



UltraTech HC Court Order

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Tax Department cannot agitate pre-CIRP dues after being extinguished by an approved resolution plan - Rajasthan High Court confirms

In a decision pronounced in UltraTech Nathdwara Cement Ltd. v Union of India and others, the Rajasthan High Court has allowed the writ petition by the petitioner company and quashed the demand notices and orders of the Central Goods and Service Tax Department whereby the petitioner]was called upon to make Goods and Service Tax payments for the period before it took over Binani Cements Ltd. ("**Corporate Debtor**"), through the resolution plan route under the Insolvency and Bankruptcy Code.

Brief facts

Corporate Insolvency Resolution Process ("**CIRP**") of Binani Cements Ltd. was initiated by an order of the NCLT, Kolkata Bench on 28 February 2018 pursuant to an application for commencement filed by Bank of Baroda.

After reviewing and comparing the resolution plan of UtraTech with others that were received, the Committee of Creditors ("**CoC**") came to the conclusion that the resolution plan provided by UltraTech was feasible and viable for resolution of the Corporate Debtor. The plan was approved unanimously for presentation before the NCLT to obtain its approval.

Worth its while to mention that the plan equitably dealt with the dues of all creditors and was superior in terms of recovery to the banks and creditors contrasted with what they would have received had the Corporate Debtor's assets been sold in liquidation. The resolution professional had verified that the claim of the respondent department was around INR 72 crores for arrears of excise duty and service tax. The liquidation value of the Corporate Debtor was Rs. 2300 crores which was far less than the total debt exposure of the Corporate Debtor and the liquidation value that would be available to the operational creditors including the tax department would be 'nil'.

The NCLT duly approved the distribution of the payment by the petitioner, and approved the resolution plan. The tax department challenging the haircut under the resolution plan, first challenged the resolution plan in the NCLAT and upon the NCLAT upholding the NCLT's approval order, assailed the plan in the Supreme Court.

The Apex Court finding no infirmity in the order of the NCLAT refused to interfere and dismissed the SLP. The matter was finally put to rest and UltraTech took over the management and operations of the Corporate Debtor and the name of the company was changed to UtraTech Nathdwara Cement Ltd. The plan was implemented and payments under the plan, including the statutory dues were paid to the creditors. Notwithstanding the

approved resolution plan and its implementation, the respondent department continued to raise demands from the petitioner company for the period April 2012 to June 2017 and interest upto 25 July 2017. Correspondence from the petitioner company remonstrating that all dues admitted in the CIRP were paid and therefore remaining claims and proceeding stood extinguished were not accepted. The petitioner company then filed the writ petition.

Observations and finding

The High Court observed that the simple issue was whether the resolution plan approved by the CoC is binding on the respondent department. In answering the issue, the Court considered amended Section 31 of the Code, by operation of which, the central government, state government or any other local authority to whom a debt in respect of payment of dues under any law is owed and have been brought under the resolution plan approved by the NCLT, are bound by the plan. The Court referred to the Finance Minister's remarks while answering questions on the amendment in the Upper House of the Parliament:

“IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but, largely, yes, it is IBC. There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan.”

From the above, the inference was clear that the government would not raise a demand after a resolution plan was approved and the amendment to Section 31 of the Code was introduced to assure resolution applicants that an approved resolution plan would be binding on governments and local authorities as it would on any other creditor with a non-sovereign character. The Court concluded that revival of the dying industry was of paramount concern and to secure the objective, the government would be *“ready to sacrifice, leaving its interest finally in the hands of the resolution professional and the COC as the case may be.”*

The Court held that purpose of the Code is salutary as it has been enacted to ensure that an industry under distress does not fade into oblivion and can be revived by virtue of the resolution plan. Once the offer of the resolution applicant is accepted and the resolution plan

is approved by the appropriate authority, the same is binding on all concerned, including those towards whom the corporate debtor may be having statutory dues.

In its judgment, the High Court also took support from the Supreme Court decision in *Committee of Creditors, Essar Steels India Limited vs. Satish Kumar Gupta & Ors.* to conclude that financial creditors are given precedence in the ratio of payments when the resolution plan is finalized whereas, the operational creditors viz. commercial taxes department of the Central Government or the State Governments as the case may be, have no right of audience. The Court held that the purpose of the statute was very clear that it intended to revive the dying industry by providing an opportunity to a resolution applicant to take over the same and begin operations on a clean slate.

Analysis

It is pertinent to note that UltraTech's resolution plan inter alia, sought the following waivers and concessions:

- i. All litigations instituted against the Corporate Debtor, initiated or arising and pending before the transfer shall stand withdrawn, without any further act, instrument or deed;
- ii. No amounts would become payable for any liability of the corporate debtor towards tax, fee, interest or penalty for which the assessment in respect of applicable tax laws were not completed;
- iii. Other than discharge of the resolution amount towards liabilities of the financial creditors, the operational creditors, contingent liabilities and CIRP costs, no other payment was to be made by the corporate debtor for any liabilities of corporate debtor.

The NCLT by approving the UltraTech's resolution plan, has allowed the above reliefs and concessions, which was upheld by the NCLAT and the Supreme Court. In fact, in its appeal before the Apex Court, the tax department had raised a specific issue regarding the NCLT allowing the above reliefs and concessions to the resolution applicant. The dismissal of the tax department's SLP signifies that resolution applicants are entitled to such waivers and concessions. This comes as a huge relief to many resolution applicants, who with a desire to start operations on a clean slate, seek waivers and exemptions from payment of past dues and protection from litigation arising out of past demand orders and notices. However, some hesitation by NCLTs in granting such relief was often observed and while in certain cases, certain benches of the NCLT allowed specific reliefs and concessions to resolution applicants against tax departments, there are instances of NCLT benches approving the resolution plan save for such reliefs and concessions for which the resolution applicant was directed to approach the relevant tax authority. This left resolution applicants burdened with

old arrears and the clean slate proposition was clearly defied. Also, there was no homogeneity insofar as certain resolution plans were approved with complete reliefs and concessions, whereas others which sought similar reliefs, to that extent were disallowed.

In fact, in the instant case, the tax department had raised the issue before the Supreme Court that the NCLT had approved the resolution plan wherein interest and penalty had been paid till the date of admission of insolvency process, whereas as per Central Excise and Service Tax laws interest and penalty had to be paid up to the payment of duty. The position is now clear that even if a payment under a tax statute is leviable, such payment shall stand extinguished if the tax department's debt has been dealt with in accordance with the Code. The Supreme Court's dismissal of the SLP and the Rajasthan High Court's observance of the same shall go a long way in giving relief to resolution applicants, who can now submit bids and hope for resolution plans to be approved by the NCLT and obtain approvals even with respect to reliefs, waives and concessions vis-à-vis statutory dues.

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