

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH (COURT-II)**

**IA. 1842/ND/2021**

**IN**

**Company Petition No. (IB)-204(ND)/2019**

**IN THE MATTER OF:**

**M/s. Pooran Trading Private Limited**

**...Financial Creditor**

**Versus**

**M/s Apple Industries Limited**

**...Corporate Debtor**

**AND IN THE MATTER OF IA-1842/2021:**

**Mr. Rakesh Singala**

Liquidator, M/s Apple Industries Ltd  
Unit No. 701-A, 7<sup>th</sup> Floor, G-ITL Tower,  
Plot No. B-8, Netaji Subhash Palace,  
Pitampura, Delhi -110034

**... Applicant/Liquidator**

**Versus**

**1. Office of the Assistant Commissioner of Central Tax**

Through its Authorised Representative  
Mr. Joseph Constant Kullu  
Anantapur CGST Division. 3<sup>rd</sup> Floor,  
Thakai Towers. R. F Road, Near  
Sreekantarn Circle, Anantapur – 515001

**...Respondent No. 1**

**2. Office of the Commissioner of Central Tax**

Central Goods & Services Tax, Tirupati Commissionerate  
9/86-A. Amaravati Nagar, West Church Compound,  
M R Palli Road, Tirupati – 517502

**...Respondent No. 2**

**3. Directorate General of Goods and Services Tax Intelligence (DGGSTI)**

(Formerly Known as Central Excise Intelligence (DGCEI))  
239, Sector 5, C Block,  
West Block, Rama Krishna Puram,  
New Delhi – 110022

**...Respondent No. 3**

**Order Delivered on: 16.09.2022**

**SECTION: Section 60(5) of IBC 2016**



**CORAM :**

**SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)**

**SH. L.N. GUPTA, HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

**For the Liquidator** : Adv. Anand Bajpai


**For the Respondent** : Adv. Samiksha Godiyal

**ORDER**

**PER SHRI. L.N. GUPTA, MEMBER (T)**

Mr. Rakesh Singala, (**hereinafter referred to as the 'Applicant/Liquidator'**) has filed the present IA No. 1842 of 2021 Rule 60(5) read with Regulations 39 of IBBI (Liquidation Process) 2016 and Rule 11 of the NCLT Rules, 2016 against the GST Department erstwhile the Excise Department (**hereinafter referred to as 'Respondents'**), seeking the following reliefs:

- a) *direct the Respondents to release/refund the unlawful payment withheld amounting 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-1.e., hindering the process.*
- c) *pass any other order as deem fit and proper to this Hon'ble Tribunal."*



2. It is stated by the Applicant that vide order dated 13.02.2020, this Adjudicating Authority had initiated the Liquidation Process against the Corporate Debtor and appointed Mr. Rakesh Kumar Singala as a Liquidator.

3. It is submitted by the Liquidator that it had sent various communications and notices to the Respondents for release of the following payments withheld unlawfully by the Respondents.

<b>S. No</b>	<b>Particulars</b>	<b>Amount (Rs.)</b>	<b>Date of Payment</b>
<b>1</b>	Paid against Show Cause Notice (SCN) dated 07.03.2018 for- Iron Ore Fines	1,08,797/-	Dated 20.02.2019
<b>2.</b>	Paid against Show Cause Notice (SCN)24.11.2011	25,46,588/-	Dated: 05.01.2012 & 09.01.2013
<b>3.</b>	Paid against the Legal visit of custom officials for Raid	96,00,000/-	Dated: 10.01.2018, 09.01.2018
<b>Total</b>		<b>Rs.1,22,55,385/-</b>	

4. It is further submitted by the Applicant that the Respondents have given the following reply to its communication.

<b>S. No</b>	<b>Amount (INR)</b>	<b>Reply of R1 &amp; R2 vide dated 06.11.2020</b>
<b>1.</b>	1,08,797/-	It is felt that in terms of Point No. 5.4 of CBIC's Circular No. 984/08/2014-CX dated 16.09.2014 even though the amount is

		eligible for refund, it appears that the same is time barred as per clause (ec) of Explanation (8) under Section 11 B of the Central Excise Act. 1944.
<b>2.</b>	25,46,588/-	As per clause (ec) of Explanation (B) to Section 11B of the Central Excise Act, 1944, for claiming refund of the other amounts also, the refund claim had to be made within one year from the date of judgement/order/decree or direction which is 05.11.2020 in the instant case. However, no refund claim is filed with the Department as on 05.11.2020.

5. It is stated by the Liquidator that based on the communication with the R-1, it had filed the Form-R for refund of Rs.25,46,588/- vide letter dated 31.12.2020.

6. It is stated by the Liquidator that subsequently, R-1 had set up a hearing through video conferencing on 25.02.2021 on the issue of refund of Rs.25,46,588/- wherein the counsel of Liquidator argued that due to ongoing IBC proceedings against the Corporate Debtor, the provisions of IBC, 2016 shall override any other civil law. It was further added that the claim could not be rejected on the ground of being time barred. However, the contentions of the Liquidator were rejected by the Assistant Commissioner Central Excise vide Judgement dated 02.03.2021, which is reproduced below -

*"I find that the sanction of eligible refund is governed by Section 11B of the Central Excise Act, 1944 and as a quasi-judicial authority, I shall abide the said section scrupulously while*



*examining the issue of sanction of refund or otherwise. I find that the execution of powers vested on me under this Section is derived from the Constitution of India through enactment of Central Excise Act, 1944. Further, the Sections quoted by the Counsel for the Liquidator does not bear anything in this case for the reason that the Liquidator's claim for refund is clearly hit by limitation of one year time as per clause (ec) of Explanation (B) to Section '11 B of Central Excise Act, 1944. I find that the Department being engaged in indirect revenue collection is not at all concerned with Civil Law. Thus, I hold that the Liquidator is not eligible for sanction of refund of Rs.25,46,588/- and the same is liable for rejection.*

14. *In view of the foregoing findings and discussions and under the statutory provisions read with the provisions of Section 174 of the Central Goods and Services Tax Act, 2017, I proceed to pass the following Order.*

**ORDER**

*I hereby reject the refund claim of Rs.25,46,588/- filed by the Liquidator of M/s Apple Industries Limited, as the same was hit by limitation of one year time as per clause (ec) of Explanation (B) to Section 11B of Central Excise Act, 1944.”*

7. Basing on the aforesaid facts, the Liquidator has sought directions to the Respondents for refund of the amount of Rs.1,08,797/- and Rs.25,46,588/-.

8. On issuance of Notice, the Respondent No.1 and 2 have filed common reply dated 20.09.2021 and stated that for the reasons set out in the following paragraphs, the Liquidator is not entitled to refund of the amounts sought in the present application.



**9. Regarding Claim for refund of Rs. 1,08,797/- :**

9.1 The Respondent No.1 and 2 issued a Show Cause Notice dated 7.03.2018 to the Corporate Debtor in relation to dues of Rs.14,50,632/- (along with interest) towards Central Excise Duty. The aforesaid demand culminated in the Order No.-Original No.11/2018 (C.Ex) dated 10.12.2018.

9.2 In order to file an appeal against this order dated 10.12.2018 before the Commissioner (Appeals), in terms of Sections 35(1) read with Section 35F(i) of the Central Excise Act, 1944 the Corporate Debtor paid a mandatory pre-deposit of Rs.1,08,797/- by Challan dated 20.02.2019.

9.3 This pre-deposit is required to be refunded to the appellant only, if the Appellant succeeds in the appeal before the Commissioner (Appeals).

9.4 The amount of pre-deposit cannot be released to the Corporate Debtor since :

- (i) The Commissioner (Appeals) by its Order-in-Appeal No. TTD- EXCUS-000-APP-036-19-20 dated 27.09.2019 disposed of the Corporate Debtor's appeal by remanding the matter back to the adjudicating authority.
- (ii) Pursuant to the above order, the Corporate Debtor did not file a claim for refund of pre-deposit with the Respondents.



- (iii) In the remand proceedings, the Show Cause Notice dated 7.03.2018 was decided afresh by the Adjudicating Authority and by the Order-in-Original No.06/2020 (Denovo) (C. Ex)- (AC) dated 04.06.2020, Central Excise duty of Rs.1,92,289/- has been confirmed against the Corporate Debtor (along with interest and penalty of Rs.19,229/-).
- (iv) The Corporate Debtor has neither paid the confirmed duty nor filed an appeal against the order dated 04.06.2020, which has attained finality.
- (v) While refund of the pre-deposit was found permissible by the Answering Respondents in its Order No.01/2021-C. Ex dated 18.01.2021, the same order notes with reasons that the amount of pre-deposit paid by the Corporate Debtor has been appropriated towards the confirmed Central Excise Duty of Rs.1,92,289/- payable by the Corporate Debtor.

**10. Regarding Claim for refund of Rs. 25,46,588/- :**

10.1 Pursuant to the Show Cause Notice dated 24.11.2011, the Respondents issued Order-in-Original No.06/2012-CE dated 18.01.2012 confirming that Central Excise Duty of Rs.12,92,374/- is due and payable by the Corporate Debtor. In addition, this order directed recovery of interest amounts of approximately Rs.12,54,214/- and imposed a penalty of Rs.12,92,374/- against the Corporate Debtor.

10.2 In an appeal filed by the Corporate Debtor, the Commissioner (Appeals) confirmed the abovesaid order by Order-in-Appeal No.57/2012 (T) CE dated 17.09.2012.



10.3 While the tax amounts were paid by the Corporate Debtor, it also filed an appeal before the CESTAT, Hyderabad against the order of the Commissioner (Appeals). The CESTAT, in turn, remanded the matter to the original adjudicating authority on 19.01.2017.

10.4 Pursuant to the CESTAT's remand order, the Corporate Debtor applied for a refund of Rs.38,38,962/-, which was already paid by them. This application was, however, rejected by the Assistant Commissioner vide Order-in-Original No.41/2017(R) dated 10.11.2017 for the reason that the matter was simply remanded to the adjudicating authority for consideration of the issue involved.

10.5 During the remand proceedings, the case was adjudicated afresh by the Joint Commissioner. In Order-in-Original No.17/2017 (C. Ex) Denovo (JC) dated 22.11.2017, Central Excise Duty of Rs.9,75,134/-, interest of Rs.11,65,152/- and penalty of Rs.9,75,134/- was confirmed. The Joint Commissioner dropped the demand of Rs.3,17,240/-.

10.6 An appeal was filed by the Corporate Debtor against the order dated 22.11.2017 before the Commissioner (Appeals), which was rejected by Order-in-Appeal No.TTD-EXCUS-000-APP-023-18-19 dated 29.06.2018.

10.7 This was further challenged by the Corporate Debtor before the CESTAT, Hyderabad, which Order No. A/31025/2019 dated 06.11.2019, set aside the order of the Commissioner (Appeals) dated 29.06.2018 and granted consequential relief to the Corporate Debtor.

10.8 While the CESTAT's order has been accepted by the Respondents on 04.06.2020, the amount of Rs.25,46,588/- cannot be refunded to the Corporate Debtor for the following reasons:

i) Under Section 11B of the Central Excise Act, the Corporate Debtor was required to make an application for refund of this amount before the expiry of one year from the CESTAT's order dated 06.11.2019 (i.e., by 05.11.2020). The Section 11B of the Central Excise Act reads as below:

“SECTION 11B. Claim for refund of duty and interest, if any, paid on such duty. — (1) **Any person claiming refund of any duty of excise and interest**, if any, paid on such duty **may make an application for refund** of such duty and interest, if any, paid on 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...**

Explanation. — For the purposes of this section, -

....

**(B) “relevant date” means, -**

**(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction** of appellate authority, Appellate Tribunal or any court, **the date of such judgment, decree, order or direction;**” (emphasis supplied)

ii) The Applicant/Liquidator herein made an application for refund in Form-R dated 31.12.2020, which was received by the Respondents by email dated 12.01.2021, which was beyond the period permitted under Section 11 B of the Central Excise Act.

iii) Accordingly, a Show Cause Notice regarding rejection of the claim for refund of Rs.25,46,588/- on the ground of delay was issued to the Applicant/Liquidator on 02.02.2021. This Show Cause Notice culminated in the Order-In-Original No.01/2021 (C.Ex-Refund) (Adj)-(A.C) dated 02.03.2021 rejecting the Applicant/Liquidator's claim for refund.

10.9. It is submitted by the Respondents that they cannot refund the amount of Rs.25,46,588/- to the Corporate Debtor in contravention of the express provisions of Section 11B of the Central Excise Act as the Respondents are a Statutory Department strictly bound by the statutory provisions and cannot act outside the boundaries of the applicable law.

11. After going through the pleadings on record and hearing submissions of both the parties, this Bench observes that whereas the sum of Rs.1,08,797/- is the pre-deposit amount made by the Applicant/Liquidator in terms of Section 35F of Central Excise Act, the amount of Rs 25,46,588/- is the refund claimed by the Applicant/Liquidator on account of the Corporate Debtor succeeding in the Appeal before the CESTAT Hyderabad.

12. It is contended by the Respondents that Liquidator was required to file its Refund Claim in Form (R1) by 05.11.2020 in terms of Section 11B of the Central Excise Act, i.e within 1 year from the date of the CESTAT order. However, the Liquidator filed its claim for refund only on 31.12.2020. Hence, it was rejected on the ground of being time-barred.

13. We further observe that the entitlement of refund of Rs 25,46,588/- has been decided by CESTAT Hyderabad in favor of the Corporate Debtor.

Hence, Rs 25,46,588/- is the 'Asset' of the Corporate Debtor. At this juncture, we refer to the provisions of Section 36(3) of IBC 2016, which is reproduced overleaf-

**36. Liquidation estate. -**

(1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.

14. From the perusal of the provisions under Section 36(3)(e) of IBC, 2016, it is evident that "assets subject to determination of ownership by court or authority" are eligible to be part of Liquidation Estate Assets of the Corporate Debtor, which are liable to be distributed amongst the stakeholders in terms of the waterfall mechanism provided under Section 53 of IBC, 2016.

15. As confirmed by the Respondents through their Reply, the CESTAT Hyderabad had decided the entitlement of the Corporate Debtor to a refund of Rs.25,46,588/-.

16. We notice that as on date, the said amount is in possession of the Respondents. On perusal of contents of Section 36(3)(b), it is clear that even if the asset of the Corporate Debtor is not in its possession, even then it is eligible to be part of liquidation estate and liable to be distributed in terms of Section 53 of IBC, 2016.

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 our 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.”

19. Hence, in our considered view, the Respondents cannot withhold the amount of Rs.25,46,588/-, entitlement of which has already been decided by the CESTAT Hyderabad in favor of the Corporate Debtor. Further, the amount of Rs.1,08,797/- deposited in terms of Section 35F of the Central Excise Act is also the asset and part of the liquidation estate of the Corporate Debtor.

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.**

21. **The IA-1842/2021 is accordingly Allowed.**

  
(L. N. GUPTA)  
MEMBER (T)

  
(DHARMINDER SINGH)  
MEMBER (J)