(2023) 04 CESTAT CK 0048

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No.75134 Of 2023

M/S. Mc.Nally Sayaji Engineering Limited APPELLANT

Vs

Commissioner Of CGST & CX, Bolpur Commissionerate RESPONDENT

Date of Decision : 25-04-2023

Acts Referred:

Customs, Excise And Service Tax Appellate Tribunal (Procedure) Rules, 1982 — Rule 22
Finance Act, 1994 — Section 31(1), 77

Citation : (2023) 04 CESTAT CK 0048

Hon'ble Judges : P.K.Choudhary, Member(J);K. Anpazhakan, Member(T)

Bench : Division Bench

Advocate : Dipankar Majumdar, S.Mukhopadhyay

Final Decision : Disposed Of

Judgement

P.K. Choudhary, Member(J)

1. The Appellant is in Appeal before the Tribunal assailing the Order-in-Appeal wherein the demand of Service Tax of Rs.19,61,585/- was confirmed along with interest and penalties of Rs.9,80,793/- imposed under Section 78(1) and Rs.10,000/- under Section 77 of the Finance Act, 1994. The said demand was confirmed on the ground of alleged mis-match of freight charges reflected in ST-3 vis-à-vis the books of account of the Appellant and on the grounds of non-payment of Service Tax on commissions paid by the Appellant for external commercial borrowings.

2. The Ld.Advocate appearing on behalf of the Appellant submits that the Appellant has undergone the Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 read with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. He further submits that such process of insolvency initiated in respect of the Appellant Company has attained finality and the Resolution Plan stands approved vide an order dated 24th February 2023 of the Hon’ble NCLT,

Kolkata, in the case of ICICI Bank Limited, Financial Creditor Vs. JitenderaLohia, Resolution Professional of McNally SAyaji Engineering Limited, Corporate Debtor [IA (IB) No. 1214/KB/2022 in CP (IB) No. 131/KB/2020]. The Ld.Advocate filed copy of claim Form dated 2. 02.2022 filed by the Assistant Commissioner, Central GST & Central Excise, Asansol-I Division, Asansol before the Resolution Professional in Form-B in the Annexures A & B. The impugned order and the demand has also been included.

4. The Appellant most humbly submits that the CBIC has issued Standard Operating Procedure (SOP) vide CBIC Circular No. 1083/04/2022-CX.9 dated 23rd May, 2022 in respect of cases where assessees are undergoing insolvency process under the Insolvency and Bankruptcy Code, 2016. Vide the said circular it has been clarified that the Central Government being the operational creditor in tax cases, may initiate insolvency resolution process and file claim in the insolvency resolution process, before the committee of creditors. Such claim is required to be made within a period of 90 days from the insolvency commencement date. It has also been acknowledged in the said circular that in case of failure to apply for claims as referred above, such claim gets extinguished.

5. In the present case, in compliance of the above referred circular the Ld. Assistant Commissioner, Central GST & Central Excise, Asansol-I Division made a claim for Rs. 9,88,70,621/- vide a letter dated 02.02.2022 before the Resolution Professional of the Appellant company. That the subject matter of the present appeal was also a part of such claim.

6. For ease of reference, a timeline of the Appellant’s insolvency proceedings in CIRP vis-à-vis the present appeal is tabulated here under:

Sl. No.

Event

FY, 2011-12 to 2012-

13

1.

Period involved in the present case before the

Hon’ble CESTAT.

FY, 2011-12 to 2012-

13

2.

SCN issued

09.07.2010

3.

OIO issued

15.12.2007

4,

OIA issued

22.04.2019

5.

Appeal preferred

22.12.2020

6.

CIRP proceedings initiated

11.02.2021

7.

Date of public announcement

15.02.2021

8.

Claim submission of the department

02.02.2022

9.

Resolution plan floated

25.04.2022

10.

Resolution plan approved by CoC

26.09.2022

11.

Resolution plan finalized by order of the Hon'ble

NCLT

24.02.2023

7. In view of finalization of the resolution plan by the Hon'ble NCLT, Kolkata in the Appellant's case vide order dated 24.02.2023, any demands against the

Appellant prior to the closing date shall immediately, irrevocably and unconditionally stand fully and finally discharged and settled as per the Resolution Plan and no action or proceeding can be initiated against the Appellant. The approved resolution plan is binding on all stakeholders including the Central Government and therefore the Appellant has no liability against the Operational Creditors in respect of claims prior to the closing date.

8. In the present case the demands relate to period prior to initiation of the Insolvency Proceedings and as the Resolution Plan stands finalized by the Hon'ble NCLT Kolkata, no further demand can be raised against the Appellant.

9. The above submission of the Appellant is supported by the judgment of the Tribunal, Mumbai Bench in the case of Alok Industries Ltd., Vs. CCE, Belapur&Ors. [2002 (10) MTI 801-CESTAT, Mumbai] wherein in light of final approval of the Resolution plan of the assessee, it was held that the orders impugned vide the appeal before the CESTAT stood merged in the order of the Hon'ble NCLT approving the resolution plan and the Hon'ble CESTAT has become functus officio and the appeal pending before the Hon'ble CESTAT stood abated.

10. It was also held that in view of the Rule 22 of the CESTAT Procedure Rules, 1982 the appeal stood abated with effect from the date of approval of resolution plan by the Hon'ble NCLT.

11. Further, the Appellant most humbly submits that the order of the Hon'ble NCLT is binding on all stakeholders, which includes the Central Government. Therefore, no liability towards any operational creditors other than as approved in the resolution plan shall exist and any other liability shall be immediately, irrevocably and unconditionally stand fully and finally discharged and settled, with there being no further claims whatsoever. That such position stands settled by the decisions of the Hon'ble Supreme Court in:

a) Committee of Creditors of Esssar Steel Ltd., Vs. Satish Kumar Gupta, & Ors [(2020) 8 SCC 531];

b). Ghanashyam Mishra & Sons Pvt. Ltd, Vs. Edelweiss ARC [(2021) 9 SCC 657].

12. The Appellant in light of the above submissions prays that the present appeal be declared abated.

13. The Ld.Authorized Representative for the Department submits that subsequent to the Order of NCLT approving the Resolution Plan, the Appeal stands abated and all the issues arising out of the order appealed against have attained finality with the said order of NCLT approving the Resolution Plan.

14. Heard both sides and perused the Appeal records.

15. We find that the CBIC has vide Instruction No.1083/04/2022-CX9 dated 23.05.2022 has laid down the guidelines (SOP) for NCLT cases. The said instructions at para-1 and 2 records as follows:-

“Subject: Standard Operative Procedure (SOP) for NCLT cases in respect of the Insolvency and bankruptcy Code (IBC) – reg

I am directed to inform the Insolvency and Bankruptcy Board of India has requested that role of GST and Customs authorities in certain key issues under the Insolvency and bankruptcy Code, 2016 needs to be formulated. Further, GST and Customs Authorities have been classified as operational creditors and are required to submit their claims against corporate debtors when the Corporate insolvency and resolution process is initi9ated and public announcement inviting claims is made by the insolvency professional.

2. A timeline of 90 days from the insolvency commencement date is available for filing of claims. However, it has been observed that there is an inordinate delay in filing of claims by Customs and GST authorities. This leads to their claims not being admitted and extinguished once a resolution plan is approved. It is also observed that the authorities then litigate on the rejection of each claims, despite the settled position that no claims can be raised once the plan is approved and no demands can be raised on the Resolution Application who has taken over the company through such a resolution plan.”

16. We find that the Hon’ble Supreme Court in the case of Ghanashyam Mishra & Sons Pvt.Ltd. vs. Edelweiss ARC reported in (2021) 9 SCC 657 AT Para-102 of the judgement has categorically held as follows:-

“102. In the result, we answer the questions framed by us as under:-

(i) That once a resolution plan is duly approved by the Adjudicating Authority under sub section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(i) 2019 amendment to Section 31 of the I & B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect.

(iii) Consequently all the dues including the statutory does owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.”

17. We find that from the date of approval of the Resolution Plan by the NCLT, the Appeal filed by the Appellant has abated and this Tribunal has become functus officio in the matters relating to this Appeal. Further it is also settled that

the impugned Order-in-Appeal has got merged in the order of the NCLT approving the Resolution Plan. The Appeal stands abated as per Rule 22 of the CESTAT Procedure Rules, 1982 w.e.f. the date of approval of the Resolution Plan by the NCLT, i.e., 24.02.2023.

In view of the above, we dispose the Appeal accordingly.