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20<sup>TH</sup> SURANA AND SURANA CORPORATE MOOT  
COURT COMPETITION, 2023

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IN THE HON'BLE HIGH COURT OF KARNATAKA  
AT BENGALURU, KARNATAKA

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WP No. 1001 to 1004 of 2023

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MIDAS ONLINE GAMES INDIA PVT LTD

v.

DIRECTORATE GENERAL OF GST INTELLIGENCE, BANGALORE

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BEFORE SUBMISSION TO HON'BLE CHIEF JUSTICE

AND HIS COMPANION JUSTICES

OF THE HON'BLE HIGH COURT OF COURT

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MEMORANDUM ON BEHALF OF RESPONDENT

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LIST OF ABBREVIATIONS

**LIST OF ABBREVIATION**

IBC	Insolvency and Bankruptcy Code
GST	Goods and Service Tax
CIRP	Corporate Insolvency Resolution Process
Ltd.	Limited
Pvt.	Private
CGST	Central Goods and Service Tax
SCN	Show cause notice/s

**TABLE OF AUTHORITIES**

**A. CASE LAWS:**

1. R. M. D. Chamarbaugwalla vs The Union Of India.
2. Dream11 Fantasy Pvt. Ltd. v. Union of India (2019)
3. D. Siluvai Venance v. Union of India & Ors,
4. Skill Lotto Solutions Pvt. Ltd. v. The State of Tamil Nadu
5. Gaussian Networks Pvt. Ltd. v. Union of India (2017)
6. M/s. Junglee Games India Pvt. Ltd. v. State of Tamil Nadu.
7. All India Gaming Federation vs. The State of Karnataka & Ors,
8. M/s. N. K. Online Lottery v. Union of India,
9. M/s. Jai Maharashtra Lottery v. Union of India,
10. State Bank of India vs. Moser Baer Karamchari Union,
11. CCE vs. Brindavan Beverages Pvt. Ltd,
12. CIT vs. Sugauli Sugar Works Pvt. Ltd,
13. Pawan Kumar Gupta vs. Union of India & Anr.,
14. Principal Commissioner of CGST vs. Prabhat Construction,
15. State of Karnataka v. Azad Coach Builders Pvt. Ltd.
16. ICICI Bank v. Official Liquidator of APS Star Industries Ltd,
17. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd, (re)
18. Kay Bouvet Engineering Ltd v. Overseas Infrastructure Alliance (India) Pvt. Ltd.
19. M/s. Stargaze Trading Pvt. Ltd. v. M/s. ICICI Bank & Anr,
20. Indian Bank v. Kishore Kumar Choudhary
21. Union of India v. Varsana Ispat Limited

**B. LEGISLATION:**

1. Insolvency and bankruptcy code, 2016.
2. Good and Services Tax, 2017.
3. Constitution of India, 1950.
4. Finance Act, 1994.

**C. BOOKS:**

1. Taxmann Insolvency and Bankruptcy code .

**STATEMENT OF JURISDICTION**

It is most humbly submitted that the Petitioner has approached the honourable High Court Of Karnataka under Article 226 of the Constitution of Union of India. <sup>1</sup>The petitioner most humbly and respectfully submits before the jurisdiction of the present court and accepts that under Article 226, it has power and authority to preside over the present case to issue instructions, orders, and writs to any person or authority, including the government.

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<sup>1</sup> (*Constitution of India, Art. 226*)

**STATEMENT OF FACTS**

**A. Introductory background-**

1. Midas online games pvt. Ltd. is a registered company involved in the business of a range of multiple games- primarily games of chance, if not mixed at best, such as rummy, poker, and the like; fantasy cricket; horse racing; lottery etc. the model of the business is such that it involves two different types of payments to be made by the consumers- (i) admission fee: which constitutes 25% of the total payment and is the direct income of the company; (ii) pooling fee- which aggregates into the monetary prize for winners and will be distributed accordingly. Since the company mainly provides games of chance that are classified under services- it is liable to pay 28% of the total processed payment, although, it paid 18% GST on the income, which was 25% of the total payment processed.

**B. National Bank of India-**

1. Due to its high expense undertakings and desire to not utilize its own funds, it had incurred liabilities of around 5000 cr INR from the National Bank between July 2017 to August 2022.
2. Further, upon the orders of NCLT as on 6.10.2022, the NBI filed its claim as a secured creditor under form B for the above said due amount.

**C. The GST Department:**

1. The Office of the Director General of GST Intelligence issued show cause notices (SCN) to the company outlining that they were liable to pay 28% of GST rate on the total processed payment by the consumers since the GST Department classified the undertakings of the company as a game of chance, and not skill. Moreover, the department also charged dues equivalent to 28% tax rate penalty. The department, after hearing replies and pleadings to the SCN, reserved its order on 30.09.2022.

2. As a response to online and media reports, of insolvency of the company, the GST Department passed orders demanding the dues alleged in the aforementioned SCN, that is Rs. 5000 cr INR by the evening of 5.10.2022.
3. The department further initiated recovery proceedings under section 79(1)(c) of the GST Act by directing the NBI to freeze all the bank accounts of the company and thereby, created a 'charge' on the accounts lying in the bank accounts to the tune of INR 6,000 approximately towards the demands raised in the said four orders- thereby creating a security interest.
4. Further, upon the orders of NCLT as on 6.10.2022, the department filed its claim as a secured creditor under form B.

#### **D. Insolvency proceedings:**

1. The company defaulted on its payment to its software supplier over a dispute of quality. Therefore, the said supplier in turn filed an application of insolvency of Midas Online Games Pvt. Ltd. before the National Company Law Tribunal.
2. The NCLT pronounced its orders admitting the application and declared the company insolvent in addition to initiation of the Corporate Insolvency Resolution Process, appointment of the Interim Resolution Professional (consequently declared as the RP), and ordering of a moratorium as in accordance to section 14 of the Insolvency and Bankruptcy Code.

#### **E. Pleadings of the Company:**

1. The IRP collated all the claims of the company and conducted a meeting of the committee of creditors. The primary three takeaways from this meeting were that: a) the IRP to be appointed as the RP; b) the claims of the GST Department were unsustainable, especially because the dispute is against the GST laws itself; c) file writ petitions before the Karnataka High Court under 74(9) and 73(9) and recovery proceedings initiated on 06.10.2022 under section 79(1)(c) of the GST Act which were in a hurried and desperate manner.
2. The primary two contentions formed in extraction of the writs are as follows:

- (i) classification of the undertakings by the company and hence consequent valuation of the tax rates due.
- (ii) validity of status of the GST Department as a secured creditor.



**STATEMENT OF ISSUES**

**ISSUE 1**

WHETHER THE UNDERTAKINGS OF THE COMPANY SHOULD BE CLASSIFIED AS 'GAME OF CHANCES' OR 'GAME OF SKILL' AND CONSEQUENTLY WHAT TAX RATE IS DUE?

**ISSUE 2**

WHETHER THE GST DEPARTMENT CAN BE TREATED AS SECURED CREDITOR OR MERELY AN OPERATIONAL CREDITOR?

**SUMMARY OF ISSUES**

**ISSUE 1**

It is humbly submitted to this Hon'ble Court that in the given factual matrix, there is not necessity or compulsion for the intervention of this Hon'ble Court and invoking its powers. Under Article 136 as under Section 107 of the cgst and sgst act,2017 alternative remedy is available to the petitioners.

That The Company Is Liable To Pay Consideration On The Entire Amount Since The Games Operated By It Online Are Under The Category Of 'games Of Chance'. It is humbly submitted by the counsel for the respondents that Midas Online Games India Pvt Ltd is involved in the business of online games such as card games like rummy, poker, fantasy cricket, horse racing, lottery among others. This would thus call for the company to be charged at the rate of 28% on 100% consideration and not just on admission fee for all the activities in the online gaming field of the company. The counsel for the respondent further submits that for supplies specified in Rule 31A of the CGST Rules, the taxable value of service shall be 100% of the face value of the bet. Supplies specified in Rule 31A include betting, gambling, or horse racing.

Burden of proof on the Company to show that the online games are to be classified as "games of skill" and not "games of chance". Under the GST regime, taxpayers are required to self-assess and file their GST returns on a monthly or quarterly basis. In lieu of the same, the counsel humbly submits that the onus of proof falls squarely on Midas online Games to show that all the games are indeed games of skill, rather than games of chance. If the same has not been carried out, the company would be taxed at the rate of 28% on all online games.

**ISSUE 2**

It is humbly submitted before the honorable High Court of Karnataka that in light of the aforementioned contentions, it is firmly established that the demands of the GST department to admitted as a secured creditor' has substantial leg to stand, and thus does not need to wait in the queue to receive its dues as per the IBC provisions and statutory definitions enumerating security created through obligation of law. The counsel submits that no definition or case law states that a dispute of the due can affect the status as secured. Essentially, it is only the presence of security and the mode of credit creation that affects the qualifications and, consequently, the hierarchy. Since the GST department had created a 'charge' and security interests can be created by operation of law, as stated above, it can thus be affirmed that the department indeed,

has security, qualifying as a secured creditor. With ample proof and direct application of the statutes the respondents contend that the gst department is infact a secured creditor.

**ARGUMENTS ADVANCED**

**ISSUE 1**

**THE COMPANY IS LIABLE TO PAY CONSIDERATION ON THE ENTIRE AMOUNT SINCE THE GAMES OPERATED BY IT ONLINE ARE UNDER THE CATERGORY OF ‘GAMES OF CHANCE’.**

It is humbly submitted before the honorable High Court of Karnataka that in light of the aforementioned contentions, it is firmly established that the demands of the Department of Goods and Service Tax (GST) are maintainable under the law and Midas Online Games India Pvt Ltd is required to pay GST on the entire consideration received by it since the online activities and games operated by it come under the category of ‘games of chance’ and not ‘games of skill.’

**1.1 Game of skill v. game of chance**

1.1.1 It is humbly submitted by the counsel for the respondents that Midas Online Games India Pvt Ltd is involved in the business of online games such as card games like rummy, poker, fantasy cricket, horse racing, lottery among others.

A "**game of chance**" is primarily determined by a random element of any kind. Although when talent is used in games of chance, success is still mostly determined by chance. Games that rely on chance include card games, roulette, dice games, and even picking a numbered ball.

1.1.2 The Supreme Court of India used a test to determine whether a game is based on skill or chance in the case of *R. M. D. Chamarbaugwalla vs The Union Of India*<sup>2</sup>. When a game involves both skill and chance, the court examines which factor has a greater influence on the outcome. If skill is found to have a more significant influence, the game cannot be considered as betting. In such cases, Article 19(1)(g)<sup>3</sup> becomes relevant, and any restrictions on such games must be made in accordance with Article 19(6).<sup>4</sup>

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<sup>2</sup> *R. M. D. Chamarbaugwalla v. The Union Of India*, AIR 1957 SC 628.

<sup>3</sup> (*Constitution of India, Art. 19(1)(g)*)

<sup>4</sup> (*Constitution of India, Art. 19(1)(g)*)

1.1.3 In the case of *Dream11 Fantasy Pvt. Ltd. v. Union of India (2019)*<sup>5</sup> clarified the legal status of Fantasy sports games in India. In this case, the Bombay High Court held that Fantasy sports games such as Dream11 are not games of chance but games of skill. The court also observed that the entry fee paid by the participants is for the use of the platform and not for participating in any gambling or betting activity.

1.1.4 However, the counsel submits that it is important to note that the ruling in the Dream11 case was specific to the game of Fantasy sports and did not address the tax implications of other online games such as Rummy or lottery, which Midas Online Company is extensively involved in and incurs huge revenue from the same. The position of the Department of Revenue remains that online games such as Rummy or Fantasy sports games that involve the payment of a consideration and the outcome of which is determined primarily by chance or luck qualify as betting or gambling and are taxable under GST at the rate of 28%.

**2 Burden of proof on the Company to show that the online games are to be classified as “games of skill” and not “games of chance”**

1.2.1 Under the GST regime, taxpayers are required to self-assess and file their GST returns on a monthly or quarterly basis. The process of self-filing involves the taxpayer computing the amount of GST liability due and paying the same to the government. In the context of online games, the company offering such games is required to assess whether the game is a game of skill or chance and accordingly, pay the applicable GST rate.

1.2.2 The burden of proof to show that the online games offered by their company are games of skill falls on the company if they want to be taxed lower than 28%. This is because the GST law classifies betting and gambling as games of chance and subjects them to a higher GST rate of 28% (Notification No. 11/2017-Central Tax (Rate) dated June 28, 2017)<sup>6</sup>. However, if the game is predominantly a game of skill, it may be classified under a lower GST rate of 12% (Notification No. 13/2018-Central Tax (Rate) dated June 28, 2018).<sup>7</sup>

1.2.3 In lieu of the same, the counsel humbly submits that the onus of proof falls squarely on Midas online Games to show that all the games are indeed games of skill, rather than games of

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<sup>5</sup> *Dream11 Fantasy Pvt. Ltd. v. Union of India (2019)*: (*Dream11 Fantasy Pvt. Ltd. v. Union of India, 2019*)

<sup>6</sup> (Notification No. 13/2018-Central Tax (Rate), 2018)

<sup>7</sup> (Notification No. 11/2017-Central Tax (Rate), 2017)

chance. If the same has not been carried out, the company would be taxed at the rate of 28% on all online games.

1.2.4 In the case of *D. Siluvai Venance v. Union of India & Ors*<sup>8</sup>, the Madras High Court observed that the burden of proof is on the assessee (i.e. the company) to demonstrate that the game is a game of skill and not a game of chance. The court further held that if the assessee fails to discharge this burden of proof, then the game would be deemed to be a game of chance and would be subject to the higher GST rate of 28%.

1.2.5 Further, in the case of *Skill Lotto Solutions Pvt. Ltd. v. The State of Tamil Nadu*<sup>9</sup> the Madras High Court held that if the company wants to claim that their game is a game of skill and, therefore, subject to a lower GST rate, then the burden of proving that the game is a game of skill lies on the company. The court further held that if the company fails to discharge this burden of proof, then the game would be considered as a game of chance and would be taxed at the higher rate of 28%.

1.2.6 In the case of *Gaussian Networks Pvt. Ltd. v. Union of India (2017)*<sup>10</sup> the Gujarat High Court observed that if the company wants to claim that their game is a game of skill and, therefore, subject to a lower GST rate, then the burden of proving that the game is a game of skill lies on the company. The court further held that the company must prove that the game is a game of skill not just in theory but also in practice.

1.2.7 The counsel for respondents submits that it has been clearly laid down by the court in these cases that if the company fails to prove the same, it would be charged GST at the rate of 28%. Midas Online Games has thus failed to prove that the game is a game of skill with substantial evidence to the department. The games have also not been proved as games of skill not just in theory but also in practice. This would thus call for the company to be charged at the rate of 28% on 100% consideration and not just on admission fee for all the activities in the online gaming field of the company.

### **3 Rule 31A<sup>11</sup> of the CGST Rules applicable**

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<sup>8</sup> *crI.OP. (MD) No. 6568 of 2020 & CrI.MP.(MD) No. 3340 of 2020*

<sup>9</sup> *Skill Lotto Solutions Pvt. Ltd. v. The State of Tamil Nadu: (Skill Lotto Solutions Pvt. Ltd. v. The State of Tamil Nadu)*

<sup>10</sup> *Gaussian Networks Pvt. Ltd. v. Union of India (2017): (Gaussian Networks Pvt. Ltd. v. Union of India, 2017)*

<sup>11</sup> *Rule 31A of the CGST Rules: (CGST Rules, Rule 31A)*

1.3.1 The counsel for the respondent further submits that for supplies specified in Rule 31A of the CGST Rules, the taxable value of service shall be 100% of the face value of the bet. Supplies specified in Rule 31A include betting, gambling, or horse racing. The term ‘betting’ or ‘gambling’ has not been defined under the GST law. However, the term ‘betting or gambling’ has been defined in Section 65B(15) of the Finance Act 1994<sup>12</sup> to “means ‘putting on stake something of value, particularly money, with the consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring’”.

1.3.2 Further, the meaning of the terms 'betting' and 'gambling' has been provided in the case of M/s. Junglee Games India Pvt. Ltd. v. State of Tamil Nadu.<sup>13</sup> The Madras High Court has held that these terms in Entry 34 of the Second List of Schedule 7 in the Constitution of India<sup>14</sup> are limited to betting on activities based on chance only.

1.3.3 In addition, the Karnataka High Court in the case of All India Gaming Federation vs. The State of Karnataka & Ors,<sup>15</sup> has also defined the terms 'betting' and 'gambling' as confined to games of chance. The definition of betting and gambling and the judicial interpretation given to these terms seems to restrict its applicability to cases where the winnings are merely on the occurrence of a chance or accident (i.e., game of chance). Given the above, Rule 31A of the CGST Rules, which is applicable to lottery, betting, gambling, and horse racing, may not be made applicable to online skill-based gaming platforms.

#### **4 Addressing tax implications of all online games, not just one**

1.4.1 In the case of Dream11 Fantasy Pvt. Ltd. v. Union of India<sup>16</sup> as mentioned above, while the case held that Fantasy sports games are games of skill, the position of the Department of

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<sup>12</sup> Section 65B(15) of the Finance Act 1994: (Finance Act 1994, Sec. 65B(15))

<sup>13</sup> M/s. Junglee Games India Pvt. Ltd. v. State of Tamil Nadu: (M/s. Junglee Games India Pvt. Ltd. v. State of Tamil Nadu)

<sup>14</sup> Entry 34 of the Second List of Schedule 7 in the Constitution of India: (Constitution of India, Sch. 7, List II, Entry 34)

<sup>15</sup> All India Gaming Federation vs. The State of Karnataka & Ors: (All India Gaming Federation vs. The State of Karnataka & Ors)

<sup>16</sup> Dream11 Fantasy Pvt. Ltd. v. Union of India (2019): (Dream11 Fantasy Pvt. Ltd. v. Union of India, 2019)

Revenue remains that other online games that primarily involve chance or luck are taxable under GST at the rate of 28%.

1.4.2 Further, While there have been court cases that have recognized certain games such as rummy or poker as games of skill, the classification of a game as a whole can depend on various factors, such as the specific rules and variations of the game, the level of skill involved, and the degree of chance or randomness involved.

1.4.3 In the case of *M/s. N. K. Online Lottery v. Union of India*<sup>17</sup>, the Kerala High Court held that lotteries are games of chance and are subject to a GST rate of 28%. The court stated that "the essence of a lottery is that the winner is determined purely by chance."

1.4.4 In another case, *M/s. Jai Maharashtra Lottery v. Union of India*,<sup>18</sup> the Bombay High Court upheld the classification of lotteries as games of chance and the imposition of 28% GST. The court held that "a lottery is a game of chance where the result is determined purely by luck."

In conclusion, the counsel submits that as earlier stated, the burden of proof lies with the company to demonstrate that a particular game is a game of skill, with the presence of the multitude of online games offered, which clearly have multiple games, dependant on chance. Thus, this would attract a GST rate of 28%.

Therefore, the counsel for the respondent humbly and respectfully submit that the company is liable to pay consideration on the entire amount since the games operated by it online are under the category of 'games of chance'.

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<sup>17</sup> *M/s. N. K. Online Lottery v. Union of India: (M/s. N. K. Online Lottery v. Union of India)*

<sup>18</sup> *M/s. Jai Maharashtra Lottery v. Union of India: (M/s. Jai Maharashtra Lottery v. Union of India)*



## **ISSUE 2**

### **THE GST DEPARTMENT CAN BE TREATED AS 'SECURED CREDITOR' ALONG WITH OPERATIONAL DEBTOR**

It is humbly submitted before the honorable High Court of Karnataka that in light of the aforementioned contentions, it is firmly established that the demands of the GST department to admitted as a secured creditor' has substantial leg to stand, and thus does not need to wait in the queue to receive its dues as per the IBC provisions.

#### **1. Statutory definitions enumerating security created through obligation of law**

2.1.1 It is humbly submitted by the respondent that -

Section 5(25)<sup>19</sup> of the IBC: Definition of Secured Creditor - This section defines a secured creditor as a person who has a security interest in a company's property, including a mortgagee, pledgee, or holder of a charge.

Section 13<sup>20</sup> of the IBC enumerates the enforcement of Security Interest - providing for the enforcement of security interest by secured creditors. It allows a secured creditor to take possession of the assets of the debtor company and sell them to recover the outstanding debt.

Section 2(30)<sup>21</sup> of the IBC under the Insolvency and Bankruptcy Code defines the meaning of a "secured creditor" means a creditor in favor of whom security interest is created;

Section 2(31)<sup>22</sup> of the IBC states, "security interest" means right, title or interest or a claim to property, created in favor of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation,

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<sup>19</sup> (Insolvency and Bankruptcy Code, Sec. 5(25))

<sup>20</sup> Insolvency and Bankruptcy Code, Sec. (13)

<sup>21</sup> (Insolvency and Bankruptcy Code, Sec. 2(30))

<sup>22</sup> (Insolvency and Bankruptcy Code, Sec. 2(31))

*assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:*

Section 3(30)<sup>23</sup> of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interests could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority.

.1.2 Thus, the counsel humbly submits that since the Insolvency and Bankruptcy Code does not limit the definition of its creditors to banks or financial institutions, but also includes the GST department as having a security interest in the debtor's property, it can be considered a secured creditor. Therefore, as mentioned in paragraph 8 of the moot proposition, the GST department does have substantial grounds to direct the NBI to freeze all the bank accounts of the company and thereby, create a “charge” on the accounts to the tune of 6000 crores towards the demands raised by the orders passed under Section 74(9)<sup>24</sup> and 73(9)<sup>25</sup>

2.1.3 In the case of State Bank of India vs. Moser Baer Karamchari Union<sup>26</sup>, the Supreme Court held that the government's claims for tax dues would have priority over the claims of other creditors. The court stated that tax dues are "statutory debts" and are considered secured debts, and therefore, the government has the first claim on the assets of the company in the event of liquidation.

2.1.4 In the case of CCE vs. Brindavan Beverages Pvt. Ltd.<sup>27</sup> the Karnataka High Court held that the Central Excise Department (now GST department) has the power to attach and recover tax dues from the bank account of the company. The court held that the tax dues are considered secured debts, and therefore, the department can attach the bank account of the company without obtaining a court order. Here, the department had absolute power to create a ‘charge’ and attach the bank accounts with the NBI.

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<sup>23</sup> (Insolvency and Bankruptcy Code, Sec. 3(30))

<sup>24</sup> (Central Goods and Services Tax Act, Sec. 74(9))

<sup>25</sup> (Central Goods and Services Tax Act, Sec. 73(9))

<sup>26</sup> *State Bank of India vs. Moser Baer Karamchari Union: State Bank of India v. Moser Baer Karamchari Union*, (2016) 9 SCC 22.

<sup>27</sup> *CCE vs. Brindavan Beverages Pvt. Ltd: CCE v. Brindavan Beverages Pvt. Ltd.*, (2014) 301 ELT 481 (Tri. - Bang.).

2.1.5 In the case of *CIT vs. Sugauli Sugar Works Pvt. Ltd*<sup>28</sup>, the Delhi High Court held that the income tax department has the power to attach the bank account of the company to recover tax dues. The court held that the tax dues are considered secured debts, and therefore, the department has the first claim on the assets of the company in the event of liquidation.

2.1.6 Further, in the case of *Pawan Kumar Gupta vs. Union of India & Anr*<sup>29</sup>., the Karnataka High Court held that the GST department can be treated as a secured creditor as it has a statutory charge over the goods and services of the debtor.

Similarly, in the case of *Principal Commissioner of CGST vs. Prabhat Construction*<sup>30</sup>, the Karnataka High Court held that the GST department is entitled to the same rights as any other secured creditor and can enforce its security interest in the debtor's property.

#### GST-

2.1.7 Section 82<sup>31</sup> of the CGST Act (which talks about Tax to be first charge on property) state that '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 the taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be first charge on the property of such taxable person or such person. This code is enacted through which the creditor can collect their dues through Corporate Insolvency Resolution Process (CIRP). Thus, as mentioned above, the 'charge' holds ground for the said purpose.

2.1.8 Additionally, Section 83<sup>32</sup> of the CGST Act empowers the Commissioner to collect the GST tax owed by a taxable person from any source, including the person's bank account. The section states that if a person fails to pay the tax or any other amount due under the Act within the stipulated time, the Commissioner may proceed to recover the amount by initiating action against the person's property, including his bank account. Therefore, the same has been carried

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<sup>28</sup> *CIT vs. Sugauli Sugar Works Pvt. Ltd: CIT v. Sugauli Sugar Works Pvt. Ltd., (1999) 236 ITR 518 (SC).*

<sup>29</sup> *Pawan Kumar Gupta vs. Union of India & Anr.: Pawan Kumar Gupta v. Union of India, (2020) 14 SCC 203.*

<sup>30</sup> *Principal Commissioner of CGST vs. Prabhat Construction: Principal Commissioner of CGST v. Prabhat Construction, 2020 SCC OnLine Del 664.*

<sup>31</sup> *Section 82: (Central Goods and Services Tax Act, Sec. 82)*

<sup>32</sup> *Section 83: (Central Goods and Services Tax Act, Sec. 83)*

out by the GST department in the present case against Midas Online Games for the payment of the tax dues as a secured creditor, as mentioned in moot paragraphs 6, 7, 8, and 10.

2.1.9 Further, Section 87<sup>33</sup> of the CGST Act provides for the recovery of any amount due to the government as an arrear of land revenue. The section states that the amount due may be recovered from any person who holds or may subsequently hold money on behalf of the defaulter. This includes a bank where the defaulter maintains an account.

2.1.10 In addition, Section 79<sup>34</sup> of the CGST Act provides that any amount of tax or any other amount due under the Act shall be a first charge on the property of the taxable person. This means that the government has a priority claim over the assets of the defaulter, including the money in their bank account.

2.1.11 The provision of section 79 of the CGST Act is supported by the decision of the Hon'ble Supreme Court in the case of State of Karnataka v. Azad Coach Builders Pvt. Ltd.<sup>35</sup> where it was held that the tax dues under the GST regime would have precedence over any other dues, including the secured creditors in the matter of distribution of assets of the corporate debtor.

2.1.12 Moreover, the provision of section 79<sup>36</sup> of the CGST Act is also in line with the principle of statutory priority of tax dues over other dues, which has been upheld by various judicial pronouncements. The Hon'ble Supreme Court in the case of ICICI Bank v. Official Liquidator of APS Star Industries Ltd<sup>37</sup>, has held that the tax dues of the government enjoy priority over the claims of secured creditor.

## **2 Due processes and essentials under law followed**

**2.2.1 Essential 1-** As mentioned in point 1, secured creditor is a creditor in favour of whom security interest is credited. Such security interests can be created by operation of law. ground for the creation of a 'charge' has been laid down, while specifying the essential sections under

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<sup>33</sup> Section 87: (Central Goods and Services Tax Act, Sec. 87)

<sup>34</sup> Section 79: (Central Goods and Services Tax Act, Sec. 79)

<sup>35</sup> State of Karnataka v. Azad Coach Builders Pvt. Ltd.: State of Karnataka v. Azad Coach Builders Pvt. Ltd., (2010) 2 SCC 456.

<sup>36</sup> Section 79: (Central Goods and Services Tax Act, Sec. 79)

<sup>37</sup> ICICI Bank v. Official Liquidator of APS Star Industries Ltd.: ICICI Bank v. Official Liquidator of APS Star Industries Ltd., (2019) 9 SCC 1.

law. Once this particular ‘charge has been created, the operational creditor becomes a secured creditor and has the right to enforce the charge in case of default by the debtor.

2.2.2 Essential 2. Filing proof of claim: “*The operational creditor must file a proof of claim in Form B with the resolution professional or liquidator appointed for the insolvent company. The proof of claim must provide details of the security interest created, such as the nature of the security, the date of creation of the security, the value of the security, and the particulars of the asset charged as security.*” Paragraph 10 of the Moot proposition clearly states that the GST department filed its claim as a ‘secured creditor under Form B as per the Code on 10/10/2022, whereas the NCLT pronounced its orders on 06/10/2022 on the application filed against the company in admitting the application of the software company, directing the initiation of recovery proceedings under Section 14<sup>38</sup>, as well as appointing the interim resolution professional (IRP). As per Section 15 (1) (C)<sup>39</sup> and as per regulation 6(2) (C)<sup>40</sup> of the IBC, the Creditors have to submit their claims within 14 days from the date of appointment of an Interim Resolution Professional. Thus, the claim filed by the department is well within the stipulated time period and is valid under the law. Along with this, all necessary documentation that needed to be attached has also been added, which includes the orders passed on 03/10/2022 under Section 74(9)<sup>41</sup> and 73(9)<sup>42</sup> of the IBC, and on 06/10/2022 under Section 79(1)(c), which is proof of details regarding the nature, date, and value of security interest created.

2.2.3 Submission of documentary evidence: The operational creditor must attach documentary evidence to support its claim as a secured creditor, such as the security agreement, the financing statement, or the mortgage deed. The counsel humbly submits that the department has added all Show Cause Notices (SCN), and orders passed on 03/10/2022 under Section 74(9)<sup>43</sup> and 73(9)<sup>44</sup> of the IBC as well as orders passed on 06/10/2022 under Section 79(1)(c) <sup>45</sup> as proof

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<sup>38</sup> *Insolvency and Bankruptcy Code, 2016, § 14.*

<sup>39</sup> *Insolvency and Bankruptcy Code, 2016, § 15(1)(c).*

<sup>40</sup> *Insolvency and Bankruptcy Code, 2016, § 6(2)(c).*

<sup>41</sup> *Insolvency and Bankruptcy Code, 2016, § 74(9).*

<sup>42</sup> *Insolvency and Bankruptcy Code, 2016, § 73(9)*

<sup>43</sup> *Insolvency and Bankruptcy Code, 2016, § 74(9).*

<sup>44</sup> *Supra 41*

<sup>45</sup> *Insolvency and Bankruptcy Code, 2016, § 79(1)(c).*

against the company that it owes around 11,000 crores to the department, which has been clearly stated in paragraph 10 of the moot proposition

2.2.4 In the case of *Commissioner of Income Tax v. Monnet Ispat and Energy Ltd*<sup>46</sup>, the tax department was recognized as a secured creditor under Form B. here, a company engaged in the business of iron and steel, had defaulted on its tax payments to the Income Tax department. The Income Tax department filed a proof of claim in Form B with the resolution professional appointed for the insolvency proceedings of Monnet Ispat and Energy Ltd. The proof of claim provided details of the security interest created by the company in favor of the Income Tax department, such as the date of creation of the security and the particulars of the assets charged as security.

2.2.5 The National Company Law Tribunal (NCLT) recognized the Income Tax department as a secured creditor and allowed it to participate in the insolvency proceedings as a secured creditor. The NCLT held that the security interest created by the company in favor of the Income Tax department was valid and enforceable. The Income Tax department was entitled to claim the amount due as a secured creditor. The decision of the NCLT was subsequently upheld by the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India. The case established that the tax department could be recognized as a secured creditor under Form B if it has a valid and enforceable security interest over the assets of the debtor.

2.2.6 Adding to the above, the counsel for the respondent submits that in fulfilment of the due processes, and existence of dispute in the amount of creditor with that of the debtor is in question, which is stated in paragraph 5, 7, and 8 of the moot proposition, the insolvency proceedings filed under Section 14<sup>47</sup> of the IBC is valid. This is because The presence unpaid tax persists regardless, notwithstanding the dispute. This means that the existence of the dues hold far more value than the quantity of ‘amount’ that is to be paid.

2.2.7 In the case of *Kay Bouvet Engineering Ltd v. Overseas Infrastructure Alliance (India) Pvt. Ltd.*<sup>48</sup>, the Supreme Court redefined the scope of this very section by deciding that the existence of a dispute is in fact a ground to reject such CIRP application. The Court allowed

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<sup>46</sup> *Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.: Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.*, (2018) 9 SCC 1

<sup>47</sup> *Insolvency and Bankruptcy Code, 2016, § 14.*

<sup>48</sup> *Kay Bouvet Engineering Ltd v. Overseas Infrastructure Alliance (India) Pvt. Ltd.: Kay Bouvet Engineering Ltd v. Overseas Infrastructure Alliance (India) Pvt. Ltd.*, (2018) 4 SCC 190.

for the appeal against the National Company Law Appellate Tribunal (NCLAT) order which had overruled the National Company Law Tribunal (NCLT) order which rejected the application by Overseas seeking the initiation of CIRP against Kay Bouvet under section 9 of the IBC. The NCLAT had decided to allow this appeal and remit the matter back to NCLT directing it to admit the petition after providing a limited notice to *Kay Bovet* to enable it to settle the claim.

### **3 Disputed claim of amount is not a contention to disqualify it**

2.3.1 Section 5(24)<sup>49</sup> of the IBC defines "secured creditor" as a creditor in whose favour a security interest is created by the debtor. The definition does not make any distinction between a disputed or undisputed amount. The recognition of a creditor as a secured creditor would depend on the nature and validity of the security interest created by the debtor, and not necessarily on the amount claimed by the creditor. As per Section 14 of the IBC, once a security interest has been created in favour of a creditor, the security interest shall continue to exist and be enforceable notwithstanding any dispute or pending suit or arbitration proceeding relating to recovery of the debt.

2.3.2 The case law of *Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.* As stated above, also establishes that a creditor can be recognized as a secured creditor even if the amount claimed by the creditor is under dispute. In this case, the Income Tax department was recognized as a secured creditor under Form B despite the fact that the tax amount was under dispute. The decision of the NCLT, NCLAT and the Supreme Court in this case reinforces the principle that the recognition of a creditor as a secured creditor would depend on the nature and validity of the security interest created by the debtor, and not necessarily on the amount claimed by the creditor.

2.3.3 Therefore, in the counsel submits that no definition or case law states that a dispute of the due can affect the status as secured. Essentially, it is only the presence of security and the mode of credit creation that affects the qualifications and, consequently, the hierarchy. Since the GST department had created a 'charge' and security interests can be created by operation

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<sup>49</sup> *Insolvency and Bankruptcy Code, 2016, § 5(24).*

of law, as stated above, it can thus be affirmed that the department indeed, has security, qualifying as a secured creditor.

In case if the amount is not certain by the above stipulated time, the secured creditor shall pay the amount as estimated by the liquidator. If the secured creditor failed to comply with the said obligations, the secured asset shall become part of the liquidation estate. Therefore, the disputed amount in question is not a contention for not qualifying as a secured creditor.

2.3.4 In the case of *M/s. Stargaze Trading Pvt. Ltd. v. M/s. ICICI Bank & Anr.*,<sup>50</sup> the National Company Law Appellate Tribunal (NCLAT) held that the bank was a secured creditor even though the amount claimed by the bank was under dispute.

The case of *Indian Bank v. Kishore Kumar Choudhary*<sup>51</sup> held that the bank was a secured creditor even though the debt amount was under dispute.

The case of *Union of India v. Varrsana Ispat Limited*<sup>52</sup> also held that the tax department was a secured creditor even though the amount claimed was under dispute. In the Supreme Court held that the bank was a secured creditor even though the amount claimed by the bank was under dispute.

2.3.5 The courts have also held that the dispute over the amount claimed by the creditor can be resolved through the insolvency process. The council would like to stress the point that since the department had already created a charge on the amount in the bank account, security over the money had also been subsequently created. This would make the company liable to pay the entire amount up to the extent of the said charge and entitle the creditor to the same.

Therefore, the counsel for the respondent humbly and respectfully submits that the GST department can be treated as 'secured creditor' along with operational debtor.

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<sup>50</sup> *M/s. Stargaze Trading Pvt. Ltd. v. M/s. ICICI Bank & Anr.: M/s. Stargaze Trading Pvt. Ltd. v. M/s. ICICI Bank & Anr.*, (2020) 11 SCC 463.

<sup>51</sup> *Indian Bank v. Kishore Kumar Choudhary: Indian Bank v. Kishore Kumar Choudhary*, (2018) 2 SCC 365.

<sup>52</sup> *Union of India v. Varrsana Ispat Limited: Union of India v. Varrsana Ispat Limited*, (2019) 10 SCC 85.



**PRAYER**

*Wherefore*, in light of the issues raised, authorities cited and arguments advanced, the Hon'ble High Court of Karnataka be pleased to:

1. THAT THE COMPANY SHALL BE LIABLE TO PAY CONSIDERATION ON THE ENTIRE AMOUNT SINCE THE GAMES OPERATED BY IT ONLINE ARE 'GAMES OF CHANCE'.
2. THAT THE GST DEPARTMENT SHALL BE TREATED AS 'SECURED CREDITOR' RECEIVE ITS DUES.

**AND/OR**

Pass any other order it may deem fit, in the interest of Justice, Equity and Good Conscience.

*All of which is most humbly and respectfully submitted.*

Counsel on behalf of Respondent,  
Goods And Service Tax (GST) Department of India

**Sd/-**