

20TH SURANA & SURANA NATIONAL CORPORATE LAW MOOT COURT

COMPETITION 2022-23

IN THE

HON'BLE HIGH COURT OF KARNATAKA

AT BENGALURU

WP No. 1001 to 1004 of 2023

MIDAS ONLINE GAMES PRIVATE LTD. (REPRESENTED BY RESOLUTION PROFESSIONAL)

.....PETITIONER

v.

DIRECTORATE GENERAL OF GST INTELLIGENCE BENGALURU

.....PETITIONER

[UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA]

WRITTEN SUBMISSION ON BEHALF OF THE PETITIONER

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STATEMENT OF JURISDICTION

The Petitioner most humbly submits that this Hon'ble High Court of Karnataka has jurisdiction to hear and adjudicate upon the matters of:

- **WP NO. 1001 TO 1004 OF 2023** under Article 226 of The Constitution of India.

All of which is urged in detail in the written submission and submitted most respectfully.

The parties most humbly submit to the jurisdiction of the Hon'ble High Court of Karnataka.

STATEMENT OF FACTS

Midas Online Games India Pvt Ltd (Midas Online Games or the Company) is a company registered under the Companies Act, 2013 in Bengaluru, it was involved in online betting games. For the purpose of payment of GST, the company believed that it is liable to pay GST at the rate of 18% only on the 'admission fee' component i.e., the 25% of the total fee collected. On April 01, 2022, the Office of the Director General of GST Intelligence issued show cause notices (SCN) and statements to the company for the financial years FY 2017-18 till FY 2020-21 under §74(2) for FY 2017-18 and under §73(2) for FY 2018-19 and statements under §73(3) for FY 2019-20 and FY 2020-21 respectively asking the company to show cause for the same. On 01.09.2022 the software supplier company of MIDAS filed an application before the National Company Law Tribunal at Bengaluru under the Insolvency and Bankruptcy Code, 2016 to initiate corporate insolvency resolution process against MIDAS. On 30.09.2022, the NCLT reserved its order and posted the case on 06.10.2022 'For Orders'. On 03.10.2022, the GST department passed separate orders under §74(9) and §73(9) respectively for the four years asking the company to pay the entire demand of tax, interest, and penalty of around INR 11,000 crores before 5 PM in the evening of 05.10.2022 relying on the proviso to §78 of the GST Act. On 06.10.2022, the department initiated recovery proceedings under §79(1)(c) of the GST Act, and the NCLT directed that the CIRP under §14 of IBC be initiated and appointed the interim resolution professional (IRP). Moratorium was also ordered as per §14 of the Code. On 10.10.2022, The GST department filed its claim as secured creditor in Form B as per the Code. On 20.10.2022, the Committee of Creditors was constituted. The first meeting of the COC was convened on 26.10.2022. The RP filed four writ petitions before the Karnataka High Court as the representative of the company challenging the GST department proceedings.

STATEMENT OF ISSUES

- I. WHETHER GST IS LEVIABLE ON ENTIRE CONSIDERATION RECEIVED BY MIDAS?
- II. WHETHER DEMAND ORDER ISSUED BY GST DEPARTMENT IS SUSTAIANABLE AND VALID?
- III. WHETHER THE GST DEPARTMENT CAN BE TREATED AS A SECURED CREDITOR IN THE
INSOLVENCY PROCEEDINGS OF MIDAS?

SUMMARY OF ARGUMENTS

I. GST Department cannot levy GST on entire consideration

MIDAS, an online gaming platform, is contending that it does not need to pay GST on the total consideration received by them because it deals in games of skill, which is not gambling and betting. Furthermore, the money that is pooled in the escrow account is an actionable claim, which is neither a supply of goods nor services. MIDAS receives two kinds of payments : an admission fee of 25% and a pooling fee of 75% respectively, of the total consideration. The pooled amount is prize money gets transferred to an escrow account, to be distributed among the winners which is exempted from the levy of GST.

II. The demand order issued by GST department is unsustainable under GST provisions.

The demand order issued by the GST department asking MIDAS to pay 28% GST on the entire amount received is unsustainable. GST cannot be levied on actionable claims, and the applicable rate on online games of skill is 18%, not 28%. Additionally, the department failed to substantiate the order with proper grounds and did not prove that MIDAS committed fraud. Therefore, the demand order is invalid.

III. GST department, being a government department should not be considered as secured creditor.

The GST department cannot be treated as a secured creditor and has to wait in line to receive its dues. Further, the GST department is an operational creditor and, therefore, cannot rely upon the provisions of §73, §78 and §79 of the GST Act. The GST department has violated various provisions of the IBC and the GST Act meaning thereby, that the GST department should not be treated as a secured creditor.

ARGUMENT ADVANCED

I. MIDAS NEED NOT PAY GST ON THE ENTIRE CONSIDERATION.

It is most humbly submitted before this Hon'ble High court, that MIDAS, an online gaming platform is not liable for paying GST on the entire consideration, it receives, because (A) it provides services for games of skill and thus (B) it is not gambling. Further, (C) money pooled in the escrow account is an Actionable claim, and (D) therefore it is neither a supply of goods nor services.

A. Midas Deals Mostly In Games And Events Which Have Substantial Element Of Skill

A game of skill is one in which the outcome is determined mostly by the player's skill, training, attention, experience, adroitness, and aptitude, rather than by chance, although the element of chance necessarily cannot be eliminated.¹ So, skill test i.e., the dominant element - "skill" or "chance" - that determines the character of the game.² Therefore, games involving a 'substantial or preponderant' degree of skill would amount to games of 'mere skill'³

The Supreme Court in State of Andhra Pradesh v. K. Satyanarayana & Ors. held that, rummy is preponderantly a game of skill and not of a chance,⁴ even if there is a stake involved.⁵

Poker is a game that requires a specific set of skills⁶ including the ability to precisely calculate the probability of a needed card coming on a turn, the skill to read opponents'

¹ Dr. K.R. Lakshmanan v. State of Tamil Nadu, (1996) 2 SCC 226.

² Id.; M.J. Sivani and Ors. v. State of Karnataka and Ors., (1996) 2 SCC 226; Pleasantime Products v. Commissioner of Central Excise, Mumbai-I, (2010) 1 SCC 265; Rex v. Fortier, [1957] 13 Q.B. 308.

³ Id.

⁴ State of Andhra Pradesh v. K. Satyanarayana & Ors., AIR 1968 SC 825.

⁵ D. Krishna Kumar v. State of Andhra Pradesh, (2010) 1 SCC 265.

behaviour and body language; and the competence to apply strategic concepts such as “semi-bluffing and playing for implied odds. So, poker is a game of skill.⁷

A horse race is a game of skill⁸ because it depends on several factors like form, fitness and inherent capacity of the animal,⁹ the ability of the jockey,¹⁰ the weight carried, and the distance of the race,¹¹ which are all objective facts capable of being assessed by persons placing the bets.¹²

The fantasy game depends upon users’ exercise of skill based on superior knowledge, judgment, and attention, and the result of the game was not dependent on the winning or losing of the particular team in the real-world game on any particular day.¹³ Therefore, it is undoubtedly a game of skill and not a game of chance.¹⁴

In the instant case, MIDAS is involved in the business of online betting of games such as Rummy, poker, and the like fantasy cricket, horse racing, etc.¹⁵ All of these activities, including Rummy, Poker, fantasy sports, and horse racing, require a substantial degree of

⁶ Roman Yampolskiy, *Game Skill Measure for Mixed Games*, 1:3 WASET 308-310 (2007).

⁷ *Gaussian Networks Pvt. Ltd. v. Monica Lakhnpal & Ors.*, Suit No. 32 of 2012, decided on Nov. 17, 2012; *State of Gujarat v. Kishanbhai*, Criminal Appeal No. 1485 of 2008, decided on Jan. 7, 2014.

⁸ *K.R. Lakshmanan v. State of Tamil Nadu & Anr.*, (1996) 2 SCC 226; *The Bombay Prevention of Gambling Act, 1887*, § 3, No. IV, Acts of Bombay State Legislature, 1887.

⁹ *People v. Monroe*, 85 ALR 605 (Cal. Ct.s of App. 1932).

¹⁰ *Commonwealth v. Kentucky Jockey Club*, 238 Ky 739 (Ky. Ct. App. 1931).

¹¹ *Utah State Fair Association v. Green*, 68 Utah 249-251 (Supreme Ct. Utah 1926).

¹² *Edwarad J. Rohan v. Detroit Racing Association*, 166 ALR 246 (Supreme Ct. Mich. 1946).

¹³ *Varun Gumber v. Union Territory of Chandigarh*, (2017) Cri LJ 3827.

¹⁴ *Ibid*; *Gurdeep Singh Sachar v. Union of India & Ors.*, (2019) 75 GST 258 (Bombay); *Chandresh Sankhla v. State of Rajasthan*, (2020) SCC Online Raj 264; *Head Digital Works Private Limited v. State Of Kerala* (2021) SCC Online Ker 3592; *Junglee Games India Private Limited v. State of T.N.*, (2021) SCC Online MAD 2762; *Ravindra Singh Chaudhary v. Union Of India And Ors.*, (2020) (4) Rlw 3322 (Raj)

¹⁵ ¶1 Case Data.

skill and have thus been classified as games of skill by the courts. Therefore, the game and events in which MIDAS deals are merely games of skill.

B. Games Of Skill Are Not Gambling

The gambling act exempts ‘games of skill’ wherever played from the ambit of penal provisions applicable to gambling and betting.¹⁶ States have the power to make laws regarding Gambling and betting.¹⁷ Exercising its power the gambling act has been carried forward as it is in a few states & UTs¹⁸ while others drafted their own but continue exempting games of skill from the ambit of Gambling.¹⁹ Gambling is defined as “the act of risking something of value for a chance to win a prize”,²⁰ and in a nutshell is the payment of a price for a chance to win a prize.²¹ The supreme court in *RMD Chamarbaugawala v. Union of India*,²² held that the competitions which substantially involve skills are not gambling activities but are commercial and business activities, protected under the constitution²³ but gambling is not.²⁴ Further Karnataka High Court recently struck down the provisions of the

¹⁶ The Public Gambling Act, 1867, § 12, No. 3, Act of Parliament, 1867.

¹⁷ INDIAN CONST art. 246, INDIAN CONST Schedule 7, List II, Entry 34.

¹⁸ The Public Gambling Act, 1867, § 12, No. 3, Act of Parliament, 1867; Andaman Nicobar; Arunachal Pradesh; Chandigarh; Dadra and Nagar Haveli; Haryana; Himachal Pradesh; Lakshadweep; Punjab; Madhya Pradesh; Chhattisgarh; Manipur; Mizoram; Tripura; Uttarakhand.

¹⁹ The Bombay Prevention of Gambling Act, 1887, § 13, No. IV, Acts of Bombay State Legislature, 1887; The Tamil Nadu Gaming Act, 1930, § 11, No. 3, Acts of Tamil Nadu, 1930; The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015, § 13; 2(i), No. 3, Acts of Nagaland, 2016; The Meghalaya Prevention of Gambling Act, 1970, No. 8, Acts of Meghalaya, 1970; The Goa, Daman, and Diu Public Gambling Act, 1976, No. 14, Acts of Goa, Daman, and Diu, 1976; The Rajasthan Public Gaming Ordinance, 1949, No. XLVIII, Ordinance of Rajasthan, 1949.

²⁰ “Gambling” Definition, Bryan A Garner, *Black’s Law Dictionary* 701 (8th ed. 2004).

²¹ *Dr. K.R. Lakshmanan v. State of Tamil Nadu*, (1996) 2 SCC 226; *Bimalendu De v. Union of India*, AIR 2001 Cal 30.

²² *RMD Chamarbaugawala v. Union of India*, AIR 1957 SC 628.

²³ INDIAN CONST art. 19

²⁴ *State of Bombay v. R.M.D. Chamarbaugawala*, AIR 1957 SC 699

amendment act,²⁵ insofar as they prohibits betting on online games, including games of skill.²⁶

In this case, the MIDAS deals with games and events that require a substantial skill set,²⁷ and are not dependent on chance, as is required in gambling. Therefore, MIDAS's operations are of a business and commercial character, which are protected by the constitution, as opposed to gambling, which is not. Further, the game of skill like in which MIDAS deals are exempted from the scope of Gambling & Betting in the Gambling Act itself.

C. Consideration In Escrow Account Is An Actionable Claim

A claim to an unsecured debt or a claim to any beneficial interest in movable property that is not in the possession of the claimant qualifies as an actionable claim,²⁸ which further qualifies as 'goods.'²⁹

The Hon'ble Supreme Court in the *Sunrise Associates case*³⁰ concluded that "on purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize money which is not in the purchaser's possession. The right would fall squarely within the definition of an actionable claim.

²⁵ Karnataka Police (Amendment) Act, 2021, No. 28, Acts of Karnataka, 2021.

²⁶ All India Games federation v. State of Karnataka, 2022 SCC OnLine Kar 435.

²⁷ Argument I(A)

²⁸ Transfer of Property Act, 1882, § 3, No. 4, Acts of Parliament, 1882.

²⁹ The Central Goods and Services Tax Act, 2017, § 2(52), No. 12, Acts of Parliament, 2017.

³⁰ Sunrise Associates v. Govt of NCT of Delhi, (2010) 10 SCC 420.

Similarly, the amounts pooled in an escrow account for operating an online fantasy game constitute an actionable claim, as the same are to be distributed among the winning participants.³¹

In this case, MIDAS operates on a business model in which each member pays two kinds of fees: an admission fee of 25% of the total consideration and a pooling fee of 75% of the total consideration.³² The latter amount is transferred into an escrow account which is the prize money,³³ that needs to be distributed among winners. The winners have a beneficial interest in the pooled amount and have no possession of it. Therefore, as decided by the courts, the amount in the escrow account is an unsecured debt of various participants, thus making it an actionable claim.

D. Actionable Claims Are Exempted From Levy Of GST

CGST Act provides for the levy and collection of tax on the supply of goods or services or both, which are taxable under the Act.³⁴ However, the scope of supply does not include activities or transactions specified in Schedule III of the Act,³⁵ which states that ‘Actionable claims, other than gambling, betting, and lottery is neither a supply of goods nor supply of services.’³⁶ Thus, actionable claims are not taxable as the same is neither ‘supply’ of goods nor ‘supply’ of services. However, an actionable claim in the lottery is considered to be

³¹ Gurdeep Singh Sachar v. Union of India & Ors., (2019) 75 GST 258 (Bombay).

³² ¶ 1 Case Data.

³³ ¶ 1 Case Data.

³⁴ The Central Goods and Services Tax Act, 2017, § 9, No. 12, Acts of Parliament, 2017.

³⁵ The Central Goods and Services Tax Act, 2017, § 7(2)(a), No. 12, Acts of Parliament, 2017.

³⁶ The Central Goods and Services Tax Act, 2017, Schedule III, Entry 6, No. 12, Acts of Parliament, 2017.

supplied,³⁷ but the ‘*value of supply*’ in a lottery is deemed to be 100/128 of the face value of the ticket or of the price.³⁸

CGST Act does not define the expressions ‘betting’ and ‘gambling.’ However both are used interchangeably in Finance Act,³⁹ and the courts also interpreted both as inextricably linked,⁴⁰ and inseparable.⁴¹

In the instant case, admittedly, there is no dispute that the amounts pooled in the escrow account is an ‘actionable claim’⁴² Since MIDAS's deals in games of skill,⁴³ it do not include betting or gambling,⁴⁴ and the actionable claim would fall under Entry 6 of Schedule III under §7(2) of the CGST Act. As a result, this activity or transaction related to such an actionable claim i.e, 75% of the consideration in the instant case cannot be regarded as a supply of goods or a supply of services and is thus clearly exempted from the levy of any GST.

Further, MIDAS’ services in the lottery,⁴⁵ involve actionable claims where GST is leviable, but the value of supply is not the entire consideration.

³⁷ Id.

³⁸ The Central Goods and Services Tax Rules, 2018, Rule 31A (2).

³⁹ The Finance Act, 1994, § 65B (15), No. 32, Acts of Parliament, 1994.

⁴⁰ State of Tamil Nadu v. K. Balu, AIR 1995 SC 264.

⁴¹ All India Games Federation v. State of Karnataka, 2022 SCC OnLine Kar 435.

⁴² Argument I(C)

⁴³ ¶ 1 Case Data; Argument I(A)

⁴⁴ Argument I(B)

⁴⁵ ¶ 1 Case Data.

Therefore, the SCNs,⁴⁶ and the order of the GST department,⁴⁷ asking MIDAS to pay GST on the entire consideration is inherently contrary to the CGST Act and holds no ground and MIDAS need not pay GST on the entire consideration.

II. DEMAND ORDER ISSUED BY GST DEPARTMENT IS ABSOLUTELY UNSUSTAINABLE UNDER GST LAWS.

Issuance of demand orders by the GST department,⁴⁸ on basis of SCN, asking MIDAS to pay ‘28% GST’ on the ‘entire amount received by it,’⁴⁹ is unsustainable because (A) GST cannot be levied on ‘entire consideration’, (B) Applicable GST on ‘games of skills’ is 18%, (C) the order under 74(9) is not substantiated with proper grounds.

A. Levy Of GST On Entire Consideration Is Contrary To The GST Laws.

MIDAS receives two kinds of payment on its platform; admission fee and pooling fee. The later amount is deposited in escrow account belongs to the winners.⁵⁰ The amount is their actionable claim,⁵¹ and GST cannot be levied over actionable claim.⁵² However, the department’s demand order asks for payment of GST at the rate of 28% on the ‘entire consideration’ received by MIDAS,⁵³ which is contrary to the GST law itself.

⁴⁶ ¶4, Case Data.

⁴⁷ ¶6, Case Data.

⁴⁸ ¶6, Case Data.

⁴⁹ ¶7, Case Data.

⁵⁰ ¶1, Case Data.

⁵¹ Argument I(C)

⁵² Argument 1(D)

⁵³ ¶7, Case Data.

B. Games Of Skill Are Taxed At A Rate Of 18%

Online fantasy Sports Gaming services are not gambling services but rather are games of skills, and games of skill are classified under entry SAC 998439,⁵⁴ which attracts 18% GST.⁵⁵ The GST on the lottery is exceptionally 28%, either conducted by the government or merely authorized by it.⁵⁶

Herein, the demand order is based on SCN.⁵⁷ From SCN it is clear that the department classified all the online games organized by the country as ‘gambling’ and levying taxes at the rate of 28%.

However, MIDAS is involved mostly in services for games of skill,⁵⁸ and not gambling.⁵⁹ Therefore, the rate of GST applicable on MIDAS is 18% for its online games of Skills except Lotteries.

C. There Is No Fraud Committed By MIDAS

SCN issued under §74 without stating whether it was actuated by reason of fraud or any wilful misstatements or suppression of facts in order to evade tax, has to be quashed.⁶⁰ There must exist some positive act on the part of assesses,⁶¹ and mere non-payment of taxes is not

⁵⁴ Gurdeep Singh Sachar v. Union of India, (2019) 75 GST 258 (Bombay).

⁵⁵ In re Amogh Ramesh Bhatawadekar, (2021) 84 GST 486 (AAR – Maharashtra).

⁵⁶ The Central Board of Indirect Taxes and Customs (CBIC), Department of Revenue, Ministry of Finance, Government of India, Notification No. 1/2017-CT (Rate) (Issued on June 28,2017)

⁵⁷ ¶7, Case Data.

⁵⁸ Argument 1(A)

⁵⁹ Argument 1(B)

⁶⁰ Nkas services (P.) Ltd. v. State of Jharkhand, (2021) 131 xx 230 (Jharkhand); Continental Foundation Joint Venture vs. CCE, Chandigarh, (2007) TIOL-152-SC-CX.

⁶¹ Easland Combines v. CCE, Coimbatore, (2003) TIOL-26-SC-CX.

equivalent to collusion or wilful mis-statement or suppression of facts.⁶² Further, the bonafide beliefs on the part of assesses cannot be equated with fraud, collusion or wilful misstatement or suppression,⁶³ and the onus lies on the department to prove that the evasion or short payment of duty was due to the actions undertaken by the assesses, knowingly and deliberately.⁶⁴

Herein, the GST department alleges MIDAS for fraud in short payment of GST by issuing an SCN for FY 2017-18 under §74(2).⁶⁵ It becomes evident from SCN that the department was treating the entire amount received as consideration and classified all the online games organized by MIDAS as the game of chance.⁶⁶

But MIDAS had a bonafide belief based on GST Laws and the ruling of various courts that the company is liable to pay 18% GST on entire consideration except for Actionable claims when it comes to Games of Skill.⁶⁷

The government did not establish the positive acts of MIDAS where it is wilfully making misstatements or suppressing the facts in order to evade tax. Further, the bonafide belief of MIDAS cannot be equated with fraud. Therefore, there was no fraud committed by MIDAS.

Therefore, the demand order issued by the GST department without taking into consideration the laws and requirements under the GST is invalid.

⁶² Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur, (2013) (288) E.L.T. 161 (S.C.); Cosmic Dye Chemical v. CCE, Bombay, (2002) TIOL -236-SC-CX-LB.

⁶³ CCE v. H.M.M. Ltd., (1995) (76) E.L.T. 497 (S.C.).

⁶⁴ Uniworth Textiles Ltd. V. Commissioner of Central Excise, Raipur, (2013) (288) E.L.T. 161 (S.C.)

⁶⁵ ¶4, Case Data.

⁶⁶ ¶4, Case Data.

⁶⁷ ¶3, Case Data.

III. THE GST DEPARTMENT CAN NOT BE TREATED AS A SECURED CREDITOR AND HAS TO WAIT IN QUEUE TO RECEIVE ITS DUES

It is humbly submitted that the GST department cannot be treated as a secured creditor and has to wait in a queue to receive its dues because, [A] The GST department is an Operational Creditor. [B] Additionally, the GST Department cannot rely upon the provisions of §73, §78 and §79 of the GST Act

A. The GST Department Is An Operational Creditor

The GST department is an operational creditor and not a secured as claimed by it. This is argued on the basis of the fact that (i) The waterfall mechanism under §53(1) of the IBC would be disturbed by such treatment of the GST department as an operational creditor. (ii) The GST department being held as a secured creditor goes against §3 and §5 of the IBC. (iii) Additionally, the IBC has an overriding effect on all other legislation.

(i) Waterfall mechanism under § 53 (1) of IBC is disturbed

In order to bring the practices in India in-line with the global practice, and to ensure that the objective of this proposed Code is met⁶⁸ keeping in mind the 'waterfall mechanism' provided in §53,⁶⁹ the government dues must be given a lower priority status⁷⁰.

It is clear from reading §53 (1)(e),⁷¹ that the debts owed to the Central or State governments shall fall under this clause. There In the event that the government dues be reduced from level 5 to level 2, the language employed in the legislature's wisdom would be rendered meaningless.

⁶⁸ United nations commission on international trade law, "legislative guide on insolvency law" (2005).

⁶⁹ The Insolvency And Bankruptcy Code, 2016, §53.

⁷⁰ *Report of the Bankruptcy Law Reforms Committee* (1st ed. 2015).

⁷¹ The Insolvency And Bankruptcy Code, 2016, §53(1)(e)

(ii) It goes against § 3 (10), § 5 (20), and 5 (21) of IBC

It is submitted that the harmonious construction of clause (10) of §3 of the I&B Code read with clauses (20) and (21) of §5,⁷² thereof would reveal, that even a claim in respect of dues,⁷³ arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of ‘operational debt.’⁷⁴ As the court in *Union of India v. Vijaykumar V Iyer* held the Central Government to be an operational creditor.⁷⁵

The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of ‘operational creditor’ as defined under sub-section (20) of §5 of the I&B Code.⁷⁶ Therefore, all statutory dues, including ‘Income Tax’, ‘Value Added Tax’ etc. come within the meaning of operational debt.⁷⁷

The government dues cannot have precedents over the secured lenders⁷⁸ and no recovery action can be taken against the corporate debtor.⁷⁹

⁷² The Insolvency And Bankruptcy Code, 2016, §3 & §5

⁷³ *Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17.

⁷⁴ *GST law issues concerning companies under Insolvency and Bankruptcy clarified by CBIC vide Circular 134/04/2020 GST dt. 23 March 2020*, (Mar. 23, 2020), <https://files.caclub.in/wp-content/uploads/cbic-circular-134-04-2020-gst-dt-23-march-2020-clarification-gst-law-issues-companies-under-insolvency-bankruptcy.pdf>.

⁷⁵ *Union of India v. Vijaykumar V. Iyer*, 2022 SCC OnLine NCLAT 689.

⁷⁶ *Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*, (2021) 9 SCC 657.

⁷⁷ *Pr. Director General of Income Tax v. Synergies Dooray Automotive Ltd.*, 2017 SCC OnLine NCLAT 317.

⁷⁸ *Electrosteel Steels Ltd. v. State of Jharkhand*, 2013 SCC OnLine Jhar 2188.

⁷⁹ *Nandkishor Vishnupant Deshpande v. Diamond India Ltd.*, 2021 SCC OnLine NCLT 2775.

(iii) The first charge created by the GST Act is over ruled by the IBC

There would be no assumption that a charge by the nature of being statutory in nature would mean that it would be given a priority status.⁸⁰ If the said authority is unable to argue on the basis of statute, then the claim would be treated as an operational debt.

According to §82 of the GST Act, ‘notwithstanding anything to the contrary contained in any law for the time being in force, save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person.’⁸¹

The NCLAT noticed in a *Jet Aircraft Case*,⁸² that §82 of the Maharashtra Goods and Services Tax Act 2017 while creating a first charge for the government authority created an exception for the IBC and hence IBC would have an overriding effect.

Taking all these considerations in mind, in the present case, the GST Act itself gives power to IBC to decide the priority status. Moreover, according to §238 of the IBC, the Supreme Court held that the IBC would override anything inconsistent contained in any other enactment⁸³, if any of the provisions of an Act is in conflict with the provisions of the I&B Code.⁸⁴

⁸⁰ Haryana through Excise and Taxation v. Anup Sood Resolution Professional

⁸¹ The Central Goods and Services Tax Act, 2017, §82, No. 12, Acts of Parliament, 2017.

⁸² Jet Aircraft Maintenance Engineers Welfare Assn. v. Ashish Chhawchharia, 2021 SCC OnLine NCLAT 4680.

⁸³ CIT v. Monnet Ispat & Energy Ltd., (2018) 18 SCC 786.

⁸⁴ Edelweiss Asset Reconstruction Company Ltd. Vs. Synergies Dooray Automotive Ltd. & Others [Company Appeal (AT) (Insolvency) No. 169 to 173 of 2017].

B. GST Department Can Not Rely Upon The Provisions Of § 73 & § 78 Of The GST Act

The GST department cannot rely on §73 and §78 of the GST Act in order to justify the demand notices sent because, (i) The GST department violated §73 of GST Act. (ii) Additionally, essential requirements under § 78 and § 79 of GST have not been met

(i) Provisions of § 73 GST have been violated

According to §73 (2) of the GST act,⁸⁵ the proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order. Additionally, according to §73 (10) ‘The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or within three years from the date of erroneous refund.’⁸⁶

It is humbly submitted that, the show cause notices were passed on 01.04.2022, for the default starting from the year 2017-18, so the time limit for issuing show cause notices had passed.

(ii) Essential requirements under §78 and §79 of GST have not been met.

§78 and §79 of the GST Act were violated because, (a) The recovery proceedings were conducted in a hurried manner. (b) The reasons for expediting the recovery proceedings were not recorded in writing. (c) There was no fraud or intentional evading of taxes so no penalty shall be affixed.

⁸⁵ The Central Goods and Services Tax Act, 2017, § 73(2), No. 12, Acts of Parliament, 2017.

⁸⁶ The Central Goods and Services Tax Act, 2017, § 73(10), No. 12, Acts of Parliament, 2017.

a) The recovery proceedings were conducted in a hurried manner and reasonable time was not provided

Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within such period less than a period of three months as may be specified by him.⁸⁷

Firstly, between passing orders on 03.10.2022 and initiating recovery proceedings on 06.10.2022 reasonable time was not provided to the company. Secondly, it can nowhere be inferred that it was justifiable in the interest of revenue to conduct the recovery proceedings in such a hurried manner. No coercive action can be taken for the recovery of GST dues,⁸⁸ by the Tax Authorities,⁸⁹ and the coercive powers of the tax authorities need to be curtailed.⁹⁰

The Initiation of any suit or proceeding is debarred under §14 of IBC by imposing moratorium period and therefore no coercive action can be taken by officers with respect to such dues.⁹¹

b) The reasons for expediting the recovery proceedings were not recorded in writing

It is an essential requirement under proviso of §78 of GST Act to record the reasons in writing as to why the recovery proceedings have to be expedited,⁹² which was not followed.

⁸⁷ The Insolvency And Bankruptcy Code, 2016, §78.

⁸⁸ Pr. Director General of Income Tax v. Synergies Dooray Automotive Ltd., 2017 SCC OnLine NCLAT 317.

⁸⁹ Leo Edibles & Fats Limited v. Tax Recovery Officer (Central), 2018 SCC OnLine Hyd 193.

⁹⁰ Sundaresh Bhat v. Central Board of Indirect Taxes and Customs(2022).

⁹¹ National Plywood Industries Ltd. v. Union of India, 2020 SCC OnLine Gau 4990.

⁹² The Central Goods and Services Tax Act, 2017, § 78, No. 12, Acts of Parliament, 2017.

This action was arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground,⁹³ as Article 14 strikes at arbitrariness in State action.⁹⁴

c) There was no fraud or intentional evading of taxes so no penalty shall be affixed

In order to attract §78, it is necessary that tax must have remained unpaid for the reasons of fraud or collusion or wilful mis-statement or suppression of facts, etc., with an intention to evade payment of tax.

It is submitted that there is no such finding against the assessee of it being guilty of wilfully not paying tax by reason of any of the clauses provided in clauses (a) to (e) of §78(1) of the Act. As per the proviso, no penalty shall be imposed if the assessee proves that there is reasonable cause for such failure to pay taxes.

Here, the company believed that it is liable to pay GST at the rate of 18% only on the ‘admission fee’ component i.e., the 25% of the total fee collected from the participants and paid GST on it promptly. It was of the firm view that the remaining 75% did not belong to it since it was an ‘actionable claim’ of the participants who would win the prizes eventually.⁹⁵

Merely stating that a fraud has been played is not enough and that such allegations must be specifically averred,⁹⁶ and the same was not done in the present case, the claims for the threshold of fraud committed were very high and as per the settled principle of law, they have to be established by leading evidence.⁹⁷

⁹³ Lachhman Das v. State of Punjab, 2013 SCC OnLine P&H 17245.

⁹⁴ Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

⁹⁵ ¶2, Case Data.

⁹⁶ C.S. Ramaswamy v. V.K. Senthil, 2022 SCC OnLine SC 1330.

⁹⁷ H.S. Goutham v. Rama Murthy, (2021) 5 SCC 241.

PRAYER FOR RELIEF

Wherefore in the light of facts stated, issues raised, authorities cited and arguments advanced, it is most humbly and respectfully prayed that this Hon'ble Court may be pleased to:

1. Declare the demands of the GST department to be unsustainable in law and hold that Midas Games is not liable to pay GST on the entire consideration.
2. Hold that the GST Department cannot be treated as Secured Creditor and declare that it has to wait in the queue as per the IBC provisions to receive its dues.

And further pass any other order in favour of the Petitioner, as this Court may so deem fit in the ends of equity, justice, and good conscience.

Date: 03 April 2023.

Counsel No. TC-02

Place: Bengaluru, Karnataka

(Counsel for the Petitioner)