Whether Imported Goods, for which no Customs Duty is paid, can be sold during CIRP/Liquidation?

Under the IBC, 2016, an IP in his capacity as IRP/RP or Liquidator is empowered to take possession of all the assets of the Corporate Debtor (CD). What if any asset/s of the CD is/are in the custody or possession of any Bonded Warehouses of Customs due to unpaid tax? The law is silent on this issue. In a recent case, the NCLT used the 'residual powers' provided under Section 60 (5) of the IBC to adjudicate this issue.

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1. Introduction

The Corporate Insolvency Resolution Process (CIRP) completes with the takeover of the Corporate Debtor (CD) by the successful resolution applicant. However, if the CD fails to get a Resolution Plan, the NCLT (Adjudicating Authority or AA) under Section 33 (1) of the IBC can order liquidation. Like a Resolution Professional (RP), the Liquidator is also responsible for identifying the assets of the CD, ascertain the claims of the creditors against the corporate debtor and distribute the sale proceeds of the assets to the creditors proportionate to their claims.

Generally, the Government dues are given preference over other creditors in realization of the amount on sale of assets of the debtor but under the IBC the government dues are considered at par with the other operational creditors. Therefore, the concerned government department is to make claims to the RP or Liquidator in its capacity as an Operational Creditor. In case the RP or Liquidator rejects the claims, the concerned department can move to NCLT which has also been given residuary jurisdiction under Section 60 (5) of the Code which means if any issue does not fall under any particular Section of the Code but is related to the insolvency process, the AA can adjudicate on it under Section 60 (5) of the IBC. With reference to the relevant provisions of Customs Act, the IBC and jurisprudence, the issues to be discussed in this article are: (a) whether the Customs Department, which is a government department, can sell the imported goods of the corporate debtor for which customs duty is payable during pendency of the insolvency process? and (b) whether the importer has to relinquish his title to the imported goods?

2. Clearance of imported goods

The 'imported goods', under the provisions of Customs act, are the goods brought into India from a place outside India but do not include goods cleared for home consumption[1]. All imported goods shall remain in the port area unless cleared for import[2]. These imported goods are cleared only after payment of the customs duty. If the customs duty is not paid the importer cannot clear the goods. As per the Customs Law, the authorized person shall file the bill of entry before the end of the next day following the day (excluding holidays) on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing[3]. Furthermore, the importer is required to present a bill of entry within 30 days of the arrival of the goods at the Port. The imported goods for which no bill of entry has been filed or cleared for import can be sold by the custodian of those goods i.e., customs department[4]. In this case, since the importer did not file a bill of entry for several years, he was considered by the Customs Department to have relinquished his title to the imported goods. Those imported goods were lying at the port at the time of initiation of CIRP.

3. Case law

The NCLAT in in the matter of *Central Board of Indirect Taxes Vs. Sundaresh Bhatt, Liquidator of 'ABG Shipyard' and other (2021)*[5]' has deliberated on the issues raised in this article.

ABG India, the largest private sector shipbuilding yard in India, which is undergoing Liquidation had imported some materials for construction and building of ships.

However, these materials were not used and were lying in Bonded Warehouses of the customs department at the time of liquidation process. Regarding these materials, the Corporate Debtor i.e., ABG Shipyard had also availed the benefits under the Export Promotion Capital Goods Scheme ('EPCG) and other related schemes/notifications. As the Export Obligation Discharge Certificate was not submitted, the Office of the Commissioner of Customs (Export), EPCG (Monitoring Cell), Mumbai, hereafter Customs Department, issued notices to the CD to pay the duty as per law. Meanwhile, the CIRP of ABG India was initiated due to financial constraints.

In the process to take over all the goods and assets of the Corporate Debtor, the Liquidator approached the Customs Department to release the imported goods. However, the Customs Department refused to release the imported goods to the liquidator. Subsequently, the Liquidator filed an IA before the Adjudicating Authority with the prayer to direct the Customs Department to allow removal of the materials lying in the Customs Bonded Warehouses without payment of Customs Duty, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016. The AA, through an order dated February 02, 2021, issued the following directions:

a. The Department is directed to allow the applicant-liquidator to remove the material, which is lying in the Customs Bonded Warehouses without any condition, demur and/or payment of Customs Duty.

b. The Department is at liberty to lodge its claim with the Liquidator with regard to the Customs Duty charges payable on the release of material, which form part of the assets of the corporate

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[1] Section 2 (25), The Customs Act, 1962 (No. 52 of 1962).

[2] Section 45 (b), ibid.

[3] Circular No.08 /2021-Customs, dated March 29, 2021, Government of India, Ministry of Finance, Department of Revenue Central Board of Indirect Taxes and Customs https://www.cbic.gov.in/resources//htdocs-cbec/customs/cs-circulars/cs-circulars-2021/Circular-No-08-2021.pdf

[4] Regulation 4 of Bill of Entry (Electronic Integrated Declaration and Paperless Processing) Regulations, 2018.

[5] 2021 (11) TMI 796 - National Company Law Appellate Tribunal, Principal Bench , New Delhi - Insolvency & Bankruptcy (https://www.taxmanagementindia.com/visitor/detail_case_laws.asp?ID=415015)

debtor in liquidation, before the Liquidator.

c. The Department shall allow removal of goods/material within two weeks, from the date of receipt of an authentic copy of this order from the Liquidator.

d. The Department shall not proceed for auctioning, selling or appropriating the materials owned by the corporate debtor, for the purpose of recovery of its customs duty, which may tantamount to violation of the Code and put the applicant/ liquidator of the corporate debtor Company (under Liquidation) in disadvantageous position.

Generally, the Govt. dues are given priority in realization of amount on sale of assets of the debtor but under the IBC the govt. dues are considered at par with other operational creditors.

3.1. Submissions by Customs Department in NCLAT: Against the order of the AA, the Department filed an appeal before the NCLAT with an appeal to set aside the order of the NCLT and submitted as follows:

a. The impugned order does not consider the question of the title of imported warehoused goods, lying in a Bonded Warehouse from 2005 onwards.

b. Since the Bonded Warehoused goods do not belong to the debtor the Liquidator cannot take control of the same.

c. Even before the commencement of liquidation proceedings, the corporate debtor itself could not have taken possession of the imported warehoused goods except by paying the applicable customs duty after an order clearing the goods for consumption was passed by Customs Department.

d. Therefore, the Liquidator cannot be in a better position than the corporate debtor itself.

e. The goods once warehoused cannot be released from the warehouse unless and until the import duties are paid as per the provisions of Customs Act and therefore the goods cannot be released to the Liquidator unless and until the import duties are paid by the liquidator.

f. The issue 'Whether the corporate debtor has clear and perfect title over the Bonded Warehoused goods under Customs Act, 1962', is a legal issue, the appellant has validly raised in the appeal, even though the same had not been raised before the AA.

3.2. Liquidator's Rejoinder in NCLAT: In response, the Liquidator filed rejoinder which could be summarized as under:

a. The appellant refuses to release the goods of the corporate debtor and asserts its right to sell the same, despite the order of Liquidation passed by the Adjudicating Authority, which would bar such proceedings under the Customs Act.

b. Since the appellant filed 'Form C' with the liquidator claiming the customs duty payable by the corporate debtor evidencing the goods in the custody of warehouses are belonging to the corporate debtor. Therefore Section 48 of the Act would not attract in this case.

c. By issuing a notice under Section 72 of the Customs Act against the corporate debtor and filing its claim with the Liquidator, the appellant acknowledges the ownership of the corporate debtor about the warehoused goods.

d. The claim filed by the appellant is based on the premise of ownership of these goods. Therefore, it is clear that the corporate debtor has not lost the ownership rights over the goods.

e. The corporate debtor has never relinquished title to the goods either under Customs Act or under the Code. No communications in this regard have also been made to the appellant. The appellant has not produced any shred of evidence to show that the corporate debtor has actively or consciously relinquished title to the goods.

Since the Bonded Warehoused goods do not belong to the debtor the Liquidator cannot take control of the same, argued the Customs Department.

f. Even if some of the assets/goods are not in possession of the corporate debtor, it does not amount to relinquishment of rights over the said goods in any manner whatsoever.

g. The Liquidator could not have, after the commencement of CIRP and Liquidation process, relinquished the title of the goods in favor of the appellant.

h. The Customs Department does not have a right to auction the goods of the corporate debtor under the provisions of the Customs Act, specifically under Section 48 of the Customs Act, and must hand over custody of the goods to the Liquidator.

In the matter of *Solitaire India Pvt. Ltd. Vs. Fairgrowth Services Pvt Ltd* (2001), the Supreme Court ruled that if two special statutes contain non-obstante provisions, the later statute must prevail.

i. Under Section 142A of the Customs Act, the statutory charge of the appellant is expressly subordinate and subject to the provisions of the Code.

j. Section 33 (5) of the Code, which squarely applies upon the passing of an order of liquidation, 'no suit or other legal proceeding shall be instituted by or against the corporate debtor'. The term 'legal proceedings for a moratorium in liquidation', will include proceedings for recovery of taxes.

k. In liquidation, the priority of debts shall be governed by the law relating to the liquidation process and not the law under which such debt is claimed to have arisen. Accordingly, Appellant cannot invoke the powers under Sections 48, 72, 142, 142A or any other provisions of Customs Act to recover its alleged dues in priority to other dues.

l. The Government dues are covered under Section 53 (1) (e) of the Code. Therefore, they are placed in the 5th position in priority while distributing the proceeds in liquidation.

m. Section 238 of the Code provides that its provisions shall have a superseding effect notwithstanding any law inconsistent with the Code.

n. There is an apparent inconsistency between the provisions of the Customs Act and the Code.

o. In the matter of *Solitaire India Pvt. Ltd. Vs. Fairgrowth Services Pvt Ltd* (2001), the Supreme Court ruled that if two special statutes contain non-obstante provisions, the later statute must prevail. Thus, the appellant cannot bypass the mandatory requirements of the Code by unlawfully resorting to provisions of the Customs Act[6].

p. The appellant neither raised the issue of jurisdiction before the Adjudicating Authority nor made ground in the present appeal.

q. The appellant did not deny that the corporate debtor has imported these goods. Therefore, the corporate debtor has a right over the goods, even if they are not in possession of the corporate debtor.

r. Consequently, the Adjudicating Authority has the jurisdiction to entertain the application of the Liquidator under Section 60(5).

s. The appellant has not taken any steps since 2014 to take into possession and confiscate the goods under the Customs Act.

t. They have sought to enforce this right after the order of liquidation was passed in July 2019, which cannot be permitted since the appellant has already filed its claim for the duty payable by the corporate debtor.

u. Determination of ownership of goods must be seen in terms of the Code and not under the Customs Act.

v. Therefore, the Liquidator can even take those assets that are not in possession of the corporate debtor.

3.3. Observations of NCLAT: The Appellate Tribunal observed that the Adjudicating Authority has passed the impugned order on the premise that the Code is a special law that provides a non-obstante clause under its Section 238 with overriding effect over other prevailing law and statute, time being in force. If there are two special statutes, which contain non-obstante provisions, the later statute must prevail. The Code is a subsequent law to the Customs Act. Therefore, by virtue of Section 238 of the Code, the Code shall have an overriding effect on the other proceedings of the Customs Act. Therefore, the Adjudicating Authority held that appellant Customs Department cannot legally withhold the releasing of the material/goods, which are the property of the corporate debtor in liquidation and impose a prerequisite condition for making payment of the customs duty by the Liquidator of the corporate

[6] Casemine.Com (https://www.casemine.com/judgement/in/619dd84c342cca63ce973229)

debtor because the claims of the appellant have to be treated as a Government Dues and needs to be dealt with under the waterfall mechanism provided under Section 53 of the Code.

> **The NCLAT further observed that the corporate debtor did not claim the goods imported by it from 2012 to 2015, lying in the Custom's Bonded Warehouses without payment of duty.**

The NCLAT further observed that the corporate debtor did not claim the goods imported by it between 2012 and 2015, lying in the Customs Bonded Warehouses without payment of duty. Since the goods are not claimed they cannot be considered as the corporate debtor's assets. The corporate debtor entered the liquidation process on April 25, 2019. Even after the lapse of four years, the corporate debtor never cleared the bills of entry for some of the said goods. Section 45 of the Customs Act provides that all imported goods shall remain in the port area unless cleared for import. Section 48 of the Act further provides that the imported goods for which no bill of entry has been filed or cleared for import can be sold by the custodian of those goods. The NCLAT concluded that the importer has relinquished his title to the imported goods by not filing a bill of entry for several years and not removing the imported goods.

The NCLAT next considered the duties of Liquidator. Section 35 (1) (b) of the Code, empowers the Liquidator to take control of the corporate debtor's assets and properties. It is the bounden duty of the Liquidator first to ascertain the assets, for which custody has been sought, belong to the Corporate Debtor. The NCLAT concluded that the importer deemed to have lost his title to the imported goods since he did not file the bill of entry for several years and did not pay the Customs Duty and other charges and did not take clearance for home consumption. Therefore, the Custom Authorities are empowered to sell the goods and to recover the government dues. The Liquidator had no power to take into possession of those goods in respect of which the corporate debtor itself had relinquished its claim and left it abundant without taking any steps for clearance of the goods for home consumption by paying the customs duty and other applicable charges.

Furthermore, the NCLAT analyzed the provisions of Customs Act, Section 45, Section 47, Section 48 and Section 71 in relation to imported goods and clearance of goods by paying customs duty and relied on various judgments in this regard.

4. Conclusion

The Court clarified that the imported items can not be removed without paying duty under the Customs Act. Furthermore, the NCLAT also upheld the jurisdiction of the NCLT on the matter under Section 60 (5) (c) of the IBC. As the Corporate Debtor had abandoned the imported goods in the Customs Warehouses for a long time without payment of duty and also had not taken any step to take possession of those goods, the NCLT rejected the claims of Liquidator. The Appellate Tribunal directed the Customs Department to take possession of the goods under Section 72 and sell them to recover dues. The court also put it on record that AA committed an error in directing the release of goods without paying customs duty and other applicable charges. Though the liquidator has an option to challenge the NCLAT order in the Supreme Court, the final decision in this matter has the potential to impact the CIRP and Liquidation process in future.