

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT III

M.A. 2905/2019

IN

C.P.(IB)-350(MB)/2019

(Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016)

Devendra Singh,

Resolution Professional,

ATS Greens Paradiso, Flat No. 02053, Tower-2,

Plot No. GH-03, Sector-CHI-04,

Greater Noida, Uttar Pradesh-201308.

.....Applicant

Vs.

1. Sanjay Rathi,

Commissioner, Government of India,

Ministry of Finance, Department of Revenue,

Office of the Principal Commissioner,

Central GST and Central Excise having its office at

Nagpur-I, Telangkhedi Road, Civil Lines,

Nagpur-440001.

2. Assistant Commissioner of Central Excise

And GST,

Office of Assistant Commissioner,

Central GST and Central Excise

Division -Hingna, having office at

Plot No. 35, Sector-A, SIDCO Layout,

Near Lokmat Press, Wardha Road,

Butibori, Nagpur-440001, Maharashtra.

.....Respondents

In the Matter of:

Venus Rolling Mills Private Limited

Company incorporated under the Companies Act,

1956, having its registered office at E-8, MIDC,

Butibori, Nagpur-441122.

.....**Corporate Debtor**

Order Reserved On : 05.06.2023

Order Pronounced On : 25.07.2023

Coram:

Hon'ble H.V. Subba Rao, Member (Judicial)

Hon'ble Madhu Sinha, Member (Technical)

Appearance:

For the Applicant in Person : Mr. Devendra Singh

For the Applicant : Mr. Palash S. Singhai a/w Ms.
Sneha Panchmukh, Advocates

For the Respondent : Adv. Sangeeta Mishra
(authorized CGST Commissioner Nagpur)

For the Respondent in Person : Mr. V. Rishi
(Commissioner)

ORDER

Per: H. V. Subba Rao, Member (Judicial)

1. The above application is filed by the Applicant/Resolution Professional under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code") for seeking the following reliefs:

(a) *That this Hon'ble Tribunal be pleased to direct the Respondents themselves, and/or their servants, agents, assigns, subordinates, superiors or inferiors in office and/or any other persons claiming through or under them or otherwise howsoever, to refund the Pre-deposit amount of Rs. 1,00,00,000/- in favour of the Corporate Debtor in the bank account detailed in Schedule I;*

(b) *Pending the final hearing and disposal of this Application, this Hon'ble Tribunal be pleased to restrain the Respondents themselves, and/or their servants, agents, assigns, subordinates, superiors or inferiors in office and/or any other persons claiming through or under them or otherwise howsoever, from acting upon and/or restraining them from dealing with the Pre-deposit amount*

of Rs. 1,00,00,000/- deposited with the Respondents in any form or manner;

(c) An ex-parte relief in terms of prayer (b) above may be granted; and;

(d) Such other order or orders be passed as the Hon'ble Tribunal may deem fit and proper.

2. The brief facts behind filing the above application as pleaded in the following

Paras are as follows:

- 1) The Applicant is the Resolution Professional of the Corporate Debtor, appointed in accordance with the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code] and the Regulations framed thereunder.
- 2) The Respondent No.1 is the Commissioner of the Central GST and Central Excise, having his office at the address mentioned in the cause title.
- 3) The Respondent no. 2 is the Assistant Commissioner of the Central Goods and Service Tax and Central Excise Department, having his office at the address mentioned in the cause title.
- 4) On 6th July 2015, the Corporate Debtor complied with the Order of the Hon'ble Customs, Excise and Service Tax Appellate Tribunal dated 28th April, 2015 and deposited the amount of Rs. 1,00,00,000/- as "Pre-deposit" amount in relation to the pending Appeal before the Hon'ble Customs, Excise and Service Tax Appellate Tribunal.
- 5) Subsequently, by way of an Order dated 8th March 2019, the Hon'ble Customs, Excise and Service Tax Appellate Tribunal allowed the Appeal by way of remanding it back to the adjudicating authority.
- 6) Pursuant to the Order dated 8th March, 2019 and the Master Circular No. 1053/02/2017-CX being a "**Master Circular on Show Cause Notice, Adjudication and Recovery -reg.**" issued on 10th March, 2017, the Pre- deposit amount ought to have been

refunded along with interest to the Corporate Debtor within a period of 15 days from the date of receipt of letter seeking refund.

- 7) However, despite numerous requests from the Corporate Debtor/Applicant, the Respondents have failed and neglected to refund the Pre-deposit amount which is the rightful and bonafide asset of the Corporate Debtor. The Respondents are in gross violation of the provisions of the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"], and the Master Circular dated 10th March, 2017.
- 8) The Applicant is therefore, constrained to file the instant Application inter alia, to direct the Respondents to refund the Pre-deposit amount of Rs. 1,00,00,000/- to the Corporate Debtor.
- 9) The material facts giving rise to the instant Application are set out hereunder:
 - a. By and under an Agreement dated 04.12.2006, the Corporate Debtor agreed to pay Kamdhenu Ispat Ltd. amounts in the nature of royalty for the use of its brand name in manufacturing and marketing of its goods-MS Angle, MS Channels etc. The Applicant craves leave to refer to and rely on the same as and when produced. The said Agreement dated 04.12.2006 was revised vide an Agreement dated 20.10.2007 for increasing the royalty amount. Copies of the said Agreements dated 04.12.2006 and 20.10.2007 are annexed hereto and marked as Exhibits-"A" and "B" respectively.
 - b. In the year 12.11.2008, the Directorate General of Central Excise Intelligence launched a common investigation into the outstanding excise dues of Kamdhenu Ispat Ltd. and the Corporate Debtor.
 - c. Subsequently, the concerned authority made a case for evasion of excise duty by the Corporate Debtor in the manufacture and clearance of goods with the Kamdhenu

Ispat Ltd. brand, during the period of April 2008 to October 2008.

- d. On 23rd June 2014, the Commissioner of Central Excise held against the Corporate Debtor and inter alia, confirmed the demand of Rs.15,47,96,134/- Central Excise Duty in respect of "*clandestine removal of 25377.83 MT of Kamdhenu brand MS Angle/Channel valued at Rs. 107,34,82,209/-*", and ordered for recovery of the same from the Corporate Debtor. The Commissioner further imposed a penalty of Rs.5,00,00,000/- on the Corporate Debtor and a penalty of Rs.50,00,000/- on the director of the Corporate Debtor for his role in the "*clandestine removal of the goods*". Hereto annexed and marked as Exhibit-"C" is a copy of the Order of the Commissioner of Central Excise dated 23rd June, 2014.
- e. Subsequently, the Corporate Debtor challenged the order of the Commissioner of Central Excise dated 23rd June, 2014 by way of an Appeal before the Customs, Excise and Service Tax Appellate Tribunal. The Applicant craves leave to refer to and rely upon the said Appeal when produced.
- f. On 28th April 2015, the Hon'ble Customs, Excise and Service Tax Appellate Tribunal held partly in favour of the Corporate Debtor in the matter of the Stay Application No. E/STAY/96274/14-MUM in Appeal No. E/88302/14-MUM. For ease of reference and convenience, relevant extracts of the aforesaid letter are reproduced herein below:

*"5... in view of the contrary statements of persons of Kamdhenu and persons of applicant, M/s. Venus Rolling Mills Pvt. Ltd., **final conclusion cannot be drawn at this stage.***

5.1 However, taking into consideration overall facts and circumstances of the case, we are of the prima facie view that the applicants have not made out case for complete

*waiver of pre-deposit of adjudged dues. **We therefore direct the appellant M/s. Venus Rolling Mills Pvt. Ltd. to make pre- deposit of Rs.1 crore.** As regard other applicants, the pre- deposit is waived subject to condition, M/s. Venus Rolling Mills Pvt. Ltd. deposit the amount of Rs. 1 Crore within a period of six weeks and report compliance on 22.06.15. On deposit of the aforesaid amount remaining amount of adjudged dues against applicants shall stand waived till the disposal of the appeal."*

Hereto annexed and marked as Exhibit-"D" is a copy of the Order of the Hon'ble Customs, Excise and Service Tax Appellate Tribunal dated 28th April, 2015.

- g. Pursuant to the Order of 28th April 2015, the Hon'ble Customs, Excise and Service Tax Appellate Tribunal issued a Notice directing the Corporate Debtor to deposit the amount of Rs.1,00,00,000/- in the nature of Pre-deposit within 6 weeks and report compliance on 22nd June 2015. Hereto annexed and marked as Exhibit-"E" is a copy of the Notice dated 29th April, 2015 issued by the Hon'ble Customs, Excise and Service Tax Appellate Tribunal.
- h. Subsequently, the Corporate Debtor challenged the Order of the Hon'ble Customs, Excise and Service Tax Appellate Tribunal dated 28th April, 2015 by way of an Appeal before the Hon'ble High Court of Bombay. The Applicant craves leave to refer to and rely upon the said Appeal when produced.
- i. By way of an Order dated 18th June 2015, in the matter of the Appeal to the Order dated 28th April, 2015, the Hon'ble High Court of Bombay held that the said Order was "*just and proper and was not to be interfered with*". The Hon'ble Court extended the period for Pre-deposit of amount by three weeks. Hereto annexed and marked as Exhibit- F is a

copy of the Order of the Hon'ble High Court of Bombay dated 18 June, 2015.

- j. Thereafter, on 6th July 2015 the Corporate Debtor complied with the Order of the Hon'ble Customs, Excise and Service Tax Appellate Tribunal dated 28th April, 2015 and deposited the amount of Rs.1,00,00,000/- as "Pre-deposit" in two tranches of Rs.50,00,000/- each. Hereto annexed and marked as Exhibit-"G" and "G-1" respectively are the copies of the payment Challans bearing No.01739 and No.01837 dated 6th July, 2015 for an amount of Rs.50,00,000/- each.
- k. On 8th July 2015, the Corporate Debtor had filed a compliance Affidavit in compliance of Order dated 28th April, 2015 before the Hon'ble Customs, Excise and Service Tax Appellate Tribunal. Hereto annexed and marked as Exhibit-"H" is a copy of the said Affidavit dated 8th July 2015.
- l. On 9th July 2015, the Corporate Debtor addressed a letter to the Superintendent of the Central Excise Range-I, wherein it forwarded the proofs of payment of the Pre-deposit amount of Rs.1,00,00,000/- as per the directions of the Hon'ble High Court of Bombay and the Hon'ble Customs, Excise and Service Tax Appellate Tribunal. Hereto annexed and marked as Exhibit-"I" is a copy of the letter dated 9th July, 2015.
- m. On 10th March 2017, the Government of India issued Circular No. 1053/02/2017-CX being a "**Master Circular on Show Cause Notice, Adjudication and Recovery-reg.**". For ease of reference and convenience, relevant extracts of the aforesaid letter are reproduced herein below:

"26. Refund of pre-deposits: ...

- (i) ***Where the appeal is decided in favour of the party/assessee, he shall be entitled to refund of***

the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act, 1944.

(ii) ***Pre-deposit for filing appeal is not payment of duty.*** Hence, refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944. Therefore, ***in all cases where the appellant authority has decided in the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.***

(iii) *If the Department contemplates appeal against the order of the Commissioner (A) or the order of the CESTAT, which is in favour of the appellant, refund along with interest would still be payable as per the time limits prescribed in the law or in the order, unless such order is stayed by a competent Appellate Authority. ...*

(iv) ***In the event of a remand, refund of the pre-deposit shall be payable along with interest."***

Hereto annexed and marked as Exhibit-"J" is a copy of the Circular No. 1053/02/2017-CX dated 10th March, 2017.

n. By way of Order dated 8th March 2019, the Hon'ble Customs, Excise and Service Tax Appellate Tribunal allowed the Appeal of the Corporate Debtor to the Order dated 23rd June, 2014. For ease of reference and convenience, relevant extracts of the aforesaid letter are reproduced herein below.

*"6. ... We find substance in the argument of the learned advocate for the appellant that since the investigation was common and M/s Kamdhenu Ispat Ltd. is also a notice in the present case, **therefore the present case also be remanded to the adjudicating authority for fresh adjudication taking all issues raised by the appellant in the present appeals.***

7. In the result, the appeals are allowed by way of remand to the adjudicating authority."

Hereto annexed and marked as Exhibit-"K" is a copy of the Order of the Hon'ble Customs, Excise and Service Tax Appellate Tribunal dated 8th March, 2019.

- o. On 3rd April 2019, the Assistant Registrar of the Hon'ble Customs, Excise and Service Tax Appellate Tribunal addressed a letter to the Corporate Debtor whereby, it made available a certified copy of the Order of the Hon'ble Customs, Excise and Service Tax Appellate Tribunal dated 8th March, 2019. The Applicant craves leave to refer to and rely upon the said letter dated 3rd April, 2019 when produced.
- p. Thereafter on 29.01.2019, the Corporate Debtor filed the Company Petition (I.B.) No.350 of 2019 before this Hon'ble Tribunal under Section 10 of the Code read with Rule 7 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016. The Applicant craves leave to refer to and rely on the same as and when produced.
- q. By way of an Order dated 22nd April 2019, this Hon'ble Tribunal inter alia, admitted the Company Petition (I.B.) No.350 of 2019 and appointed the Applicant as the Interim Resolution Professional of the Corporate Debtor. Pursuant

to this Order, the CIRP of the Corporate Debtor commenced and concomitantly the period of Moratorium as per Section 14 of the Code also commenced. Hereto annexed and marked as Exhibit - "L" is a copy of the Order dated 22nd April, 2019 passed by this Hon'ble Tribunal.

- r. On 26th April 2019, the Corporate Debtor addressed a letter to the Respondents, requesting refund of the Pre-deposit amount of Rs.1,00,00,000/- in view of the Order of the Hon'ble Customs, Excise and Service Tax Appellate Tribunal dated 8th March 2019 in favour of the Corporate Debtor. The Corporate Debtor also invited the attention of the Respondents to the relevant portion of the Master Circular dated 10th March, 2017 pertaining to refund of pre-deposits and accordingly, requested the Respondents to refund the Pre-deposit amount along with interest @12% from the date of deposit till the date of refund, within a period of 15 days. Hereto annexed and marked as Exhibit "M" is a copy of the said letter dated 26th April, 2019
- s. On 8th May 2019, the Respondents reverted to the Corporate Debtor's letter dated 26th April, 2019 making reference to "*Para 6- Procedure and manner of making the pre-deposits*" of Circular No.984/2014 dated 16th September, 2014. For ease of reference and convenience, relevant extracts of the aforesaid letter are reproduced herein below.

"03. Accordingly, you are requested to submit the copy of Challans/debit entry in CENVAT register as the proof of pre- deposit amount deposit. Further please provide receipt copy of relevant EA-3 of relevant CESTAT appeal filed at CESTAT, Mumbai."

Hereto annexed and marked as Exhibit-"N" is a copy of the said letter dated 8th May, 2019.

- t. On 28th May 2019, the Advocate for the Applicant addressed a letter to the Addl. Commissioner, Central GST

and Central Excise, whereby it reverted to the Respondent's letter dated 8th May, 2019. The Advocate for the Applicant inter alia, provided copies of the necessary proofs of payment of Pre-deposit amount of Rs.1,00,00,000/- requested by the Respondents and reiterated the request for refund of Pre-deposit amount with interest in the account details provided therein. Further, the Advocate for the Applicant informed that this Hon'ble Tribunal had admitted Company Petition and resultantly, the Corporate Debtor was undergoing the Corporate Insolvency Resolution Process under the Code and was under moratorium as per Section 14 of the Code. Accordingly, the Advocate for the Applicant stated that no money could be retained by any person where no demand was due and further requested the Addl. Commissioner to return the amount at the earliest. Hereto annexed and marked as Exhibit-"O" is a copy of the letter dated 28th May, 2019.

- u. On 28th May 2019, the first meeting of the Committee of Creditors of the Corporate Debtor was held wherein it was resolved inter alia, to confirm the Applicant as the Resolution Professional of the Corporate Debtor. The Applicant craves leave to refer to and rely on the Minutes of Meeting of the Committee of Creditors held on 28th May, 2019, as and when produced.
- v. On 19th June 2019, the Respondents addressed a letter to the Corporate Debtor in response to its letter dated 18th May 2019, wherein it requested a copy of the Order of the Hon'ble High Court of Bombay dated 18th June, 2015 and a copy of the stay Order dated 28th April 2015, to establish payment of Rs.1,00,00,000/- as Pre-deposit. Hereto annexed and marked as Exhibit-"P" is a copy of the letter dated 19th June, 2019. The Applicant's counsel vide his email dated 21.06.2019 had furnished the required

documents to the Respondents. A copy of the said email dated 21.06.2019 is annexed hereto and marked as Exhibit - "Q"

- w. It is evident from the facts detailed above, that the Applicant has made numerous applications to the Respondents to refund the Pre-deposit amount of Rs.1,00,00,000/- to the Corporate Debtor, in compliance with the Master Circular dated 10th March, 2017 and the provisions of the Code. However, the Respondents and its associated authorities have in response to each of the Applicant/Corporate Debtor's request for refund, demanded a new list of documents to be provided in order to process the request. The Respondents have failed and neglected to extend co-operation to the Applicant in performing his duties as the Resolution Professional and concomitantly hindered the CIRP proceedings.
- 10) The Applicant submits that as per the provisions of the Code, it is the duty of the Resolution Professional to inter alia, preserve and protect the assets of the Corporate Debtor and for that purpose, the Resolution Professional shall inter alia, take immediate custody and control of all the assets of the Corporate Debtor.
- 11) The Applicant states and submits that he dutifully made numerous applications to the Respondents to refund the Pre-deposit amount to the Corporate Debtor and complied with each request for copies of documentation to be made available. However, the Respondents have taken advantage of the Applicant/Corporate Debtor's conscientious nature and sought to delay the refund of pre-deposit amount by seeking a new list of documents in response to every application made by the Applicant/Corporate Debtor. The Applicant submits that the Respondents have failed and neglected to extend co-operation to the Applicant in performance of their duties as the Resolution Professional and concomitantly hindered the CIRP proceedings.

- 12) The Applicant states that the Master Circular dated 10th March, 2017 succinctly states that the Pre-deposit for filing Appeal is not payment of duty and therefore, need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944. It further elucidates that, in all cases where the appellant authority has decided in the matter in favour of the Appellant, refund with interest should be paid to the Appellant within 15 days of the receipt of the letter of the Appellant seeking refund, irrespective of whether order of the Appellate Authority is proposed to be challenged by the Department or not. The Applicant submits that it is evident that the Respondents are in gross violation of the Master Circular dated 10th March, 2017.
- 13) The Applicant states that this Hon'ble Tribunal by its Order dated 22nd April 2019, admitted the Company Petition (I.B) No.350 of 2019 and consequently imposed a Moratorium under Section 14 of the Code whereby it prohibited the *"institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority"*. The Applicant submits that any further Appeal or proceedings for fresh consideration of the matter are squarely covered and prohibited under the Code during the period of Moratorium. It is submitted, that any demands or claims against the Corporate Debtor will have to be made in compliance with the provisions of the Code and in the form and manner set out therein.
- 14) The Applicant states and submits that the objective of the Code is to expedite the Insolvency Resolution Process and to secure maximization of the value of assets of the Corporate Debtor for distribution to all stake holders. Therefore, the Applicant is constrained to file the present Application to prevent prejudice being caused to the financial creditors and other creditors and stakeholders of the Corporate Debtor.

- 15) The Applicant submits that the Pre-deposit amount is of a substantial value of Rs.1,00,00,000/- and the creditors and other stakeholders would be at a loss if the Applicant were constrained to exclude the same from the list of assets of the Corporate Debtor. The Applicant submits that the list of assets plays an integral role in estimating the value of the Corporate Debtor for any potential Resolution Applicants and in the absence thereof, thereafter, in estimating the Liquidation Value of the Corporate Debtor.
- 16) The Applicant states and submits that unless Pre-deposit amount is refunded to the Corporate Debtor, the Applicant will be unable to proceed with CIRP of the Corporate Debtor in accordance with the Code and the provisions set out therein.
- 17) The Applicant states that the Code provides for a fixed timeline of 180 days which can be further extended by 90 days. It is submitted that as on the date of filing this instant Application 95 days have already lapsed. It is submitted that the Respondents are causing inordinate and unwarranted delay and consequently hampering the CIRP process.
- 18) The Applicant has a strong prima facie case for grant of the reliefs prayed for herein under. No harm, loss or prejudice will be caused to the Respondents if the reliefs prayed for herein are granted, but if the reliefs are not granted, irretrievable damage and loss would be caused to the Corporate Debtor in valuing the assets available to any potential Resolution Applicants and consequently affecting the amounts to be recovered by the financial creditors and other stakeholders of the Corporate Debtor. The balance of convenience is, therefore, entirely in favour of the Applicant.
- 19) The Applicant declares that this Application falls within the jurisdiction of this Hon'ble Tribunal.
- 20) The Applicant further declares that no part of this Application is barred by limitation.

3. The Respondent filed affidavit in reply of Ms. Sonal Jawanjal, Assistant Commissioner, CGST & Central Excise Division Hingnan, Nagpur-I strongly opposing the above application. The Parawise comments on the application in reply are extracted hereunder for ready reference:

I Points to be urged

1. **Para 1** It is true that Corporate debtor was undergoing the Corporate Insolvency Resolution Process under the code and was under moratorium. However it is submitted that department has not retained any amount where no demand was due. The corporate debtor had filed GSTR-1 but never filed GSTR-3B. Thus the debtor did not discharge their admitted liability. Even the applicant i.e Interim Resolution Professional (IRP) in his email dated 16.07.2019 (Exhibit B-3) admitted liability of Rs.4,44,32,280/- (Rs. 49,166/- + Rs.1,86,13,310/- + Rs. 2,57,69,804/-).
2. It is further submitted that the Respondent No.1 issued show cause notice to the Corporate Debtor as Noticee 1 & 3 on 06.05.2013.
3. (Exhibit B-2) for liability of Central Excise duty including interest and penalty amounting to Rs. 25 cr. Approximate, for suppressed production of 25377.83 MT of "Kamdhenu" brand MS Angles and channels, which had been clandestinely removed without issue of Central Excise invoices during the period from 04/2008 to 9/2008. The matter is still pending before the Adjudicating Authority. Thus it is not true that the corporate debtor has no demand.
4. **Para 2** The department had asked the corporate debtor to submit all the documents so as to confirm the claim of refund filed by them. It is practice to verify the claim with relevant

documents if the claimant does not file claim of refund with proper documents.

5. **Para 3** No assets of the corporate debtor were laying with the respondents so as to be given in custody of IRP. Unless the refund claim is sanctioned it does not become asset of the applicant.
6. **Para 4 and 5** the applicant has referred to the procedure which has been addressed in para 2 above.
7. **Para 6 and 7.** That the Respondent No.2 through the letter/e-mail dated 12.06.2019 (Exhibit B-5) communicated the Applicant that the amount claimed under Form B that the C.E.duty amounted Rs. 15,47,96,134/- with Interest and Penalty demanded under show cause notice are dues in litigation and may be considered in the claim. As well as it is also clarified that the Corporate debtor had filed GSTR-1 and allowed their customers (recipients of goods) to claim input tax credit. However the corporate debtor has never paid the tax liability declared In GSTR-1. Thereby caused double loss to government of India/State government in as much as the corporate debtor allowed the recipients to claim input tax credit and use it for discharge of their tax liability at the same time the corporate debtor did not deposit the tax collected by them from their customer. The Corporate debtor has committed a fraud to the tune of Rs.4 Crores which calls for prosecution. But for the protection given under NCLT Act, the Corporate Debtor was liable for arrest.

Comments on the main application

1. **Para 1 to 5:** Facts have been mentioned No comments.
2. **Para 6, 7 and 8:** The circular mentioned in the para specifies the procedure to be followed for granting refund of pre deposit.

But the circular nowhere says that the respondents can secure any amount recoverable from the applicants. As per extant procedure before sanctioning any refund claim the proper officer has to ensure to confirm that no government dues are recoverable from the applicant. In the Instant case the corporate debtor was liable to pay Rs.4,44,32,280/-as admitted by IRP. Therefore respondents were entitled to exercise their rights to safeguard revenue.

3. **Para 9:** Facts leading to file refund claim for pre deposit have been enumerated again. No comments.
4. **Para 10:** No assets of the corporate debtor were laying with the respondents so as to be given in custody of IRP. Unless the refund claim is sanctioned it does not become asset of the applicant.
5. **Para 11 to 15.** The circular mentioned in the para specifies the procedure to be followed for granting refund of pre deposit. But the circular nowhere says that the respondents can secure any amount recoverable from the applicants. As per extant procedure before sanctioning any refund claim the proper officer has to ensure to confirm that no government dues are recoverable from the applicant. In the Instant case the corporate debtor was liable to pay Rs. 49 cr. including C.E duty, interest and penalty according to "Form B" but only Rs.4,44,32,280/-as admitted by IRP. Therefore respondents were entitled to exercise their rights to safeguard revenue.
6. **Para 16:** It is not true that the amount claimed as refund is an asset of the corporate debtor. As on date the refund claim has not been processed. As and when the claim is processed it has to be processed as per the provisions of existing law and the provisions of CGST Act, 2016. Since the Corporate debtor had

an admitted liability of Rs. 4,44,32,282/- the refund claim of Rs. 1,00,00,000/- can very well be appropriated against the admitted liability as per the provisions of Section 79(1)(a) of CGST Act, 2017. It is further highlighted that as per Section 82 of CGST Act, 2017, Tax to be the first charge on property. However the respondents have so far not claimed first right on the property. Respondents had only safeguarded the government dues.

7. **Para 17-18:** The Corporate debtor has committed a fraud to the tune of Rs. 4 Crores in as much they did not deposit the tax collected from their customers into government account. They allowed their customers to take input tax credit by only filing GSTR-1 without filing GSTR-3B, which calls for prosecution. But for the protection given under NCLT Act, the Corporate Debtor was liable for arrest

OBSERVATIONS & FINDINGS

4. Heard Mr. Palash S. Singhai a/w Ms. Sneha Panchmukh, counsel appearing for the Liquidator and Ms. Sangeeta Mishra, counsel appearing for the Respondent and perused the record.
5. As pleaded in the application, the learned counsel appearing for the Liquidator argued in the light of his pleadings contending that the Corporate Debtor has deposited an amount of Rs. 1,00,00,000/- as pre-deposit amount on 06.07.2015 in relation to a pending appeal before the Customs, Excise and Service Tax Appellate Tribunal and the said appeal was allowed by the Appellate Tribunal vide its order dated 08.03.2019 by remanding the matter to the Adjudicating Authority for fresh adjudication. During the interregnum period the Government of India on 10th March 2017, issued

Circular No. 1053/02/2017-CX being a "**Master Circular on Show Cause Notice, Adjudication and Recovery-reg.**". It is the submission of the Petitioner that as per the said circular the pre-deposit amount deposited by the Corporate Debtor for filing appeal cannot be treated as a payment of duty payable to the department and any such payment made by the company shall be refunded to the assessee with interest in the event of the appeal decide in favour of the assessee or in the event of remanding the matter by the Appellate Authority also. Thus, the Liquidator contends that the above amount has to be returned by the department to the Corporate Debtor which was not complied by the department despite his request and the department now cannot exercise their lien towards pre CIRP dues if any after commencement of the moratorium.

6. The only contention of the counsel appearing for the department both in their reply as well as during the oral submissions is that the pre-deposit amount of Rs. 1,00,00,000/- can very well be appropriated towards the admitted liability of the Corporate Debtor of Rs. 4,44,32,282/-. The entire argument of the department in this regard is contrary to the provisions of the Code and contrary to their own departmental circular referred above. Since the IB Code has overriding effect over other laws and the remedy of the Government department and statutory authorities for recovering their pre CIRP dues is only by way of submitting their claim to the RP/Liquidator and not by retaining the amounts of Corporate Debtor lying with them towards their pre CIRP dues. In fact, the Liquidator also appears to have admitted the claim of the department to the extent of Rs. 4,44,32,282/-.

7. Therefore, after hearing both sides and upon perusing the above submissions, this Bench is of the considered opinion that the above application filed by the Liquidator has to be allowed directing Respondents/department to refund the pre-deposit amount of Rs. 1,00,00,000/- with interest in favour of the Corporate Debtor within two weeks from the date uploading of this order.
8. Accordingly, the above application bearing no. **M.A. 2905/2019 is allowed.**

Sd/-
MADHU SINHA
Member (Technical)

Shubham

Sd/-
H.V. SUBBA RAO
Member (Judicial)