

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 473 of 2018

[Arising out of Order dated 2nd August, 2018 passed by National Company Law Tribunal, New Delhi Bench, in Company Petition No. (IB) 447/2018]

IN THE MATTER OF:

M/s Seth Thakurdas Khinvraj Rathi

Through its Partner Sh. Rajesh Rathi,
Plot No. 643, Rajvilas, Sector – 8,
Gandhinagar – 382 007.
Gujrat.

...Appellant

Vs

1. M/s Cal Refineries Limited

Through Resolution Professional
Shri Rakesh Kumar Jain
At registered office at
Unit No. 209, 2nd Floor Suneja Tower – II,
District Centre, Janakpuri
New Delhi - 110058.

2. Assistant Commissioner of Income Tax

Circle – 5(2), R. No. G-22C,
Central Revenues Building
I. P. Estate, New Delhi – 110 002.

3. Union of India,

Through its Secretary,
Department of Revenue,
Ministry of Finance, 128-A North Block,
New Delhi – 110001.

....Respondents

Present:

For Appellant: Mr. Anurag Ojha, Advocate.

For Respondents: Mr. Lakshmi Gurung, Standing Counsle for Income Tax Department (Respondent Nos. 2 and 3).

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Appellant (Operational Creditor) has challenged order dated 2nd August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench whereby the Adjudicating Authority passed following order as learned counsel for the Income Tax Department submitted that the department wants a representation in the Committee of Creditors:-

“ORDER

Ms. Lakshmi Gaurang, Advocate appearing on behalf of the Income Tax Department submits that the dept. wants a representation in the COC. The RP is therefore directed to work out and reconstitute the COC after due notice to the other participants whose voting power shall consequently get affected. It would not be out of place to record that the Operational Creditors are highly aggrieved by the said inclusion of the Income Tax Department, as from a majority on the committee, they are not being reduced to a minuscule percentage.

Copy of the order be given to the petitioner. Dasti. The RP is directed to convene the COC as expeditiously as possible.

Learned counsels appearing for the SFIO, SEBI and respondent 11 & 12 viz. Smt. Swaroopa Saha and M/s. Spice Energy Private Limited confirm that in terms of the directions given by SEBI to disgorge the sum of US \$ 92 million, no amount has been received. Further respondent 11 & 12 are not facing any prosecution as alleged by the RP. Pursuant to the order of SEBI whereby the ex-Directors of the Corporate Debtor were directed to disgorge the aforesaid amount, all parties confirm that no money has been received back in India. The RP submits in that as per an observation of the Criminal Court, it was noted that a sum of Rs.36,000/- crores has been received by the ex-Director. However, these are observations made by the Court and there is nothing to show that this money can be traced out or attached.

As the statutory departments SEBI and SFIO have filed their report, they are no longer required in this case and are hereby discharged. There is no outcome in the application filed

by the RP under Section 66 of the Code and no further action is contemplated.

This application therefore does not merit any further consideration and is being disposed off accordingly.”

2. Learned counsel appearing on behalf of the Appellant submits that the Central Government including the Income Tax Department cannot be treated to be ‘Operational Creditor’ on the basis of claim of Income Tax. According to learned counsel for the Appellant, the statutory debt as Income Tax do not come within the meaning of ‘Operational Debt’ as defined under Section 5(21) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’). Therefore, it is submitted on behalf of the Operational Creditor that no representation should be allowed to the Income Tax Department.

3. The aforesaid issue fell for consideration before this Appellate Tribunal 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 this Appellate Tribunal 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'."

4. In view of the aforesaid finding that the Central Government for the purpose of 'Income Tax' comes within the meaning of 'Operational Creditor', the plea taken by the Appellant could not be accepted. In absence of any merit the appeal is dismissed. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice A. I. S. Cheema]
Member (Judicial)

NEW DELHI

14th May, 2019

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