creditor

Versus

International Mega Food Park LimitedRespondent-Corporate Debtor

And in the matter of:-

IA No.460/2020

Under Section 60(5) of the IBC, 2016

Mr. Sumat Gupta, Resolution Professional
of M/s International Mega Food Park Limited

...Applicant

Vs.

1. Commissioner of Income Tax,
Circle 1, Aayakar Bhawan, Sector-17E,
2nd Floor, Chandigarh

2. Assistant Commissioner of Income Tax,
ACIT Circle 1, Aayakar Bhawan, Sector-17E,
2nd Floor, Chandigarh

....Respondents

Order delivered on: 04.08.2022

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present through video-conferencing:

For the Applicant in : 1. Dr. Rajansh Thukral, Advocate
IA No.460/2020 2. Dr. Surekha Thukral, Advocate

For the Respondents : Mr. Yogesh Putney, Senior Standing Counsel
IA No.460/2020 for Income Tax Department

Per: Subrata Kumar Dash, Member (Technical)

ORDER

IA No.460/2020

The present application has been filed under Section 60(5) of the IBC, 2016. In the present application, **Mr. Sumat Gupta, Resolution Professional of M/s International Mega Food Park Limited** is the applicant, and **Commissioner of Income Tax, Chandigarh and Assistant Commissioner of Income Tax, Chandigarh** are the respondents.

2. In the present application, the applicant prays for direction to the respondents to release a refund of Rs.1,15,27,130/- representing for Assessment Year 2018-19 for an amount of Rs.43,49,040/- and Rs.71,78,090/- for Assessment Year 2019-20 along with interest to the Corporate Debtor i.e. M/s International Mega Food Park Limited.

3. This case was re-listed for hearing on 01.08.2022 on the grounds mentioned in the administrative order dated 29.07.2022. On the date of hearing, it was stated by the learned counsel for the applicant that the applicant has already received the amount of Rs.71,78,090/- for the Assessment Year 2019-20 along with interest, and his prayer is now restricted to the release of a refund of an amount of Rs.43,49,040/- with interest by the respondents. It was also clarified by the learned Senior Standing Counsel for the Income Tax Department that the amount of refund of Rs.43,49,040/- for Assessment Year 2018-19 has been set off against the demand for Assessment Year 2016-17 after the Income Tax Department issued a notice

under Section 245 to the applicant dated 20.09.2019 and the same was not contested.

4. It is stated that for Assessment Year 2018-19 an intimation under Section 143(1) dated 18.09.2019 was issued to the applicant (attached as Annexure A-3 of the application). It is further stated that the Income Tax Return acknowledgment for the Assessment Year 2019-20 filed on 30.10.2019 (Annexure A-4 of the application) indicates a refund of Rs.71,78,090/-. In the present case, the CIRP of the corporate debtor was initiated on 28.02.2019 and a moratorium was declared. Subsequently, the Income Tax Department by its order dated 29.10.2019 adjusted the refund arising in Assessment Year 2018-19 (Snapshot of the website as Annexure A-9 of the application). It is further stated that the subsequent applications for redressal of grievance were filed (copies of the acknowledgment of grievances attached as Annexure A-11 of the application). It is prayed that the respondents-Income Tax Department could not have adjusted the refunds arising subsequent to the commencement of the moratorium on 28.02.2019 against the pre-CIRP demand.

5. In Income Tax Department, in its reply filed by Diary No.00352/2 dated 08.01.2021, stated that demand in the case of the corporate debtor for Assessment Year 2016-17 was created on 06.12.2018, i.e. much prior to the CIRP commencement date and the corporate debtor filed an appeal challenging the assessment order of the Assessing Officer dated 06.12.2018 before the Commissioner of Income Tax (Appeals) on 14.12.2018. Reliance has been placed on the decision of the Hon'ble NCLT, Ahmedabad Bench in the case of ***Dada Dhuniwale Khandwa Power Ltd. Vs. Commissioner of Income Tax, bearing Misc. Application No.18/NCLT/AHM/2019*** decided on

05.07.2019, which was upheld by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.821 of 2019, wherein it was held that the NCLT has no such power to give any direction to any of the authority under the Income Tax Act. It is further stated that set-off/adjustment during moratorium is permissible as there is no restriction or prohibition in the statute, nor is there a specific bar or barrier in the IBC, 2016. The doctrine of set-off or the accounting principle of netting off is an accepted principle of law. Reliance has been placed on the decision of the Hon'ble Supreme Court in the case of **Swiss Ribbons Private Limited Vs. Union of India & Ors. reported as (2019) 4 SCC 17.**

6. In his rejoinder filed by Diary No.00352/3 dated 18.11.2021, the applicant has argued that the decision of the Hon'ble Supreme Court in the case of **M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Ors. MANU/SC/1661/2019 decided on 03.12.2019** has been misread. It also asserted that the judgment clearly indicates that the said dues payable to the Government will come within the meaning of the expression "operational debt" under Section 5(21), making the Government an "operational creditor" in terms of Section 5(20). It is also stated that after the commencement of CIRP, intimation under Section 143(1) of the Income Tax Act, 1961 dated 18.09.2019 was issued crystalizing a refund of Rs.43,49,040/- that became due and payable post-CIRP and as per Section 14(1)(c) the respondent cannot recover previous crystalized dues from the corporate debtor by adjustment of refund that fell due for payment during CIRP period. It is further stated that the critical issue is the date on which the demand and the refund crystalized. In its rejoinder, it is pointed out that the respondent-Income Tax Department has already processed and released a refund amount of

Rs.78,24,110/- which includes the interest of Rs.6,46,020/- as on 18.09.2020 after the date of filing of the present application on 10.08.2020. It is, therefore, logical for the Department to refund the remaining amount of Rs.43,49,040/- along with interest thereon. Reliance has been placed on the circular bearing No.Facilitation/004/2020 dated 12.09.2020 by IBBI, wherein it is mentioned in Para 5 and 7 that deals with tax dues, tax dues/Government dues are operational debts (Annexure A-15). It is also pointed out that since the respondents have failed to file claims in response to the public notice and the demand relates to Assessment Year 2016-17, the same is barred by limitation. Even for the sake of the arguments, it is presumed that demand under appeal is still subsisting, no further claim from the Department can be entertained by the CoC after the approval of the resolution plan, in view of the decision of the Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Limited through Authorized Signatory Vs. Satish Kumar Gupta and Others.***

7. In the written submissions of the applicant filed by Diary No.00352/4 dated 12.05.2022, the applicant has stated that as per the judgment of the Hon'ble Supreme Court in the case of ***M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Ors. MANU/SC/1661/2019 was decided on 03.12.2019***, wherein the income tax dues are operational debt and if the demand is crystalized before CIRP, the claim can be adjudicated and paid only in a manner prescribed in Resolution Plan. Refund due cannot be adjusted against pre-CIRP dues. The respondent is required to file a claim in respect of pre-CIRP dues. It is also pointed out that as per ***Hon'ble NCLAT judgment in Company Appeal (AT) (Ins)***

205/2017 dated 20.03.2019 in the matter Pr. Director General of Income Tax (Admn. & TPS) Vs. M/s. Synergies Dooray Automotive Ltd. & Ors.

has also held that Income Tax dues are operational debt.

8. In the written submissions of respondents filed by Diary No.00352/5 dated 21.06.2022, the respondents have stated that the refund for Assessment Year 2018-19 of Rs.43,49,040/- determined under Section 143(1) of the Income Tax Act, 1961 by order dated 18.09.2019 was adjusted against the demand of outstanding of Assessment Year 2016-17 after issuing a notice under Section 245 of the Income Tax Act, 1961 to the corporate debtor. It is further stated that the refund of Rs.78,24,112/- for the Assessment Year 2019-20 was determined and issued on 18.09.2020. It is further clarified that the claim in Form B was filed by the Department on 01.12.2020 after adjusting the demand of Rs.43,49,040/- from the demand for the Assessment Year 2016-17. Reliance has been placed on the decision of the Hon'ble Apex Court in the case of **Embassy Property Developments Private Limited**, and the following extract has been quoted in the reply:-

“Therefore, the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results. (It will be a different matter if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression “operational debt” under Section 5(21), making the Government an “operational creditor” in terms of Section 5(20). The moment the dues to the Government are crystalized and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the Adjudicating Authority, namely the NCLT)”

9. It is further stated that the corporate debtor has filed an appeal against the Assessment Order for Assessment Year 2016-17 and the demand

is not crystallized. It is stated that no direction at this stage can be issued by this Adjudicating Authority with regard to the refund, in view of the decision of the Hon'ble NCLT, Ahmedabad Bench in the case of **Dada Dhuniwale Khandwa Power Ltd. (supra)**. Further reliance has been placed on the judgment in the case of **Embassy (supra)** has further held that:

“This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).

40. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.”

10. The Department has vehemently argued that keeping in view the aforementioned judicial decisions, the claim made by the Resolution Professional for issuance of refund during the pendency of Appeal before the Commissioner of Income Tax (Appeals) falls outside the purview of the IBC, 2016.

11. We have heard the learned counsels from both sides and have also gone through the records carefully.

12. In the context of the rival submissions made, a reference is made to the judicial decisions on the issue of the nature of the debt arising out of unpaid Income Tax and other such dues of the corporate debtor. This issue fell for consideration before the Hon'ble NCLAT in **‘Pr. Director General of Income Tax (Admn. & TPS) Vs. M/s. Synergies Dooray Automotive Ltd. & Ors. in Company Appeal (AT) (Insolvency) No. 205 of 2017, etc.**

decided on 20th March, 2019 wherein the Hon'ble NCLAT observed and held as follows:-

*“28. From the plain reading of sub-section (21) of Section 5, we find that there is no ambiguity in the said provision and the legislature has not used the word ‘and’ but chose the word ‘or’ between ‘goods or services’ including employment and before ‘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, and State Government or any local authority’.*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’.

30. For the said very reason, we also hold that ‘Income Tax Department of the Central Government’ and the ‘Sales Tax Department(s) of the State Government’ and ‘local authority’, who are entitled for dues arising out of the existing law are ‘Operational Creditor’ within the meaning of Section 5(20) of the ‘I&B Code.’

(emphasis supplied)

13. This ratio was subsequently followed by the Hon'ble NCLAT in the case of ***M/s Seth Thakurdas Khinvraj Rathi Vs. M/s Cal Refineries Limited (2019) ibclaw.in 324 NCLAT dated 14-05-2019.***

14. In the present case, there was a demand against the corporate debtor for Assessment Year 2016-17 by the Income Tax Department on 06.12.2018 much prior to 28.02.2019 i.e., the CIRP commencement date. The said demand was to be paid within 30 days upto 06.01.2019 under the relevant provisions of the Income Tax Act. The corporate debtor has filed an appeal challenging the order dated 06.12.2018 of the Assessing Officer

before the Commissioner of Income Tax (Appeals) on 14.12.2018 as per Annexure A-8 of the reply. The claim that the demand for Assessment Year 2016-17 has not crystallised because of the pending appeal appears to be an afterthought as the Department has already treated it as a crystallized demand and filed a Form B on 01.12.2020 before the Resolution Professional for the demand for the Assessment Year 2016-17 after deducting the refund amount of Rs.43,49,040/- which was already adjusted. The reliance placed by the Respondent on the decision of the Hon'ble Apex Court in the case of **M/s Embassy Property Developments Pvt. Ltd. (supra)** is also completely misplaced as in the extract relied upon by the Department, the Hon'ble Apex Court was referring to the absurdity of a situation where a Resolution Professional would claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal Under Section 260A of the Income Tax Act, 1961. It is apparent that no such issue is before us in the case on hand. The reliance on the other decision **Dada Dhuniwale Khandwa Power Ltd. (supra)**, is also equally out of context of the issues at hand. During the hearings, the Income Tax Department also could not furnish a plausible explanation for applying different rules to identical facts in two assessment years, i.e., adjusting the refund in Assessment Year 2018-19, while releasing the refund for the Assessment Year 2019-20 while the same demand was pending in both these years.

15. Following the decisions of the Hon'ble NCLAT in the case of **Pr. Director General of Income Tax (Admn. & TPS) Vs. M/s. Synergies Dooray Automotive Ltd. & Ors. (supra)** and in the case of **M/s Seth Thakurdas Khinvraj Rathi Vs. M/s Cal Refineries Limited (supra)**, we

note that under the provisions of IBC, the Income Tax Department is an operational creditor and is entitled to dues arising out of the existing law are 'Operational Creditor' within the meaning of Section 5(20) of the 'I&B Code. With the initiation of CIRP, the Moratorium under section 14 of the IBC, 2016 came into force on 28.02.2019. The provisions of Section 14 of the IBC provide that on the insolvency commencement date, the Adjudicating Authority shall, by order, declare a moratorium prohibiting the institution of suits or continuation of pending suits or "proceedings" against the corporate debtor, including the execution of any judgment, decree, or order in any court of law, Tribunal, Arbitration Panel, or any other authority. The present refund of Rs.43,49,040/- for the Assessment year 2018-19 was determined on 18.09.2019 and adjusted on 29.10.2019, i.e. after the initiation of the CIRP and the declaration of the moratorium period under the provisions of Section 14 of the IBC, 2016, which is unjustified being against the settled law as discussed above.

16. In view of the above discussions, the respondent is directed to release the refund of an amount of Rs.43,49,040/- with interest up to the date of the issuance to the applicant. In the circumstances, this appeal is allowed and disposed of.

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

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

August 04, 2022

AV