

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

Under Section 60 (5) of Insolvency &
Bankruptcy Code, 2016 r/w Rule 11 of
NCLT Rules, 2016

Mr. V. Vijay Kumar Iyer,
Liquidator of M/s Bharati Defence and
Infrastructure Ltd.

...Applicant

Vs.

Dy. Commissioner of State Tax,
Mumbai - North-West and Anr.

...Respondent

In the matter of

C.P.(IB) No. 292/MB/2017

Edelweiss Asset and Reconstruction
Company Limited

.... Financial Creditor

Vs.

M/s Bharati Defence and Infrastructure
Ltd.

...Corporate Debtor

Order delivered on: 10.04.2024

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Applicant	:	None
For the Respondent 1	:	Mr. Amar Mishra, Advocate
For the Respondent 2	:	Mr. Vikram Nankani, Sr. Adv.

ORDER

Per: V.G. Bisht, Member (Judicial)

1. This Application IA 354/2023 is filed by Mr. Vijay Kumar Iyer, Liquidator ("Applicant") in the Liquidation Proceedings ("Liquidation") in the matter of M/s Bharati Defence and Infrastructure Limited [In Liquidation] (Corporate Debtor) under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs :

- a) direct the Respondent No.1, i.e., Dy. Commissioner of State Tax, Mumbai North-West to immediately refund the amount of INR 26,669,392/-, being the GST Refund Amount without any adjustment/ set off/ appropriation against any outstanding amounts into the liquidation account of the Corporate Debtor bearing bank account no. 03810200001710, being maintained with Bank of Baroda;

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

- b) direct the Respondent No. 1, i.e., the Dy. Commissioner of State Tax, Mumbai - North-West, to pay interest at the rate of 12 % per annum or at the prime lending rate plus 1 % per annum, on the GST Refund Amount from 22.09.2023, being the date of filing of Revised Application, till the date of payment and realization of the GST Refund Amount; and/ or
2. The present application ("Application") has been filed by the Liquidator ("Liquidator" "Applicant") of Bharati Defence and Infrastructure Limited ("Corporate Debtor") under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 ("Code") read with Rule 11 of the National Company Law Tribunal Rules, 2016 ("NCLT Rules"), seeking directions against the Dy. Commissioner of State Tax, Mumbai North-West ("Respondent No. 1"), to refund the amount of INR 26,669,392/- ("GST Refund Amount") along with interest, in order to ensure full compliance with the order dated 28.06.2023 ("Order"), passed by this Tribunal in I.A. No. 2708 of 2023 in the captioned company petition.
- 2.1. By way of the Order, this Tribunal allowed the said I.A. No. 2708 of 2023, which was filed by the Liquidator, inter alia, (i) seeking cancellation of the Letter of Intent dated 10.02.2023 ("LoI") issued by the Liquidator to HR Commercials Private Limited/Successful Bidder ("Respondent No.2") for Parcel 8 Assets of the Corporate Debtor; and (ii) refund of the total sale consideration (including interest and GST) paid by HR Commercials. Consequently, the total sale consideration amount of INR 17,65,81,007 received towards Parcel 8 Assets (including the amount of INR 2,66,69,392 paid towards GST) was required to be refunded to the Successful Bidder as per the Order passed by this Tribunal.

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

- 2.2. The said GST Refund Amount, having been deposited with the Respondent No. 1 authority, in compliance with the provisions of the applicable laws, the Liquidator applied for refund of the same in September 2023. However, the Respondent No.1 has refused to refund the GST Refund Amount on one pretext or the other. On the contrary, Respondent No. 1 is trying to adjust/set off its claims against the GST Refund Amount in total contravention of the provisions of the Code.
- 2.3. In compliance with the Order, the Liquidator cancelled the Lol issued to HR Commercials by way of a letter dated 17.07.2023. Further, the tax invoice was also cancelled by way of a credit note issued in favour of HR Commercials on 14.07.2023.
- 2.4. Consequent to the above, the sale consideration amount of INR 17,65,81,007 received towards Parcel 8 (including the amount paid towards interest and GST) was required to be refunded to the Successful Bidder in accordance with the directions contained in the Order.

Particulars (as per tax invoice dated 22.01.2023)	Amount (in INR)
Sale consideration	140,000,000
Interest (paid by Successful Bidder in view of delayed payment of sale consideration)	8,163,288
Total	148,163,288
CGST @18%	13,334,696
SGST @18%	13,334,696
Total	174,832,680
TCS @ 1%	1,748,327
Total amount paid by the successful bidder	176,581,007

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

2.5. The detailed breakup of the amount that was received from the Successful Bidder, towards Parcel 8 assets is as follows:

2.6. In view of the above, the Corporate Debtor made the following statutory payments to the government authorities, to ensure compliance with the applicable laws:

Particulars	Amount paid	Date of payment	Liability to make the payment as per applicable law
TCS	1,748,327	07.02.2023	Within 7 days from the last day of the month in which the tax was collected (monthly)
GST	26,669,392	20.02.2023	20 days after the end of month when the amount was received

2.7. The Applicant, by way of form GST RFD-01 (Refund on account of any other order) dated 22.08.2023, applied to the Respondent No. 1 authority seeking a refund of INR 26,669,392/- i.e., the GST Refund Amount paid by the Applicant as part of the GST Liability to the Respondent No.1 ("Original Application").

2.8. In response thereto, a 'Deficiency memo' was issued by the office of the Respondent No.1 on 05.09.2023 advising the Corporate Debtor/Liquidator to file a fresh application along with supporting documents.

2.9. Accordingly, a revised application seeking refund of the said GST Refund Amount, accompanied with a letter dated 21.09.2023 and other relevant documents, was filed by the Liquidator on 22.09.2023, in form GST RFD-01 under "Refund on account of assessment / provisional assessment / appeal/any other order" for the GST Refund Amount of INR 2,66,69,392 to be refunded, in compliance with the Order ("Revised Application"). The Respondent No.1 also issued an acknowledgement to the said

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

Application filed by the Liquidator on 06.10.2023 by way of Form GST RFD 02.

- 2.10. Thereafter, by e-mail dated 05.12.2023, the Respondent No.I provided the working of the calculation of interest and penalty claimed by it (as per DRC 07) to the Liquidator. The said details are reproduced herein below for the easy reference of this Tribunal:

BHARATI DEFENCE AND INFRASTRUCTURE LIMITED				
GSTIN – 27AAACB1688E1ZT	SUMMARY			
PARTICULARS	IGST	CGST	SGST	TOTAL
TAX LIABILITY	-	19,50,805	19,50,805	39,01,611
INTEREST	-	22,04,670	22,04,670	44,09,340
PENALTY	-	2,00,349	2,00,349	4,00,698
TOTAL	-	43,55,824	43,55,824	87,11,648

- 2.11. After having verified the claim of the Respondent No.I, the Liquidator, by way of his e-mail dated 14.12.2023, inter alia, informed the Respondent No. 1 that out of the total claim of the Respondent No.I, an amount of INR 39,01,610/-, being the principal amount due from the Corporate Debtor towards GST liability determined under order dated 19.05.2022 for the period from July 2017 to March 2018 had been admitted by the Liquidator, since the said amount of INR 39,01,610/- pertained to the period from July 2017 to March 2018, i.e., the CIRP. The remaining amount of INR 48,10,038/- pertaining to the amount of interest and penalty had not been accepted as no interest and penalty are payable for the CIRP Period, considering the principal amount of GST liability is a CIRP cost and would be paid in priority in accordance with section 53(1)(a) of the Code and dues for the CIRP period have top priority at the time of distribution as per section 53 of the Code; and the amount of INR 26,669,392/- (paid as GST on the sale consideration for Parcel 8) was not

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

eligible for any adjustment/ set-off/ appropriation against any outstanding amounts due to the Respondent No.I, including the aforesaid claim amount, as the outstanding amounts, if any, can be paid only in accordance with the provisions of the Code, as per the waterfall mechanism provided under section 53 of the Code.

- 2.12. In view of the above, the Liquidator once again requested the Respondent No.1 to refund the GST Amount in order to ensure compliance with the Order of this Tribunal. Pertinently, the verified admitted amount of INR 39,01,610/- was paid by the Liquidator to the Respondent No.1 on 14.12.2023 having payment reference number IP 2712230015868.
- 2.13. Although, the Applicant had applied to the Respondent No. I authority seeking the GST Refund Amount on 22.08.2023, till date the Respondent No. I has not refunded the same on one pretext or the other. On the contrary, the Respondent No.I is trying to adjust/ set off its claims against the GST Refund Amount in total contravention of the provisions of the Code. All such actions of the Respondent No. I have caused a lot of delay in closing the issue. Further, the pursual of the issue with the Respondent No.I, including filing of the present application has caused outlays from the liquidation estate of the Corporate Debtor. Therefore, in the fitment of things, this Tribunal may be pleased to direct the Respondent No.1 to pay interest on the GST Refund Amount, till the date of payment and realization thereof.
3. The Respondent No.1 filed affidavit in reply dated 26.02.2024 stating that the allegations contained in the application are baseless and denied in toto. It is admitted that following tax has been paid through cash of

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

Rs.2,47,62,272/- and an amount paid through or adjusted against the ITC at Rs.19,07,120/- i.e. by use of credit ledger. This amount of Rs. 19,07,120 is not at all paid to government in cash. So there is no question of asking cash refund of the same. Considering above situation, it is humbly submitted that the refund, if due, may be calculated as per the circular No.135,DT-31/03/2020 issued CBEC.

3.1. The assessment order for period 01/07/2017 to 31/03/2018 was passed by the STO-ANDHERI-WEST-701(MUM-BCP-C-037) Dt19/05/2022 and raised the demand of INR. 87,11,648/-. The order was passed within the stipulated time as per the provision of section 73 of the MGST Act 2017. Immediately after passing the order as mentioned above, the claim was lodged with the Official Liquidator. The said claim was rejected by the Official Liquidator and e-mailed to this office on-22/ 12/2022 and 23/01/2023. The details of the order passed were communicated vide mail dt. 05/12/2023 to the Appellant.

3.2. It is mandatory to adjust any dues as per the provision of section 54(10)(b) of the GST Act 2017. Also whether the Appellant is eligible to get the refund claimed or not was not decided upon. Therefore, Appellant's contention that he should be given refund of amount of INR.2,66,69,392/- without adjusting the outstanding is not acceptable.

3.3. The application for the refund by the M/s Bharati Defence Infrastructure Ltd was being verified by this office. (a) During verification it came to the notice that the applicant had made an application under the wrong category, (b) It was also found that the Hon. NCLT had directed the applicant to refund the amount of GST to M/s HR Commercial Pvt Ltd however this Respondent was not a party to the application filed by M/s HR Commercial Pvt Ltd.

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

- 3.4. The amount of refund to be given to M/s HR Commercial Pvt Ltd by the applicant is an issue which is to be dealt in by the applicant. I say that the refund of GST is required to be verified and after that it is payable to the applicant, on proper application for the same by the applicant & after due verification of such application by this office. Such refund cannot be granted to the applicant without processing of refund application.
- 3.5. The due process of law and procedure and the parameters laid down under Section 54 of the GST ACT have not been followed by the tax payer. The applications filed I.A. No. 2708 of 2023 and I.A. No. 260 of 2024 without making this Respondent party in the proceedings. This Respondent has not been given an opportunity for being heard in I.A. No. 2708 of 2023 and I.A. No.260 of 2024. However, the Hon NCLT vide order Dt. 23/01/2024 in I.A. No. 260 of 2024 has directed GST Department to grant refund to the tax payer. Considering the directions issued by the Hon NCLT mentioned the Deputy Commissioner, MUM-LTU-516 has proceeded to grant admissible amount of refund after adjusting the outstanding dues of Rs. 49,36,001/-. Out of the refund amount, that may be found due, a part is re-credited to electronic credit ledger & a part is granted as refund in cash as per the provisions of rule 86(4A) of MGST Act,2017 and the information mentioned in the circular No-135, Dt-31/03/2020 issued by the CBEC.
4. Heard learned counsel and perused the materials on record.
5. The applicant had deposited a sum of Rs. 2,66,69,392/- towards GST liability on the cancelled auction sale, out of which Rs.2,47,62,272/- was deposited in cash and Rs. 19,07,120/- was paid through or adjusted against the Input Tax Credit available in the ledger. It is not in dispute that whole of Rs. 2,66,69,392/- has been sanctioned as

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

refund by the Respondent vide order dated 24.02.2024 and a sum of Rs. 49,36,000/- has been deducted from such sanctioned refund on account of pending demand in form of interest and penalty payable on the GST liability arising during the CIRP period in other case. Admittedly, the principal GST liability was deposited by the Applicant. Out of such sanctioned refund amount, the Respondents have paid a sum of Rs. 1,98,26,272/- in cash vide payment order dated 24.02.2024 and balance amount of Rs. 19,07,120/- has been paid by crediting the Input Tax Ledger of the Applicant. The applicant has disputed the appropriation of the demand of Rs. 49,36,000/- and payment of Rs. 19,07,120/- through credit to its ledger account.

5.1. It is not in dispute that the Applicant had incurred GST liability of Rs. 39,01,611/- on another auction sale during CIRP period and that amount having been collected from the auction buyer was deposited beyond the due date. We note that liability to deposit GST was in relation to CIRP period and applicant has also fairly admitted that it would have formed part of CIRP Cost. It is settled law that interest is compensatory in nature and the GST collected from the buyer is required to be deposited in accordance with the GST law, failing which the seller incurs liability on account of interest. It is undisputed fact that STO-ANDHERI-WEST-701(MUM-BCP-C-037) Dt19/05/2022 and raised the demand of INR. 87,11,648/-, out of which principal tax amount of INR 39,01,610/- was paid by the Liquidator to the Respondent No.1 on 14.12.2023 having payment reference number IP 2712230015868. The Applicant has contended that interest and penalty is not payable for dues arising during CIRP period. However, we do not find any force in this contention as the levy of interest, being compensatory in nature and penalty arises from the statutory

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

provisions contained in GST law and once assessed as such partake the character of tax. Further, the principal that interest and penalty are not payable on the claims of the creditors applies to pre-CIRP dues and can not be applied to CIRP dues, as the Applicant was duty bound to remit the amount of tax collected from buyer to the Government within the prescribed time, failing which interest and penalty was to be levied from the Applicant. Accordingly, we do not find any infirmity in the appropriation of amounts arising on account of interest for late deposit of tax by the Respondent since the refund as well as the demand pertain to CIRP period and either of two are not in relation to pre-CIRP dues. However, as regards penalty for late deposit, we are of considered view that the Respondent must take note of the fact that act of bona-fide delay in deposit of tax must not be visited with penalty. Accordingly, on applicant's applicant for remission of penalty, the same must be considered in light of conduct of the applicant in deposition of tax beyond the prescribed period. Therefore, we consider it appropriate to direct the Respondent to consider waiver of the penalty by passing a revised order on an application, if made by the liquidator.

5.2. As regards credit of part of refund amounting to Rs. 19,07,120/- to the Input Tax Credit ledger, we note that this amount was collected from the buyer and was paid in cash to the credit of Government account towards GST Liability. The Respondent has submitted that such credit is ordered in view of rule 86(4A) of MGST Act,2017 and the information mentioned in the circular No-135, Dt-31/03/2020 issued by the CBEC providing that out of the refund amount, that may be found due, a part is re-credited to electronic credit ledger & a part is granted as refund in cash. Rule

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 354 OF 2024

86(4A) of Maharashtra GST Rules 2017 provides that “*Where a registered person has claimed refund of any amount paid as tax wrongly paid or paid in excess for which debit has been made from the electronic credit ledger, the said amount, if found admissible, shall be re-credited to the electronic credit ledger by the proper officer by an order made in FORM GST PMT-03*”. Para 4.4. of CBEC circular No-135, Dt-31/03/2020 provides that ”....., *the refund to be paid in cash and credit shall be calculated in the same proportion in which the cash and credit ledger has been debited for discharging the total tax liability for the relevant period for which application for refund has been filed. Such amount, shall be accordingly paid by issuance of order in FORM GST RFD-06 for amount refundable in cash and FORM GST PMT-03 to re-credit the amount attributable to credit as ITC in the electronic credit ledger*”. We do not find any infirmity in the action of the Respondent in ordering the refund of tax amount paid by debit to GST ledger by credit to GST ledger of the Applicant.

6. In view of the above, the IA 354/2024 is dismissed with directions to Liquidator as aforesaid in para 5.1. in relation to levy of penalty. The IA is disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)

b