



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT  
JODHPUR**

D.B. Sales Tax Ref./rev. No. 9/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara Dis. Sirohi

-----Petitioner

Versus

1. The Assistant Commissioner, Commercial Tax  
Department, Special Circle, Pali, Special Circle, Pali
2. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur

-----Respondents

Connected With

D.B. Sales Tax Ref./rev. No. 10/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara Dis. Sirohi

-----Petitioner

Versus

1. The Assistant Commissioner, Commercial Tax  
Department, Special Circle, Pali, Special Circle, Pali
2. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur
3. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur

-----Respondents

D.B. Sales Tax Ref./rev. No. 11/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara, Dis. Sirohi

-----Petitioner

Versus

1. The Assistant Commissioner, Commercial Tax  
Department, Special Circle, Pali, Commercial Tax  
Department, Special Circle, Pali
2. The Appellate Authority - II, Commercial Taxes  
Department, Jodhpur



----Respondents

D.B. Sales Tax Ref./rev. No. 12/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara Dis. Sirohi

----Petitioner

Versus

1. The Assistant Commissioner, Commercial Tax  
Department, Special Circle, Pali, Commercial Tax  
Department, Special Circle, Pali
2. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur

----Respondents



D.B. Sales Tax Ref./rev. No. 13/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara, Dis. Sirohi

----Petitioner

Versus

1. The Commercial Taxes Officer, Anti Evasion, Anti Evasion  
Rajasthan Circle-Ii, Jodhpur
2. The Appellate Authority - Ii, Commercial Taxes  
Department Jodhpur

----Respondents

D.B. Sales Tax Ref./rev. No. 14/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara Dis. Sirohi

----Petitioner

Versus

1. The Assistant Commissioner, Commercial Tax  
Department, Special Circle, Pali, District Pali
2. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur

----Respondents



D.B. Sales Tax Ref./rev. No. 15/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara Dis. Sirohi

-----Petitioner

Versus

1. The Commercial Taxes Officer, Anti Evasion, District Jaipur
2. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur

-----Respondents



D.B. Sales Tax Ref./rev. No. 16/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara, Dis. Sirohi

-----Petitioner

Versus

1. The Assistant Commissioner, Commercial Tax  
Department, Special Circle, Pali, District Pali
2. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur

-----Respondents

D.B. Sales Tax Ref./rev. No. 17/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara, Dis. Sirohi

-----Petitioner

Versus

1. The Commercial Taxes Officer, Anti Evasion, District Jaipur
2. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur

-----Respondents



D.B. Sales Tax Ref./rev. No. 18/2021

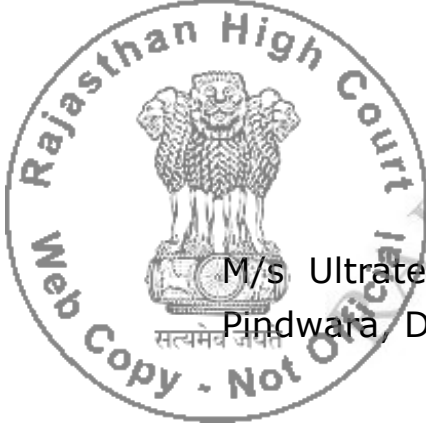
M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara, Dis. Sirohi

-----Petitioner

Versus

1. The Commercial Taxes Officer, Anti Evasion, District Jaipur
2. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur

-----Respondents



D.B. Sales Tax Ref./rev. No. 19/2021

M/s Ultratech Nathdwara Cement Limited, Adityanagar, Tehsil  
Pindwara, Dis. Sirohi

-----Petitioner

Versus

1. The Assistant Commissioner, Commercial Tax  
Department, Special Circle, Pali, District Pali
2. The Appellate Authority-II, Commercial Taxes  
Department, Jodhpur

-----Respondents

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For Petitioner(s)	:	Dr. Sachin Acharya, Senior Advocate, assisted by Mr. Manish Priyadarshi and Mr. Gopal Sandu
For Respondent(s)	:	Mr. Hemant Dutt

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**HON'BLE MR. JUSTICE SANDEEP MEHTA**  
**HON'BLE MR. JUSTICE VINOD KUMAR BHARWANI**

**Order**

**Date of pronouncement : 18/04/2022**

**Order reserved on : 24/02/2022**

**BY THE COURT : PER HON'BLE MEHTA, J.**

**Reportable**



This bunch of Sales Tax Revisions involves identical questions of facts and law and hence, the same is being decided together by a common order. These revisions have been preferred by the petitioner M/s. UltraTech Nathdwara Cement Limited for assailing the order dated 28.12.2020 passed by the Rajasthan Tax Board, Ajmer, rejecting the applications of the petitioner for refund of mandatory statutory obligation pre-deposit with interest made with appeals filed before the Tax Board.

With the consent of the learned counsel for the parties, the matters have been heard finally.

The following substantial questions of law are proposed for adjudication in these revisions :-

A. Whether in the facts and circumstances of the case, the learned Rajasthan Tax Board exercised its jurisdiction excessively and with material irregularity by ignoring the order dated 14.11.2018 passed by NCLAT, New Delhi read with the resolution plan and as well as not adhering to the orders passed by Hon'ble Supreme Court dated 26.07.2019 & 19.05.2020 & 24.01.2020 and the judgment dated 07.04.2020 of the Hon'ble Division Bench of Rajasthan High Court in true spirit of law and in rejecting the prayer to refund the amount paid as pre-deposit with the appeals (along with interest)?

B. Whether in the facts and circumstances of the case, the learned Rajasthan Tax Board wrongly exercised its jurisdiction and acted with material irregularity as on one hand it has held that in view of order dated 14.11.2018 passed by NCLAT, New Delhi read with the resolution plan and orders passed by Hon'ble Supreme Court dated 26.07.2019 and





19.05.2020 and 24.01.2020 and the judgment dated 07.04.2020 of the Hon'ble Division Bench of Rajasthan High Court, maximum amount which can be recovered from the petitioner is Rs. 61.05 Cr while on another hand has rejected the refund of pre-deposit amount which was deposited and lying with the respondent department in excess of Rs. 61.05 Cr?

Brief facts, relevant and essential for disposal of these revisions are noted hereinbelow :-

The Assistant Commissioner, Commercial Taxes Department issued VAT assessment orders fixing liability of company M/s. Binani Cement Limited for different periods ranging from 2005-06 to 2015-16 and also imposed upon it, additional tax and interest. These orders were carried by M/s. Binani Cement Limited in appeal to the Deputy Commissioner (Appeals), Commercial Taxes Department, Jodhpur, who dismissed the same by separate orders. Being aggrieved by the orders passed by the assessing authority and the appellate authority, M/s. Binani Cement Limited preferred appeals before the Rajasthan Tax Board, Ajmer.

As per Section 82 (3) of the Rajasthan Value Added Tax Act, 2003 (for short, "the Act of 2003"), the appeals were entertained with the mandatory statutory pre-deposit of stipulated percentage of the amounts levied under the disputed Tax Assessment orders.

Binani Cement Ltd. suffered losses and became sick during the pendency of these appeals, whereupon its Creditors



initiated Insolvency procedure under the Insolvency and Bankruptcy Code, 2016 (for short, hereinafter referred to as 'the IBC, 2016') before the National Company Law Tribunal, Kolkata (for short, 'NCLT'). Various players including the petitioner M/s UltraTech Nathdwara Cement Ltd. submitted their Resolution Plans before the NCLT. The respondent Commercial Taxes Department, in the capacity of an operational statutory creditor, made a claim to the tune of Rs.479,73,13,819/- towards Value Added Tax in the resolution proceedings. By virtue of the orders of Hon'ble Supreme Court, the resolution proceedings were transferred to the National Company Law Appellate Tribunal (for short, 'NCLAT'), which admitted claim of the Department to the extent of Rs.61.05 Crores only and dismissed the remaining claim. The NCLAT approved the Resolution Plan submitted by the petitioner UltraTech Cement Limited for Rehabilitation/Revival of the sick industrial unit, i.e. Binani Cement Ltd. As a consequence to acceptance of its Resolution Plan and upon being declared the successful resolution applicant, the present petitioner took over the company Binani Cement Limited.

In terms of the approved Resolution Plan, all liabilities of the sick unit, except those admitted by the NCLAT, as they existed prior to acceptance of the Resolution Plan stood wiped off. This proposition of law has been enunciated by Hon'ble Supreme Court in the case of ***State of Gujarat Vs. Essar Steel Ltd.*** **[2016 SCC Online Guj 4125]**.

Despite acceptance of the petitioner's Resolution Plan, the GST Department continued to raise demands for the period



prior to acceptance of the Resolution Plan, upon which Writ Petition No.9480/2019 (Ultra Tech Nathdwara Cement Ltd. Vs. Union of India & Ors.) came to be filed on behalf of the petitioner in this court, which was accepted vide order dated 07.04.2020 and the demands raised by the GST Department were quashed as being contrary to the IBC and the Judgment of Hon'ble Supreme Court in the case of Essar Steel Ltd. (supra). The said judgment of this court has attained finality.

Pursuant to acceptance of its Resolution Plan, the petitioner stepped into the shoes of the original appellant M/s. Binani Cement Ltd. in the pending appeals before the Tax Board.

As the Commercial Taxes Department was itself contemplating to dispose off the outstanding demands against the sick unit as a consequence of the NCLAT's acceptance of the petitioner's Resolution Plan, applications seeking withdrawal of the appeals and refund of the amount of pre-deposits made by way of mandatory statutory obligation alongwith the appeals filed before the Tax Board on behalf of the petitioner. All the appeals were disposed off by the Tax Board by the common order dated 28.12.2020 observing that all demands of the Commercial Taxes Department, Government of Rajasthan beyond a sum of Rs.61.05 crores had been turned down by the NCLAT and hence, were not recoverable. Nonetheless, the prayer made by the petitioner for refund of the pre-deposit amount with interest was negated in the following terms :-

“(vii) अपीलार्थी के विरुद्ध सृजित और इन अपीलों में विवादग्रस्त मांग राशियों की वैधता माननीय सर्वोच्च न्यायालय के समक्ष न तो विचाराधीन थी





और न ही इस सम्बन्ध में कोई निर्णय प्रदान किए गये हैं। प्रत्यर्थी विभाग द्वारा माननीय सर्वोच्च न्यायालय में अपीलार्थी के विरुद्ध कुल सृजित में से तत्समय बकाया मांग रुपये 479,73,13,819/- के विरुद्ध एन.सी.एल.ए.टी. द्वारा केवल रुपये 61.05 करोड़ ही स्वीकृत करने को चुनौती प्रदान की गयी थी। माननीय सर्वोच्च न्यायालय द्वारा विधिक बिन्दु को खुला छोड़ते हुए अपने निर्णय दिनांक 26.07.2019 में केवल यह निर्धारित किया गया है कि विभाग की 'ट्रांसफर डेट' को अपीलार्थी के विरुद्ध कुल बकाया मांग में से केवल रुपये 61.05 करोड़ की वसूली करने के ही अधिकार हैं। अतः हस्तगत अपीलों में अपीलीय प्राधिकारी द्वारा पुष्ट मांग वैध एवं अंतिम (Legal & Final) तो हो गयी है लेकिन इसमें से विभाग को केवल रुपये 61.05 करोड़ की वसूलने का अधिकार रह गया है। अतः इन अपीलों में विवादग्रस्त मांग की वसूली (यदि पूर्व में जमा नहीं पायी जाए) माननीय सर्वोच्च न्यायालय एवं एन.सी.एल.ए.टी. द्वारा अनुमत सीमा (Permissible Limits) तक करने को विभाग स्वतंत्र रहेगा।

(ix) विचाराधीन अपीलों को अपीलार्थी की प्रार्थना पर खारिज कर दिए जाने से इनमें विवादित मांग की वैधता के संबंध में अपीलीय प्राधिकारी का निर्णय अन्तिमता प्राप्त कर चुका है। अपीलार्थी द्वारा कानून (Statute) के अन्तर्गत सृजित मांग के विरुद्ध अपील पेश करने हेतु आज्ञापक सांविधिक दायित्व (Mandatory Statutory Obligation) के निर्वहन में रिफण्ड चाही जा रही राशि जमा करवायी गयी है। स्टेट्यूटरी क्रेडिटर को राशि जमा कराना अपीलार्थी का दायित्व (Liability) हो सकता है परिसम्पत्ति (Asset) नहीं। अपीलार्थी इकाई रुग्ण (Sick) नहीं होती और हस्तगत अपीलों में अन्तर्ग्रस्त विवाद बिन्दुओं को निर्णय सर्वोच्च स्तर से भी अपीलार्थी के विरुद्ध हुआ होता तो क्या पूर्व में जमा राशि/मांग राशि तब भी परिसम्पत्ति ही समझी जाती ? विवादग्रस्त मांग राशि के अवैध होने के सम्बन्ध में आज दिनांक को किसी स्तर से कोई निर्णय अस्तित्व में नहीं है।



(x) स्वयं रिजोल्यूशन एप्लीकेंट (अल्ट्राटेक सीमेंट लिमिटेड) द्वारा प्रस्तुत एवं एन.सी.एल.ए.टी. द्वारा स्वीकृत रिजोल्यूशन प्लान में प्रत्यर्थी विभाग को 'ऑपरेशनल स्टेट्यूटरी क्रेडिटर' स्वीकार किया गया है। प्रत्यर्थी विभाग द्वारा एन.सी.एल.ए.टी. के समक्ष प्रस्तुत अपने क्लेम रुपये 479,73,13,819/- में अपील पेश करने हेतु अपीलार्थी द्वारा आज्ञापक रूप से जमा करायी गयी राशि को शामिल नहीं किया गया तथा दावा केवल तत्समय अदत्त (unpaid) राशि के लिए ही किया गया। एक ही मांग राशि का एक भाग (पूर्व में जमा कराया गया) 'परिसम्पत्ति' और विलुप्त दायित्व सहित दूसरा अदत्त भाग (ट्रांसफर डेट को बकाया) 'दायित्व' होने की अपीलार्थी की बहस आत्मघाती (Self defeating) है। अपीलार्थी द्वारा 'ट्रांसफर डेट' से पूर्व जमा करायी जा चुकी राशि सफल रिजोल्यूशन एप्लीकेंट को रिफण्ड करने पर एन.सी.एल.ए.टी. अथवा माननीय सर्वोच्च न्यायालय द्वारा न तो विचार किया गया और न कोई निर्णय प्रदान किया गया। अतः प्रथम अपील प्रस्तुति के समय सांविधिक बाध्यता के कारण अपीलार्थी द्वारा जमा करायी गयी राशि अपीलार्थी को लौटाने योग्य नहीं है। फलस्वरूप इस राशि के रिफण्ड की प्रार्थना के सम्बन्ध में अपीलार्थी के विविध प्रार्थना-पत्र अस्वीकार किये जाते हैं।"

The Tax Board was of the view that if the appeals had been dismissed, the petitioner would not have been in position to claim refund of the mandatory statutory obligation pre-deposit amounts. Refund of such amount would only be admissible in the event of appeals being accepted. However, neither of the consequences ensued and since the demands prior to acceptance of the resolution plan had simply been disposed off and as the Department had not incorporated the amounts towards pre-deposit in the claim filed before the NCLAT, the argument of the petitioner regarding the entire liability of the sick unit towards the respondent Department including the pre-deposit amounts also



having been washed off was self-defeating. Accordingly, the appeals and the applications for refund were dismissed by the Tax Board by the common order dated 28.12.2020, which is assailed in these revisions with a prayer to refund the amounts furnished as mandatory pre-deposit while filing the appeals.

Learned Senior Advocate Dr. Sachin Acharya, learned Senior Advocate, assisted by Mr. Manish Priyadarshi and Mr. Gopal Sandu, Advocates, representing the petitioner, vehemently and fervently urged that the appeals preferred by the petitioner were disposed off as infructuous on account of the fact that the respondent Department itself accepted that pursuant to the acceptance of the Resolution Plan and with the approval of the petitioner as the successful resolution applicant, all outstanding demands of the Department against the defaulting unit M/s. Binani Cement Ltd. had been extinguished over and above the amount of Rs.61.05 crores approved under the Resolution Plan. He pointed out that all existing liabilities of the unit prior to the acceptance of the Resolution Plan have been disposed off by the Commercial Taxes Department by a formal order dated 12.08.2021. Thus, the Department has no subsisting claim against the unit beyond the sum of Rs.61.05 crores. If the respondent Department is permitted to retain the amounts paid towards mandatory statutory obligation with the appeals, it would amount to unjust enrichment of the Department, which is not at all warranted. In support of his contentions, Dr. Acharya relied upon the following judgments :-



**1. *Ghanshyam Mishra and Sons Private limited Vs. Edelweiss Asset Reconstruction Company Limited & Ors* [2021 SCC Online SC 313]**

**2. *GGs Infrastructure Private Limited Vs. Commissioner of CGST & Central Excise* (WP-LD-VC-NO.269 of 2020) decided on 22.12.2020**

**3. *M/s. Jagat Janani Services Vs. Goods & Service Tax Council and Others* [W.P.(C) No.17196 of 2020] decided on 21.09.2021**

**4. *Suvidhe Ltd. Vs. Union of India, 1996 (82) ELT 177 (Bom.)* (Affirmed in *Union of India Vs. Suvidhe Ltd., [(2016) 11 SCC 808]*)**

**5. *State of Gujarat Vs. Essar Steel Ltd.* [2016 SCC Online Guj 4125]**

**6. *Nelco Limited Versus Union of India* [2001 SCC Online Bom 1251]**

and prayed that the revisions deserve to be accepted and the amounts pre-deposited with the appeals by way of mandatory statutory obligation deserve to be reimbursed to the petitioner with interest.

Per contra, Mr. Hemant Dutt, learned counsel representing the respondent Commercial Taxes Department, vehemently opposed the submissions advanced by Dr. Acharya. He contended that the amounts pre-deposited with the appeals filed by Binani Cement Ltd. as mandatory statutory obligation were never claimed by the Department during the resolution proceedings. The pre-deposits were mandatory for filing the





appeals, which were withdrawn and hence, the petitioner cannot claim refund of such amounts. He urged that the petitioner would have been acting well within its right to request for refund of the pre-deposits in case the appeals had been accepted. However, as the appeals were withdrawn, the claim for refund got extinguished as an automatic consequence. He, thus, submitted that the instant bunch of revisions does not involve any substantial question of law and hence, the same should be dismissed.

We have given our thoughtful consideration to the submissions advanced at bar and have gone through the material available on record as well as the impugned orders.

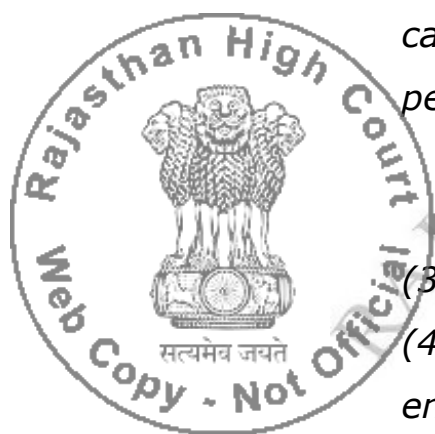
The Department acted under the Act of 2003 and issued notices/assessment orders raising demands of outstanding tax and penalty etc. from the unit M/s. Binani Cement Ltd. for the Financial Years 2005-06, 2006-07, 2007-08, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2013-2014, 2014-2015, 2015-2016. M/s. Binani Cement Ltd. assailed these demands by filing appeals as referred to supra before the learned Tax Board. Pre-deposit of a percentage of the assessed amounts was paid with the appeals by way of mandatory statutory obligation as per Section 82 (3) of the Act of 2003. The procedure for filing the appeals is provided under Section 82 of the Act of 2003, which reads as below :-

*82. Appeal to the appellate authority.- (1) Subject to the provisions of section 86, an appeal against any order of an Assistant Commissioner, a Commercial Taxes Officer, an Assistant Commercial Taxes Officer or Junior Commercial Taxes Officer or Incharge of a*



check-post or barrier shall lie to the appellate authority.

(2) The appeal shall be presented within sixty days of the date on which the order sought to be appealed against is communicated; but the appellate authority may admit an appeal even after the said period of sixty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.



(3) Notwithstanding anything contained in sub-section (4) of section 38, no appeal under this section shall be entertained unless it is accompanied by a satisfactory proof of the payment of tax and other amounts admitted by the appellant to be due from him or of such installment thereof as might have become payable and in case of an appeal from **an ex-parte assessment order, five percent of, and in other cases ten percent of the 3["disputed tax amount"]**.

(Emphasis supplied)

(4) Notwithstanding that an appeal has been preferred to the appellate authority, the tax or any other sum shall, subject to the provisions contained in sub-sections (4) and (5) of section 38, be paid in accordance with the order against which appeal has been preferred.

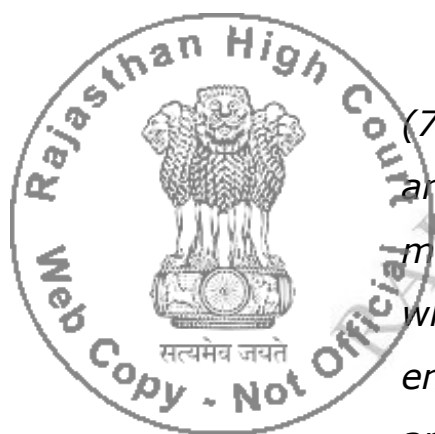
(5) The appeal shall be in the prescribed form and shall be verified in the prescribed manner.



(6) The following shall have the right to be heard at the hearing of the appeal, –

(a) the appellant, either in person or by the authorized representative;

(b) the authority or officer against whose order the appeal has been preferred either in person or by a representative.



(7) The appellate authority may, before disposing of any appeal make such further enquiry as it thinks fit, or may direct the assessing authority or the officer against whose order appeal has been preferred to make further enquiry and report the result of the same to the appellate authority and in disposing of the appeal the said authority may, –

(a) in the case of an order of assessment, interest or penalty, –

(i) confirm, enhance, reduce or annul the assessment, interest or penalty; or

(ii) set aside the order of assessment, interest or penalty and direct the assessing authority to pass fresh order after such further enquiry as may be directed; and

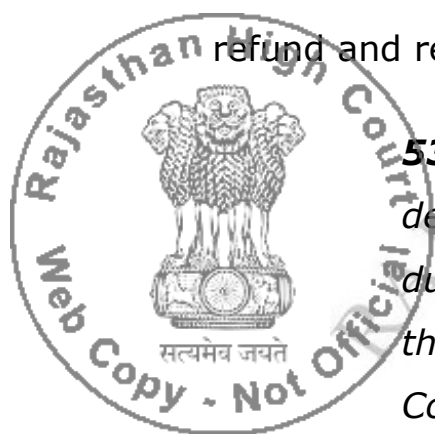
(b) in the case of any other order, confirm, cancel, vary or remand such order.

(8) The appellate authority shall send a copy of the order passed by it to the appellant, the assessing authority or such authority against whose order the appeal has been preferred, the Deputy Commissioner (Administration) concerned and the Commissioner.”



Section 82(3) of the Act of 2003 imposes a mandatory statutory obligation of making a pre-deposit for entertaining an appeal. In appeals against ex parte assessment orders, the mandatory statutory pre-deposit would be 5% of the Value Added Tax and 10% of the Value Added Tax amount in other cases.

Section 53 of the Act of 2003 deals with the concept of refund and reads as below :-



**53. Refund.**— (1) Where any amount is refundable to a dealer under the provisions of this Act, after having duly verified the fact of 1["deposit of such amount"], the assessing authority or the officer authorized by the Commissioner, shall in the prescribed manner refund to such dealer the amount to be refunded either by cash payment or by adjustment against the tax or other sum due in respect of any tax period.

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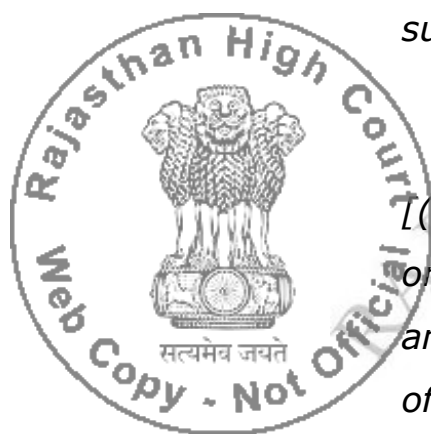
(2) Notwithstanding anything contained in this Act, where a registered dealer files a return and claims refund on account of sales in the course of export outside the territory of India, the assessing authority or officer authorized by the Commissioner may require such dealer to furnish such documents as may be prescribed and after having been satisfied shall within thirty days from the date of such claim, grant the dealer a refund in cash.

(3) Where an amount or tax is collected from any person who is not registered under this Act and such amount or tax is not found payable by him, or where an amount in lieu of tax for any works contract is deducted in any manner by an awarder from any bill of





payment to a contractor, who is not liable to pay tax under this Act, the amount so collected or deducted shall be refunded in the prescribed manner by the Assistant Commissioner or the Commercial Taxes Officer, as the case may be, in whose territorial jurisdiction such person or contractor ordinarily resides; and where such person or contractor does not reside in the State, then such refund shall be made by such officer as may be directed by the Commissioner.



[(3A) Where any amount has been deposited wrongly or in excess, by a dealer and it is found that such amount is not payable or has been deposited in excess of the amount payable by the dealer for the tax period mentioned in the challan, the Commissioner or any officer as authorized by the Commissioner in this behalf shall direct the assessing authority to grant refund of the said amount in the manner as prescribed.]

(4) [Where refund of any amount becomes due to a dealer, he shall be entitled to receive, in addition to the amount of refund, simple interest at such rate as may be notified by the State Government with effect from 1st April of the year immediately following the year to which it relates upto the date of payment:

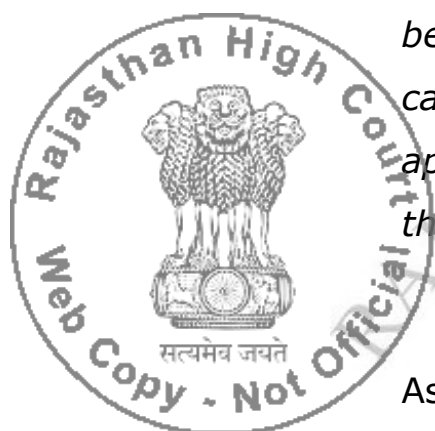
Provided that where the dealer has paid any amount of tax after the closing of the year and such amount is required to be refunded, no interest shall be payable for the period prior to the date of the deposit of such amount.]

(5) Notwithstanding anything contained in this section or in any other law for the time being in force, only the dealer or the person, who has actually suffered the



*incidence of tax or has paid the amount, can claim a refund and the burden of proving the incidence of tax so suffered or the amount so paid shall be on the dealer or the person claiming the refund.*

*[(6) Where tax is collected on any official or personal purchase by Foreign Diplomatic Missions or their Diplomats or by UN Bodies or their Diplomats, it shall be refunded to such person or Mission or Bodies, as the case may be, within thirty days of the receipt of the application, by such officer as may be authorized by the State Government in this behalf by notification.]”*



As per Section 53 (4) of the Act of 2003, where refund of any amount becomes due to a dealer, he shall be entitled to receive simple interest at such rate as may be notified by the State Government.

The Act of 2003 has further been supplemented by the Rajasthan Value Added Tax Rules, 2006 (for short, “the Rules of 2006”). Rule 27 of the Rules of 2006 also deals with refund of excess tax/penalty/interest/other sum due, as a result of an assessment made or in pursuance of an order passed by any competent officer, authority or court, and is quoted hereinbelow for the sake of ready reference :-

**"27. Refund.-(1) (a)**Subject to the provisions of sub-section (2) of section 17, section 53 and section 54, the assessing authority or the authorised officer, after having verified the fact of deposit of such amount, is satisfied that the payment made by a dealer or a person is in excess of any tax, penalty, interest or other sum due, as a result of an assessment made or in pursuance of an order passed by any competent officer,



*authority or court, such assessing authority or authorised officer, either suo motu or on an application made in this behalf in Form VAT-20 or VAT-21 or VAT-22 as the case may be, shall pass an order for refund within fifteen days of such assessment or receipt of such order or receipt of completed application. Refund order shall be passed in favour of a dealer or a person who has account in a bank having core banking system (CBS) in Form VAT-23A, and in case of others in Form VAT-23.]”*

On going through the aforesaid provisions of the Act of 2003 and the Rules of 2006, it becomes clear that mandatory statutory obligation pre-deposit with the appeal comprises of a proportion of VAT liability imposed upon the assessee by the assessing authority.

M/s. Binani Cement Limited became sick and during pendency of the insolvency proceedings and Corporate Insolvency Resolution process was undertaken under the IBC, 2016. With the acceptance of the Resolution Plan of the petitioner who was declared the successful applicant by the NCLAT, the petitioner gained absolute control over the unit and was under an obligation to discharge the existing liabilities of the sick unit, strictly in terms of the Resolution Plan approved by the NCLAT. It is not in dispute that the respondent Department had submitted a claim for an outstanding amount of Rs.479,73,13,819/- before the NCLAT in the resolution proceedings in the capacity of an operational creditor. The amount so claimed would relate to Value Added Tax and nothing else. The NCLAT disposed of the demands raised by all corporate/operational creditors including the respondent Department while accepting its claim only for a sum of Rs.61.05



crores. It may be mentioned here that the respondent Commercial Taxes Department challenged the order of the NCLAT by filing a SLP, which was dismissed by Hon'ble Supreme Court. Thus, the liability of the petitioner towards the respondent Department was fixed at Rs.61.05 crores. Any demand made or amount retained by the Department beyond the said sum of Rs.61.05 crores either from the sick unit or from the petitioner would, thus, be invalid as being contrary to the Resolution Plan approved by the NCLAT.

Consequently, all that the Department could claim from the petitioner, being the successful resolution applicant, would be the said amount and nothing beyond that.

It cannot be disputed that if the appeals had been accepted on merits, *a fortiori*, the amounts deposited with the appeals as mandatory statutory obligation would have to be reimbursed to the assessee. Nonetheless, the Tax Board was not called upon to decide the appeals on merits because the Department itself took a conscious logical decision to dispose all liabilities of the sick unit as they existed prior to acceptance of the Resolution Plan and hence, the petitioner was not required to invoke the appellate jurisdiction of the Tribunal for getting the appeals decided on merits. The applications were correctly moved by the petitioner for withdrawal of the pending appeals, which had virtually become infructuous with the liabilities of the unit towards the Department having been settled by the NCLAT. The withdrawal of the appeals was as good as acceptance because in effect, all the outstanding liabilities of the Department stood





disposed of, by virtue of the Department's order dated 12.08.2021.

Once the tax liability raised by the Department had been fixed by effect of acceptance of Resolution Plan, manifestly, the Department could not hold on to any payment made by the assessee in excess of what has been approved under the Resolution Plan, i.e. Rs.61.05 crores. The reasoning given by the Tax Board in the impugned orders that the amount deposited by the assessee by way of statutory pre-deposit was not a part of the Resolution Plan is absolutely without foundation for the simple reason that this amount was a proportion of the tax liability fixed on the assessee and once the total tax liability has been quantified by the NCLAT, any amount paid by the assessee over and above such amount would have to be reimbursed as per Section 53 (3) (3A) of the Act of 2003 read with Rule 27 of the Rules of 2006.

The Tax Board held that the burden of establishing that the amount deposited with the appeals by way of mandatory statutory obligation was also a part of the Resolution proceedings and in absence of any such material, the appellant could not stake a claim for the same. Superficially this logic of the Tax Board appears to be justified in view the stipulation made in Section 53 (5) of the Act of 2003 that the burden of proof is on the dealer or the person claiming the refund. However, when the situation is considered in light of the order passed in the insolvency proceedings, it becomes clear that the entire tax liability accruing to the Department was put forth by way of a claim filed by the Department before the NCLAT in the capacity of a statutory



creditor. As the NCLAT comprehensively decided the claim of the Department and restricted the liability of the Resolution applicant, i.e. the petitioner herein, towards the Department to Rs.61.05 crores, it can be presumed that there was no other liability of the petitioner against the outstanding amounts due to be paid by way of Commercial Taxes. The Resolution Plan having been approved and the claim of the Department having been finally decided by the NCLAT, if at all the Department was desirous of claiming that the pre-deposit amounts were exclusive and beyond the claim filed by the Department before the NCLAT, then the burden would be on the Department to prove the same. The assessee discharged the burden put upon it by Section 53 (5) of the Act of 2003 by virtue of the Resolution Plan finalized by the NCLAT. Thus, the finding recorded by the Tax Board that the amount of pre-deposits were distinct and were not covered under the claim filed by the Department before the NCLAT has no foundation whatsoever.

The petitioner questioned validity of the demand notices issued by the CGST Department in relation to the period prior to the transfer date on which the petitioner took over the company M/s Binani Cement Ltd. in proceedings under the IBC, 2016 by filing a **Writ Petition No.9480/2019 (Ultra Tech Nathdwara Cement Ltd. Vs. Union of India & Ors.)**, which was accepted by this court vide order dated 07.04.2020 by making the following observations :-

*"Therefore, we are of the firm opinion that the respondents would be acting in a totally illegal and arbitrary manner while pressing for demands raised vide the notices which are impugned in this writ*



*petition and any other demands which they may contemplate for the period prior to the resolution plan being finalized.*

*The demand notices are ex-facie illegal, arbitrary and per-se and cannot be sustained.*

*Accordingly, the impugned demand notices and orders viz. notice dated 11.2.2019 (Annex.10), letter dated 7.9.2018 (Annex.11), order dated 20.3.2019 (Annex.12), notice dated 6.3.2019 (Annex.13), notice dated 8.3.2019 (Annex.14), notice dated 29.3.2019 (Annex.15), notice dated 29.3.2019 (Annex.16), notice dated 10.4.2019 (Annex.18), order dated 9.4.2019 (Annex.19), two notices dated 11.6.2019 (Annex.20) and any further demands pending as on the date of finalization of the resolution plan issued/raised by the respondents Central Goods and Service Tax Department, Govt. of India are quashed and struck down."*

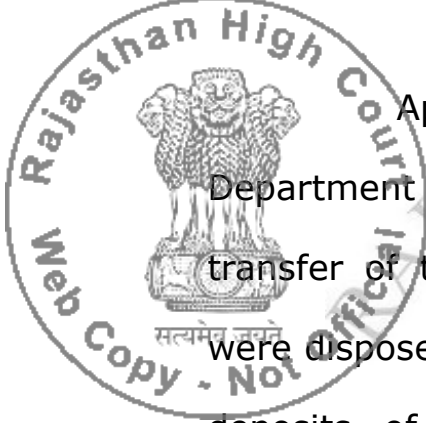
Drawing analogy from the conclusions drawn by this court in the judgment dated 07.04.2020, any demand made by the State Commercial Taxes Department in excess of that approved by the NCLAT would have to be struck off and if any amount has already been received over and above what has been approved under the Resolution Plan, the same would have to be refunded.

The Commercial Taxes Department issued the order dated 12.08.2021, whereby it has been resolved as below :-

"अतः IBC-2016 के प्रावधानों (विशेष Section 238) के अनुसरण में National Company Law Appellate Tribunal, new Delhi (NCLAT) द्वारा दिनांक 14.11.2018 को पारित/अनुमोदित किया गया Resolution Plan तथा माननीय सर्वोच्च न्यायालय आदेश दिनांक 19.05.2020 की अनुपालना में उक्त व्यवसायी फर्म के विरुद्ध Transfer Date (25.07.2017) से पूर्व की अवधि हेतु



सृजित की गई समस्त बकाया मांग राशि उक्त सारणी (DCR अनुसार) कुल 106 पृष्ठियां एवं संबंधित कुल राशि रु 513.09 करोड़ निस्तारित (Disposed Off) की जाती है। उक्त आदेश अधोहस्ताक्षरकर्ता के कार्यालय द्वारा श्रीमान् अतिरिक्त आयुक्त (कर) वाणिज्यिक कर विभाग राजस्थान (मार्फत उपायुक्त प्रशासन वा.क.पाली) को मार्गदर्शन हेतु लिखे गये पत्रांक 21.12.2020 के संदर्भ में श्रीमान् अतिरिक्त आयुक्त (कर) पत्रांक 391 दिनांक 11.08.2021 (संलग्न) के अनुक्रम में श्रीमान् आयुक्त महोदय वाणिज्यिक कर विभाग राजस्थान से अनुमोदित है।”



Apparently, as per this order, all demands of the Department against the sick unit as they existed prior to date of transfer of the original unit to the petitioner, i.e. 25.07.2017, were disposed of in accordance with the Resolution Plan. The pre-deposits, of which refund is sought by the petitioner, had been made by way of mandatory statutory obligation while filing appeals before the Tax Board as part of the tax liability of M/s. Binani Cement.

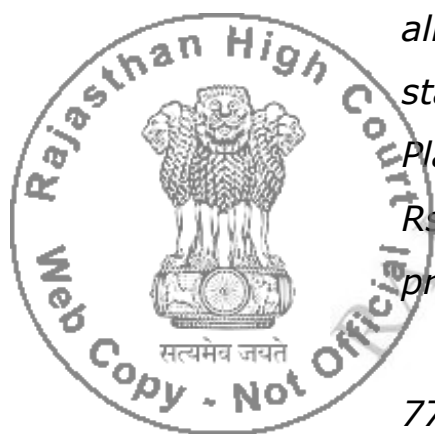
However, as all demands raised by the Department for the date prior to the taking over of the sick unit under the Resolution Plan have been disposed of, the appeals pending before the Tax Board became infructuous as the liability of the successful Resolution Applicant, i.e. the petitioner herein, qua the Commercial Taxes Department stood extinguished beyond what has been quantified by the Tribunal.

In the case of **Ghanshyam Mishra & Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Company Ltd. (supra)**, the Hon'ble Supreme Court examined an identical controversy and held as below :-





"23. The appellant therefore filed a Civil Miscellaneous Writ Petition No. 354/2020 before the High Court of Allahabad challenging the order passed by the Additional Commissioner Grade 2 (Appeal) dated 30.1.2020, to the effect, that the proceedings in the State of U.P. would remain unaffected irrespective of the approval of the Resolution Plan of the appellant by NCLT. The appellant also prayed for a declaration, that all the proceedings pending before different authorities stand abated in terms of the approval of the Resolution Plan by NCLT. A prayer was also made for refund of Rs.248.92 lakhs deposited by the appellant under protest and for return of the Bank Guarantee.



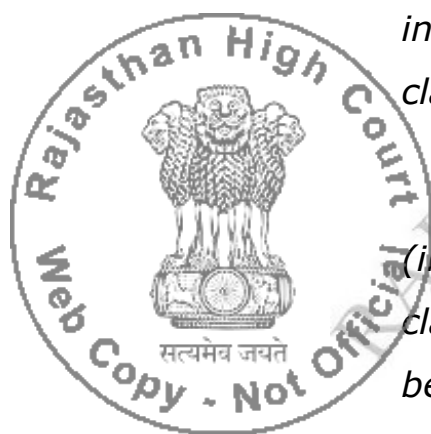
77. It is clear, that the mischief, which was noticed prior to amendment of Section 31 of I&B Code was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the Adjudicating Authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.

95. 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 subsection (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;*



*(ii) 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 dues 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.*

*132. The appeal therefore is allowed. The impugned judgment and order dated 6.7.2020 passed by the Allahabad High Court is quashed and set aside. We hold and declare, that the respondents are not entitled to recover any claims or claim any debts owed to them from the Corporate Debtor accruing prior to the transfer date. Needless to state, that the consequences thereof shall follow."*



The controversy at hand is virtually concluded by the observations made at para 132 of the above judgment, wherein Hon'ble Supreme Court has categorically held that the respondents are not entitled to recover any claims or claim any debts owed to them by the corporate debtor accruing prior to transfer date and "**that consequences shall follow**".

As the original assessee, i.e. M/s. Binani Cement Ltd., was compelled to file the appeals with pre-deposits of a percentage of the tax liability by way of mandatory statutory obligation as per the assessment orders issued by the Commercial Taxes Department, the consequential relief pursuant to extinguishment of the demands under the assessment order would definitely require a direction for refund of the amount to the successful Resolution Applicant, i.e. the petitioner herein, who took over the assets and liabilities of the sick unit according to the Resolution Plan approved by the NCLAT.

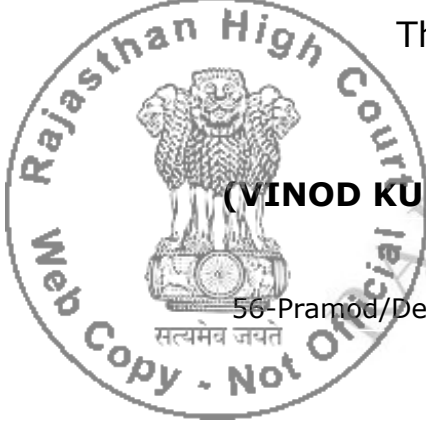
In the case of **State of Gujarat Vs. Essar Steel Ltd. (supra)**, Hon'ble Gujarat High Court directed refund of pre-deposit on acceptance of the appeals and decided the issue in favour of the assessee. In the present case, though the appeals have not been accepted, but an analogous situation has been created with acceptance of the Resolution Plan and extinguishment of all debts/liabilities of the sick unit towards the statutory creditor, i.e. the State Government/Commercial Taxes Department.

As a consequence, the consolidated impugned order dated 28.12.2020 passed by the Rajasthan Tax Board, Ajmer in the appeals filed by the petitioner is set aside to the extent the



applications filed by the petitioner for refund of pre-deposit amounts with interest were rejected. The amounts deposited by M/s. Binani Cement Ltd. as mandatory statutory obligation while filing the appeals before the Tax Board shall be reimbursed to the petitioner within a period of three months from today with interest at the rate applicable by law.

The revisions are allowed in these terms.



**(VINOD KUMAR BHARWANI),J**

**(SANDEEP MEHTA),J**

56-Pramod/Devesh-



सत्यमेव जयते