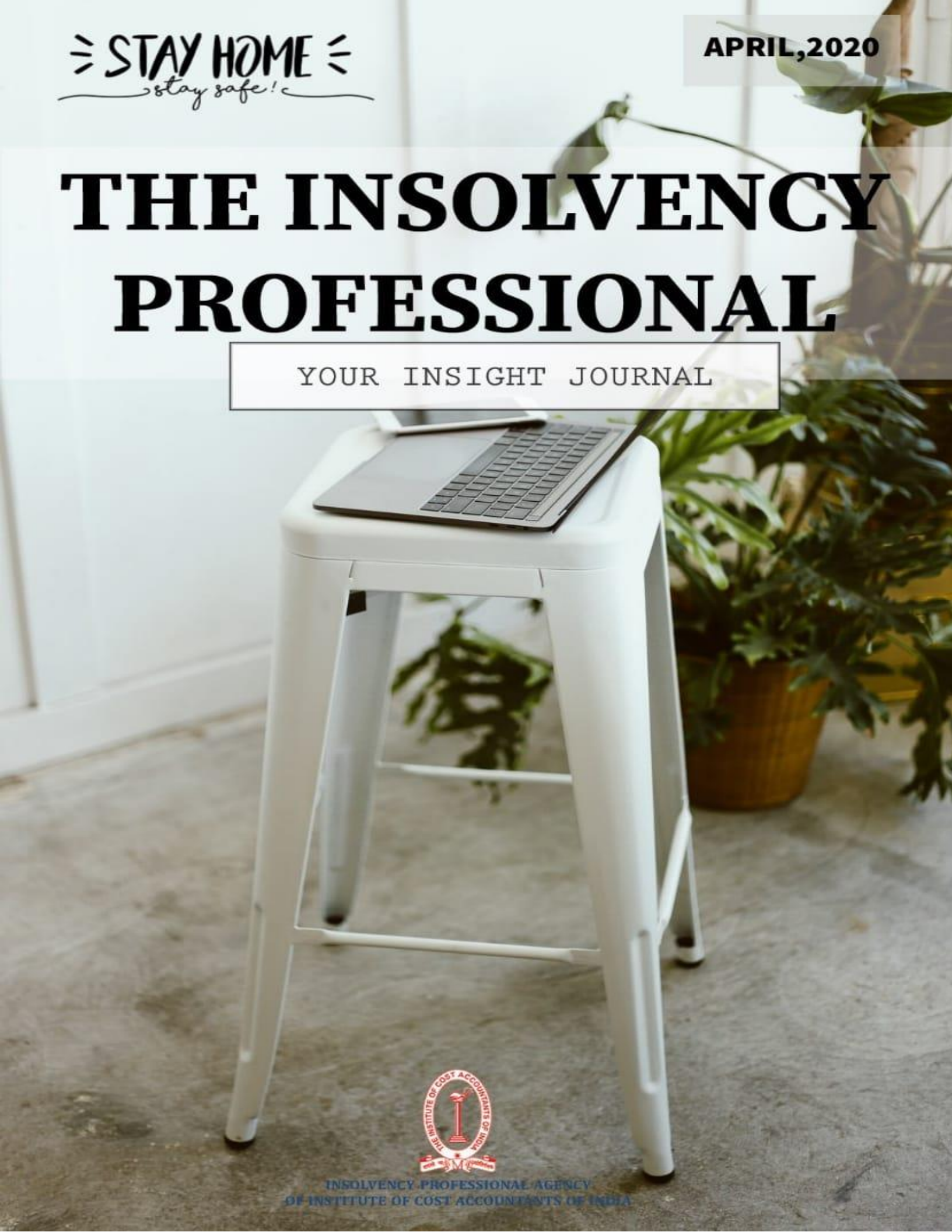

APRIL,2020

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) is a Section 8 Company incorporated under the Companies Act -2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfill all requirements set out in its byelaws on payment of membership fee. We are established with a vision of providing quality services and adhere to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavor to disseminate information in aspect of Insolvency and Bankruptcy code to Insolvency professionals by conducting Round tables, webinars and sending daily newsletter namely “IBC Au courant” which keeps the insolvency professionals updated with the news relating to Insolvency and bankruptcy domain.

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MD&CEO MESSAGE

The Coronavirus outbreak and the nationwide lockdown to curb spreading of infections have significantly impacted economic activities. Most companies have seen their cash flows drying up overnight, as cash circulation has screeched to a halt amid the lockdown and companies are unable to conduct even day-to-day operations. Coronavirus has led to a standstill for several companies under the IBC and all the receivables have dried up and companies are struggling with operations. It is generally believed that the situation will have a long-term impact on the viability of the companies.

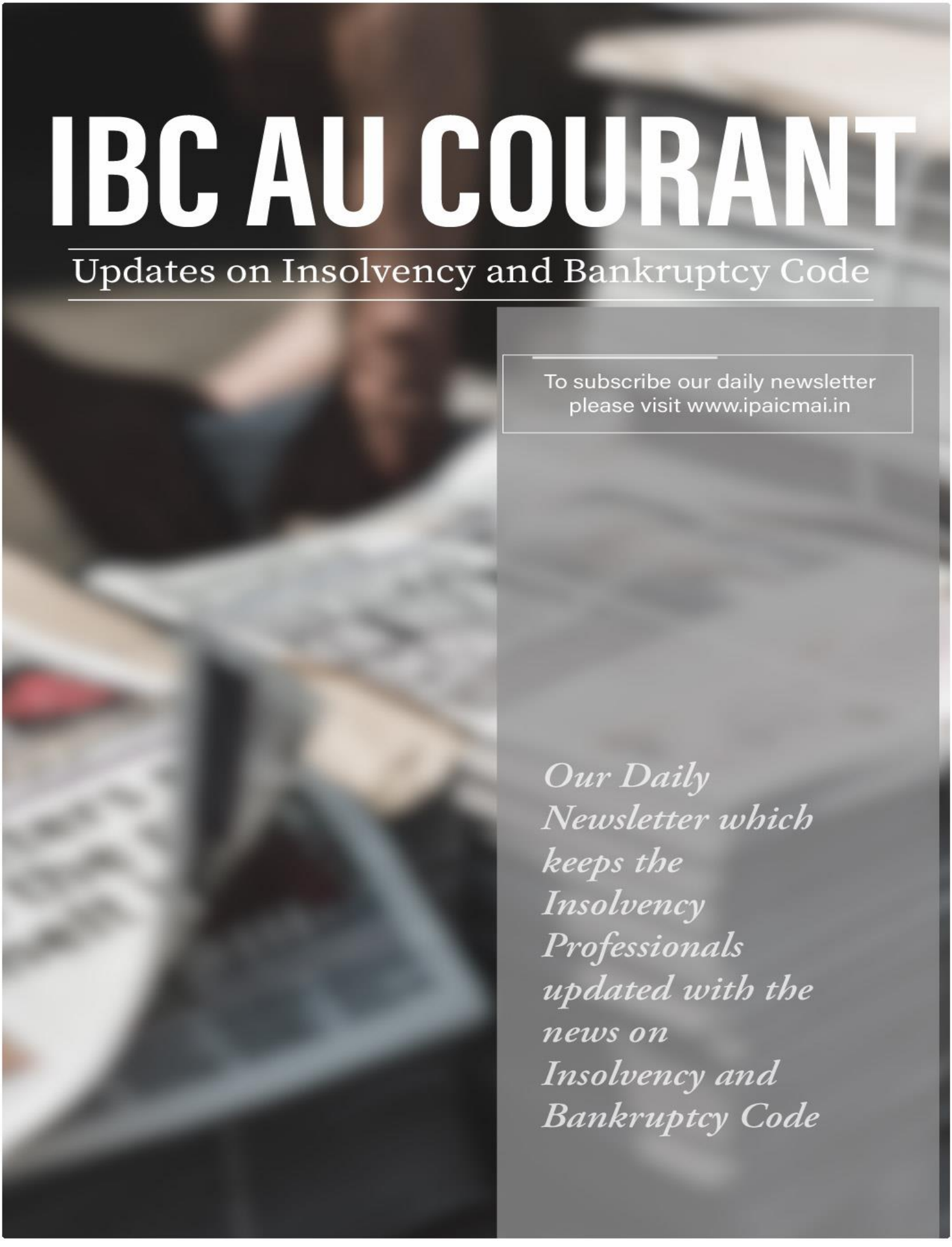
In response to the unprecedented lockdown situation prevailing in the country, The government raised the threshold for invoking insolvency under the IBC to Rs 1 crore from the current Rs 1 lakh with a view to prevent triggering of such proceedings against small and medium enterprises that are facing currently the heat of coronavirus pandemic. IBBI has notified that The period of lockdown imposed by the central government in the wake of the Covid-19 outbreak shall not be counted for the purposes of the timeline for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process.This would, however, be subject to the overall time-limit provided in the code.An ordinance is also likely to be promulgated to suspend three sections of IBC for up to one year and a decision in this regard was taken by the Union Cabinet. Section 7, 9 and 10 of the IBC would be suspended for six months and the suspension time can be extended up to one year. An enabling provision with respect to extending the time would be part of the ordinance.Suspension of these provisions could be extended up to one year based on the economic situation going forward.

PROFESSIONAL DEVELOPMENT INTIATIVES

Insolvency Professional Agency Of Institute Of Cost Accountants Of India

EVENTS CONDUCTED

APRIL,2020	
1-Apr-20	Webinar on Inspection Do's and Don'ts and Ease of Doing Business
1-Apr-20	Webinar on "How to Read a Valuation Report"
3-Apr-20	Webinar on Liquidation under IBC
4-Apr-20	Webinar on Professional Opportunities under IBC
7-Apr-20	Webinar on Tools and techniques of Forensic Audit - Opportunities for Professionals
8-Apr-20	Webinar on Impact of IBC on EODB and Insolvency of personal Guarantors to Corporate Debtors
10-Apr-20	Webinar on Facts and implications of Hon'ble Supreme Court in Jaypee Infra Ltd.
11-Apr-20	Webinar on Voluntary Liquidation & mediation Techniques (During CIRP to make its process smoother
12-Apr-20	Webinar on Information Utility services for Insolvency Professionals
13-Apr-20	Webinar on Inspection of IP's by IPA's
8 -14-Apr-20	28th Batch of Pre-Registration Educational Course (Online Course) - from 08th April, 2020 to 14th April, 2020
15-Apr-20	Webinar on Judicial Pronouncements Pertaining to IPs
15-Apr-20	29th Batch of Pre-Registration Educational Course (Online Course)-from 15 April,2020 to 21st April,2020
16-Apr-20	Webinar on Report of Insolvency Law Committee
17-Apr-20	Webinar on Cross Border Insolvency in India- Key Issues and Leading Cases
18-Apr-20	Valuation Under IBC
19-Apr-20	Impact of COVID - 19 On Insolvency and Bankruptcy code, 2016
19-Apr-20	Webinar on Graduate Insolvency Program
20-Apr-20	Webinar on Certificate Course on IBC
20-Apr-20	Issues Under IBC
21-Apr-20	Discussion on IBBI Disciplinary Orders
22-Apr-20	Issues faced by Insolvency Professionals Under IBC
23-Apr-20	Impact of COVID -19 On Insolvency and Bankruptcy Code functioning
24-Apr-20	30th Batch of Pre-Registration Educational Course (Online Course) from 24th April, 2020 to 30th April, 2020
24-Apr-20	Appearance before NCLT/NCLAT - Court Craft
26-Apr-20	Webinar on Challenges before IPR/RP under Insolvency and Bankruptcy Code, 2016
27-Apr-20	Webinar on Forensic Audit Under IBC
28-Apr-20	Queries On Valuation



IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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Our Daily Newsletter which keeps the Insolvency Professionals updated with the news on Insolvency and Bankruptcy Code


ARTICLES
Insolvency Professional Agency of Institute of Cost Accountants of India

IMPACT OF CHANGES IN INSOLVENCY AND BANKRUPTCY CODE, 2016 IN THE WAKE OF COVID-19.

Mr.Brahm Datt Verma
Advocate & Insolvency Professional

The country is experiencing economic and financial turmoil in the wake of the COVID-19 pandemic all over the world including India. According to United Nationthe effect of COVID-19 on the Indian economy would be to the tune of $348 millionand India is among the top 15 global economies that have been adversely impacted by curtailing of activities in the manufacturing sector. Factories are shutting down thereby impacting the supply chains. Cash flows of the companies are showing negative trends. As such, the future is extremely crucial and challenging for the already deteriorating Indian economy. In the given scenario whatever measure the government takes are going to have a long term effect on the financial health of the country.

The Government has announced a large number of measures to combat COVID-19. From the financial perspective, the Union Government has taken several steps for the businesses. One of these steps is increasing the threshold limit of Rupees one lakh to Rupees one crore for initiation of CorporateInsolvency Resolution Process. This step has been widely propagated as a relief for MSME sector in this time of crisis. However, this might have multiple implications. Though the measure has been taken in view of the disruption caused due to the COVID crisis, but there may be several issues around it.

At the time of filing of application for initiation of insolvency resolution process, it is not known as to how much amount the Corporate Debtor is owing to other creditors. Suppose if a Debtor is having 25 vendors and each vendor is having an average claim of say Rs.90.00 lakh. The amendment practically means that CIRP cannot be initiated against the said Debtor even if there is a default of Rs.22.50 crores (90 lakh x 25).

Moreover, while issuing this notification the Government has ignored the fact that if a MSME unit can afford the credit of Rs.99.99 lakh with one debtor (and he is not dealing with only one creditor) should that unit be categorized as MSME at all. Cash flow of MSMEs is very limited. They work on day to day basis like daily wagers and if they are

made to wait till their claim reaches Rs.1.00 crore, they will cease to exist. Under these circumstances the relief purported to have been given to MSMEs becomes questionable.

The Indian Industries Association (IIA), representing hundreds of micro, small and medium enterprises (MSMEs) of Uttar Pradesh has already written a letter to PM Modi, MSME Minister and RBI Governor, raising concern over the raising the threshold limit to Rs.1.00 crore for initiation of the insolvency process. According to IIA, "This statement of FM and amendment has taken the MSMEs by surprise as we had never raised the issue. It seems the amendment has been basically done to please the large industries so that MSME cannot file cases in NCLT. MSME now shall have to wait till the debt becomes One Crore instead of One Lakh".

With this notification coming into effect, the Corporate and Government entities get protected to the extent the limit has been raised while the MSMEs seem to have lost a strong leverage that could be used to make the powerful ones settle cases of amount due to MSMEs.

The notification, under reference, can be modified to the extent that CIRP cannot be initiated against MSMEs if the amount of default is less than Rs.1.00 crore but MSMEs can initiate the CIRP without any limitation.

Another announcement that the Government of India has made is that itis considering the suspension of sections 7, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 in order to prevent mass insolvency proceedings with the hope thatno one would be able to initiate any insolvency proceedings for a period of six months**.** This step is being proposed in order to prevent the economy from collapsing in the wake of COVID-19.

There is a possibility that this waiver may help some of the companies to meet their deadlines and are able to retain "standard" tag for their accounts. But the lockdown will prove to be a tough time for most of the other companies because their businesses has already nosedived and their viability is gone. Cash flows of most of the companies has already dried up as the cash circulation has come to a grinding halt due to the lockdown and companies are not able to meet even their day-to-day operational expenses. Already struggling companies may not even survive a prolonged business and liquidity crunch.

Further, suppose if a MSME unit has taken a credit facility from a financial institution and that MSME unit is not paid for the supplies and services made to the organized/large scale sector, the very account of the said MSME would go NPA on account of non-repayment and there will be a default

without any fault. Whom is the Government saving – MSME or organized sector?

Moreover, many small financial institutions/NBFCs (which are main lenders to the MSME sector) are already facing stress on their balance sheets, which they are not able to control and will

spiral out soon**.** In view of this denial of the right to invoke the IBC proceedings will result into denial of the right to recourse to the most timely and efficient debt resolution mechanism available in the country today. Reserve Bank of India has already admitted that in certain cases, financial institutions shall be allowed to recover debts owed to them. This will simply prolong their struggle to enforce debt and may increase their stress on the already struggling financial system.

Finally if there is a moratorium of 6 months for initiation of new cases, the asset value of companies which are already struggling may get further deteriorated thereby defeating the very purpose of the IBC i.e. maximization of the value.

While the measures announced by the Government are commendable considering the tough time country is facing, the government is supposed to come up with a balanced policy rather than grossly denying any recourse under the Insolvency and Bankruptcy Code on a blanket basis.

DIFFERENCE BETWEEN FINANCIAL AND OPERATIONAL CREDITORS AND THEIR TREATMENT

Mr. Rajender Kumar (CMA,CS,LLB)
Dy. Registrar of Companies

During the course of going concern, the dues are mainly divided in 'Financial Debt' and 'Operational Debt' As per Section 5(7) of the Insolvency and Bankruptcy Code, 2016, 'Financial Creditor' means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialized equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f)any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation.—For the purposes of this sub-clause,—

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in caused (d) and (zn) of section 2 of Real Estate (Regulation and Development) Act, 2016 (16 of 2016)];

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond,

documentary letter of credit or any other instrument issued by a bank or financial

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Vis-à-vis 'Operational Creditor' in terms of Section 5(20) of the Code means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. As well, "operational debt" in terms of section 5(21) of the Code means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

2. Procedure & documents for filing application for Financial and Operational Debt

The procedure of filing application and annexures in case of Financial and Operational Debt is different. In the case of financial debt, the adjudicating authority has to ensure merely to the records of the information utility or other evidences along with fees of Rs.25000/- and the name of interim Resolution Professional has to propose. As against, in case of operational debt, the applicant has to enclose a demand notice of the unpaid debt and other documents, proposing the name of the interim-resolution professional is not mandatory and fees of Rs.2000/- is to be paid. In M/s Innoventive Industries Ltd v. ICICI Bank Ltd, Civil Appeal No.8337-8338 of 2017 Supreme Court of India date of decision 31.08.2017. It was considered that Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing –i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor get out of the clutches of the Code. On the other hand, in the case of financial debt, the adjudicating authority has merely to the records of the information utility or other evidences produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating

authority may reject an application and not otherwise (para 29,30 and page 39-40).

3. Reason for different Treatment

The financial debt is with regard to money lending as against the operational debt is in terms of recovering of money of supplying of goods or providing service. In the matter of Swiss Ribbons Pvt Ltd &Anr.Vs. Union of India &Ors. Civil Original/Appellate Jurisdiction Writ Petition (Civil) No.99 of 2018 Supreme Court order dated 25 January, 2019. Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since, this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provides goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business (p. 93, para 44). Similarly, In the matter of Essar Steel Ltd IA No.431 of 2018 in CP(IB) Nos.39 & 40 of 2017 and allied IAS. NCLT Ahmedabad date of order 8.3.2019.Since the Financial Creditors are in the business of the money lending, banks and Financial Institutions are best equipped to assess viability and feasibility of the business of the Corporate Debtor. Even at the time of granting loan, these banks and Financial Institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection etc. Since the detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, Operational Creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

Members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, 'Operational Creditors' are neither able to decide on matters regarding the insolvency of the entity, nor willing to take task of postponing payments for better future prospects for the entity. The committee concluded that for the process to be rapid and efficient, the 'I &

B Code' will provide that the creditors committee should be restricted to only the 'Financial Creditors'. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution. The lordship held that the dues of operational creditors must get at least similar treatment as compared to the dues of Financial Creditors.

4. Statutory dues are 'operational debt'

The statutory dues are operational debt while the corporate debtor is going concern. In the matter of Pr. Director General of Income Tax (Admn.& TPS) v. M/s Synergies Dooray Automotive Ltd &Ors., NCLAT order dated 20th March, 2019. The Appellate Authority held that 'operational debt' in normal course means a debt arising during the operation of the company (corporate debtor). The 'goods' and services including employment are required to keep the company (corporate debtor) operational as a going concern. If the company is operational and remains a going concern, only in such case, the statutory liability, such as payment of income tax, value added tax etc. will arise. As the income tax, 'value added tax' and other statutory dues arising out the existing law, arising when the company is operation, the NCLAT held that such statutory dues has direct nexus with operation of the company and held that all statutory dues including 'income tax', 'value added tax' etc. come within the meaning of 'operational debt'. Reliance has been placed upon the decision of the Hon'ble Supreme Court in "Central Bank of India vs. State of Kerla&Ors-(2009) 4 SCC 94; "Life Insurance Corporation of India Vs. D.J.Bahadur&Ors.-(1981) 1 scc 315" Hon'ble Supreme Court in "Municipal Corpn. of Delhi v. Tek Chand Bhatia-(1980) 1 SCC 158", in "Swiss Ribbons Pvt. Ltd &Anr. Vs. Union Of India &Ors.- Writ Petition (Civil) No.99 of 2018.

ANALYSIS OF THE CIRCULAR ISSUED BY THE CENTRAL GOVERNMENT IN RESPECT OF PROCEDURE TO BE ADOPTED IN CASES OF INSOLVENCY RESOLUTION

Mr. K S N Murthy

Insolvency Professional

Central Government vide Notification No. 11/20 Central Tax dated 21st March 2020 has prescribed specialprocedure in respect of GST formalities to be complied by Companies which are in the process Insolvency Resolution. Salient features of the same and also analysis of the provisions so notified is attempted herewith.

1. The procedure prescribed is applicable to registered persons (i.e. registered persons under the GST Normal regime) undergoing Corporate Insolvency Resolution Process (CIRP) and whose affairs are being managed by Interim Resolution Professional (IRP) or Resolution Professional (RP)
2. The procedure prescribed is applicable for the date of appointment of the IRP / RP till the period they undergo the CIRP
3. IRP/RP so appointed under CIRP will be treated as a distinct class of persons – distinct from the Corporate Debtor – and are required to apply and obtain Registration in each of the State (s) / Union Territories where the Corporate Debtor has applied. – within thirty days of being appointed as IRP/RP.
4. Existing IRP/RPs as on the date of notification i.e. 21.3.2020 are also required to be obtain new registration for each of the State(s) / Union Territories where the Corporate Debtor has earlier obtained registration – within 30 days from the date of the notification i.e. 21.3.2020

ANALYSIS OF THE ABOVE PROVISIONS

- The Notification is applicable to Corporate Debtors who are undergoing CIRP. This implies that those Corporate Debtors who have come out of the CIRP i.e. who have approved Resolution Plans will not be covered under the notification. It is only in case of Corporate Debtors who are currently undergoing the CIRP, then the IPR/RP are required to take new Registration under the GST Act.
- On initiation of CIRP the Board of the Corporate Debtor is superseded and the IRP/RP takes control of the activities of the Corporate Debtor. There is no change in the constitution of the Corporate Debtor. Section 21 requires registration by every Supplier. Section 2(105) of the CGST defines supplier as "in relation to any goods or services or

both, shall mean thepersonsupplying the said goods or services or both and shall include an agentacting as such on behalf of such supplier in relation to the goods or services or bothsupplied. The RP/CIRP cannot by any stretch of imagination can be said to be supplying goods / services– because the goods or services are supplied by the Corporate Debtor.

- The Word Person has been defined under Section 2(84) and the definition is an inclusive definition due to the use of the words – Person Includes in the definition. The definition enumerates 14 types / classes who can be defined as person. The IRP/CIRP does not fall in any of the enumerated situations.
- Registration can be sought only from a Person as per the Definition of Person under GST Act. IRP/RP is not a distinct person in its capacity as RP / CIRP – he or it is bestowed with the authority to run the affairs of the Company during the CIRP. It is not clear at this point to specify with RP/IRP can be classified as a Person under GST Act.
- The provisions of the notification have not covered the Resolution Professional appointed as Liquidator because in case of Company under Liquidation, the management of the Company is vested with the Liquidator and the principles which apply to the IRP/RP should also apply to Liquidator. It is not clear whether the registration obtained by the RP/CIRP will also be applicable to the Liquidation Professional – there can be practically situations where the RP/ IRP and Liquidation Professional could be different entities / Persons. In such a case what is the process to be followed has not been specified.
- There may be instances when the IRP/RP are different. The IRP / RP initially appointed may be replaced by another IRP / RP. In such cases, whether each of the IRP / RP s so appointed have to registration or it is sufficient compliance if the first IRP takes registration and the same registration is valid for all subsequent appointments. There is no clarity in the notification in this regard.
- Registration under GST is PAN specific. It is not clear from the Circular which PAN shall be used for applying the Registration by the IRP/RP. Section 25(6) mandates that every person seeking registration under the Act shall have a PERMANENT ACCOUNT NUMBER (PAN) ISSUED UNDER THE INCOME TAX ACT, 1961**.**There are many provisions in GST which are applicable to Registered Persons based on their PAN – for example intra-state supplies are not treated as Supplies if the supplies are made to the Registration with same PAN. It may be possible that the Registration number which will be given to the IRP/RP though may contain the PAN of the Corporate Debtor may contain some distinctive feature which will differentiate it from the

Registration Number of the Corporate Debtor.

- No specific format has been prescribed for the application for registration in which the existing form FORM GST-REG-01 should be used in terms of Rule 8 of the CGST Rules.
- The requirement of registration prescribed under the Notification is only for States / Union Territories for which the Corporate Debtor is holding Registration. The Notification does not envisage a situation for a new Place of Business in a New State can be added during the CIRP. In case IRP/RP wants to take registration in a State for which earlier Registration was not obtained by the Corporate Debtor, then procedure for the same is not prescribed in the Notification. The better drafting could have been to include a provision that the IRP/RP shall take New Registration in the States /UT in which Corporate Debtor has already taken registration and also in new States where it is proposed to have business / supply by the IRP/RP. To this extent, the notification needs to be reviewed.
- It is presumed, due to the use of the words, "to take new registration in each of the states /UT where the Corporate Debtor was registered" – that the Notification will apply to Registration as Input Service Distribution (ISD), Tax Deduction at Source or Tax Collected at Source and such other registrations that are to be taken under GST regime under different enactments i.e. IGST, SGST, UTGST, CGST etc.
- What is the IRP/RP fail to take Registration as per the Notification? No consequences have been specified in the notification for failure to take Registration. Can the Section 25(8) be made applicable in such a case. Section 25(8) reads as under:

Where a person who is liable to be registered under this Act fails to obtainregistration, the proper officer may, without prejudice to any action which may be takenunder this Act or under any other law for the time being in force, proceed to register suchperson in such manner as may be prescribed

But the RP/IRP is not a person who is liable to be registered under the GST Act. He is only required to take registration by way of notification. In such case can 25(8) be invoked.

- Whether the other provisions of the GST Act i.e. Section 21 to 25 will also apply mutatis mutandis to a registration covered under this notification? The notification does not elaborate or clarify on this matter. Section 25(10) and Section 25(12) specify the period within which registration can be granted or rejected or provision for automatic registration. Whether these provisions apply for an application for registration under the notification?

FILING OF RETURN BY THE NEW REGISTRATION HOLDER

Return.- The said class of persons (IRP/RP) shall, after obtaining registration file the first return under section 40 of the said Act, from the date on which he becomes liable to registration till the date on which registration has been granted

ANALYSIS

The New Registration Holder i.e RP/IRP is required to file the first return under section 40 of the said Act, from the date on which he becomes liable to registration till the date on which registration has been granted.

Section 40 of GST Act reads as under:

Every registered person who has made outward supplies in the period betweenthe date on which he became liable to registration till the date on which registration hasbeen granted shall declare the same in the first return furnished by him after grant ofregistration.

The requirement is only with reference to the outward supplies made by the Newly Registered Person from the date from which is liable to register i.e. from the date when he became IRP/RP till the date when the New Registration has come into effect.

Again, when the IRP/RP is replaced with another IRP/RP whether at each such instance a fresh return (FIRST RETURN) has to be filed or not – the Notification is not clear on this.

How about other returns filed or to be filed under the New Registration Number – it is not clear as the notification does not clarity on the same.

PROVISIONS REGARDING INPUT TAX CREDIT

The IRP/RP shall, in his/ its first return, be eligible to avail input tax credit on invoices covering the supplies of goods or services or both, received since his appointment as IRP/RP but bearing the GSTIN of the erstwhile registered person, subject to the conditions of Chapter V of the said Act and the rules made under, except the provisions of sub-section (4) ofsection 16 of the said Act and sub-rule (4) of rule 36 of the Central Goods and Service Tax Rules,2017(hereinafter referred to as the said rules).

ANALYSIS

- Credit can be availed only the supply of goods or services or both received since the appointment as RP / IRP even if the invoices bear the GSTIN of the Corporate Debtor
- The input tax credit availed is subject to the conditions of Chapter V of GST Act and the rules made thereunder
- The Words "except the provisions of Sub Section 16(4) and rule 36(4) of the CGST" require further consideration.
- Sub Section 16(4) reads as under:

A registered person shall not be entitled to take input tax credit in respect of anyinvoice or debit note for supply of goods or services or both after the due date of furnishingof the

return under section 39 for the month of September following the end of financial yearto which such invoice or invoice relating to such debit note pertains or furnishing of therelevant annual return, whichever is earlier.

Does this imply in respect of the Registration by RP/IRP the credit can be availed at any time and Section 16(4) is excepted i.e not applicable?

Section 37(4) of the CGST Act reads as under:

Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 10 per cent of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37

Here again the restriction in availing credit for invoices which are not matching, it seems is not applicable to the a Registration done by IRP/RP.

But is this the real intent or is there a drafting error.

- A reading of the Clause (4) of the Notification indicates that the credit can be availed only for invoices which have been received after the appointment of IPR/RP. This implies the Transitional Credit under Tran-1 cannot be carried forward for utilization for the IRP/RP. This will have serious ramifications for the cash flows.
- Section 140 (1) of the CGST Act reads as under:

A registered person, other than a person opting to pay tax under section 10,shall be entitled to take, in his electronic credit ledger**,** the amount of CENVAT credit carriedforward in the return relating to the period ending with the day immediately preceding theappointed day, furnished by him under the existing law in such manner as may be prescribed

Transitional Credit is a vested right and can it be curtailed by a notification? By specifying that the input tax credit can only be availed for the services / goods received from the date of appointment of RP/IRP, does it not amount to saying that the carry forward credit as of the date of appointment of RP/IRP is not available to be taken credit.

- What happens if the Corporate Debtor , RP, IRP have availed more credit than is prescribed under the current notification? Will be treated as dues of tax and theRP/IRP will have to pay the same to the exchequer – with interest or without interest – There is no clarity on this issue

Registered persons who are receiving supplies from the said class of persons shall, for the period from the date of appointment of IRP / RP till the date of registration as required in this notification or thirty days from the date of this notification, whichever is earlier, be eligible to avail input tax credit on invoices issued using the GSTIN of the

erstwhile registered person, subject to the conditions of Chapter V of the said Act and the rules made thereunder, except the provisions of sub-rule (4) of rule 36 of the said rules.

ANALYSIS

- Input tax credit can be availed by the Receiver of Goods / Servicers on the invoices issued using the GSTIN of the Corporate Debtor up to the date of New Registration obtained by IRP/RP or thirty days from the date of the notification i.e.21.3.2020 whichever is earlier. Subsequent to this, they cannot avail the credit.
- This provision is also a restriction on the vested right under 16(4) of the CGST Act where the right to take input tax credit is available up to the date of submission of the Annual Return or the return for the month of September in the subsequent year under Section 39.
- Can a notification curtail a vested right provided by the Act is the moot point?

AMOUNTS DEPOSITED IN THE CASH LEDGER

Any amount deposited in the cash ledger by the IRP/RP, in the existing registration, from the date of appointment of IRP/RP to the date of registration in terms of this notification shall be available for refund to the erstwhile registration

ANALYSIS

- Any amount deposited in the Electronic Cash Ledger by the IRP/RP in the existing registration from the date of appointment of IRP/RP to the date of registration in terms of the notification is available for refund to the erstwhile registration.
- There seems to be a serious drafting error in this provision. What is the amounts were paid for discharge of the duties payable during the period of appointment of IRP/RP till the date of Registration – how can they be refunded to the oldregistration and who will pay the duties for such supplies – the IRP/RP? This is preponderous**.**

ANALYSIS OF PREFERENTIAL TRANSACTIONS UNDER SECTION 43 OF IBC ,2016

Mr. Sumit Binani
Insolvency Professional

Background

The Bankruptcy Law Reforms Committee (BLRC) Report, the foundation document which recommended the contours of the Insolvency and Bankruptcy Code, 2016 concluded that the bankruptcy law must give honest debtors a second chance, and penalize those who act with mala fide intentions in default. A line must be drawn between malfeasance and business failure. When a company is sound, corporate governance ensures that the benefits obtained by every share are equal. When a company approaches default, managers may anticipate this ahead of time and illicit transfers of cash may take place. The bankruptcy process must be designed with a particular focus on blocking such behavior, which is undoubtedly malfeasance.

The Committee also discussed the possibility of identifying and recovering from vulnerable transactions. These are transactions that fall within the category of wrongful or fraudulent trading by the entity, or unauthorized use of capital by the management. There are two concepts that are recognized in other jurisdictions under this category of transactions: of fraudulent transfers, and fraudulently preferring a certain creditor or class of creditors. If such transactions are established, then they will be reversed. Assets that were fraudulently transferred will be included as part of the assets in liquidation. The Committee thus recommended that all transactions up to a certain period of time prior to the application of the Insolvency Resolution Process (referred to as the "look-back period") should be scrutinized for any evidence of such transactions by the relevant Insolvency Professional. The relevant period will be specified in regulations. At any time within the resolution period (or during the Liquidation period if the entity is liquidated) the relevant Insolvency Professional is responsible for verifying that reported transactions are valid and central to the running of the business. There should be stricter scrutiny for transactions of fraudulent preference or transfer to related parties, for which the "look back period" should be specified in regulations to be longer.

The Hon'ble Supreme Court in the matter of Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs Axis Bank

Limited Etc. Etc. [Civil Appeal Nos. 8512-8527 of 2019 and other petitions] dated 26th February, 2020 (hereinafter referred to as the "SCC order") also observed that the concept of 'preference' has been taken note of since 15th century and the principles relating to avoidance of certain preferences have evolved, particularly in the fields of mercantile laws and more particularly in the laws governing insolvency and bankruptcy; and definitively from 1874, various jurisdictions have defined, described and dealt with 'preferential transfer' as being the transaction where an insolvent debtor makes transfer to or for the benefit of a creditor so that such beneficiary would receive more than what it would have otherwise received through the distribution of bankruptcy estate. Section 547 of US Bankruptcy Code provides for the circumstances in which a bankruptcy trustee may, for the benefit of the estate in question, recover a preferential transfer from the transferee. Section 239 of the UK Insolvency Act, 1986 also provides for the same measures for avoidance of preference given to any person at the relevant time. The time factor also plays a crucial role in such measures of avoidance. This 'relevant time' for the purpose of avoidance of preferential transactions is now commonly referred to as the 'look-back' period. Significantly, when the preferential transaction is with an unconnected party, the look-back period is comparatively lesser than that of the transaction with a connected party, who is referred to as insider or related party.

It may also be worthwhile to note that there existed provisions for avoidance of transactions in the erstwhile Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. These enactments were repealed by IBC. Section 56 and Sec 69 of the aforesaid respective Acts contained such provisions albeit not as detailed as in IBC. In respect of companies, the concept of fraudulent preference earlier embodied in Section 531 of the Companies Act, 1956 now occurs in its modified form in Section 328 and 329 of the Companies Act, 2013. Further, paragraph 177 of the UNCITRAL Legislative Guide on Insolvency Law lays the criteria of preferential transactions.

Sections 43 and 44 of The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code" or "IBC") deals with the provisions relating to preferential/avoidance transactions. While Section 43 deals with provisions relating to "Preferential transactions and relevant time", Section 44 contains provisions relating to "Orders in case of Preferential transactions". Also there are separate provisions in IBC for a] Avoidance of undervalued transactions (Sec 45 to 49); b] Extortionate credit transactions (Sec 50 to 51) and Fraudulent trading or wrongful trading (Sec 66 to 67).

In view of the foregoing information, it is amply clear that the concept of avoidance of preferential transaction has not all of a sudden come in vogue in IBC. It is prevalent in many other countries. It was also there under other enactments some of which has been repealed while bringing the Code in force, of course not as detailed as it is there in the Code.

Let us now understand the relevant provisions on preferential transactions through Frequently Asked Questions (FAQs). While framing the FAQs, the author of this paper has relied and inserted relevant extracts from the BLRC Report, IBC, SCC order dated 26th February, 2020 and also the order dated 25th July, 2018 of Hon'ble NCLT Mumbai Bench in the matter of Sumit Binani (Resolution Professional for Monnet Ispat & Energy Limited) Vs Excello Fin Lea Ltd &ors (hereinafter referred to as the "NCLT Mumbai Order")

Frequently Asked Questions on Section 43 of the Code

Q1)The provisions relating to 'preferential transactions in Section 43 of the Code occur in Chapter III of Part II, relating to liquidation process. Are the provisions applicable in CIRP?

A1)Subsection (1) of Section 43 of the Code mandates both the liquidator as well as the resolution professional, to apply to Adjudicating Authority for avoidance of preferential transactions, if they form any such opinion during the course of their respective proceedings. Further, in terms of the SCC order, though Section 43 of the Code occur in Chapter III of Part II, relating to liquidation process, but such provisions being for avoidance of certain transactions and having bearing on the resolution process too, by their very nature, equally operate over the corporate insolvency resolution process. The Hon'ble Supreme Court also highlighted the fact that the resolution professional is obligated, by virtue of clause (j) of subsection (2) of Section 25 of the Code, to file application for avoidance of the stated transactions in accordance with Chapter III. That being the position, Section 43 of the Code comes into full effect in CIRP too.

Q2)What is the obligation of a Liquidator/Resolution Professional under Section 43 of the Code?

A2)Section 43 of the Code, casts an obligation on the Resolution Professional/Liquidator to file an application before the Adjudicating Authority for avoidance of preferential transactions or for one or more orders referred to in Section 44, if while performing their duties, in their opinion, they come across any transaction where preference has been given by the corporate debtor at a relevant time.

Please also refer Q13 below.

Q3)What type of transactions are covered for the purpose of determining preference under Sec 43 of the Code?

A3)The transaction pertaining to transfer of property or an interest thereof of the corporate debtor is only covered*.*

Q4)What are the questions which need to be examined in respect of the abovementioned type of transactions for the purpose of determining it as preferential under the provisions of Sec 43 of the Code?

A4) In order to find as to whether a transaction, of transfer of property or an interest thereof of the corporate debtor, falls squarely within the ambit of Section 43 of the Code, ordinarily, the following questions shall have to be examined in a given case:

1. As to whether such transfer is for the benefit of a creditor or a surety or a guarantor? [Sec 43(2)(a)]
2. As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor? [Sec 43(2)(a)]
3. As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53? [Sec 43(2)(b)]
4. If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date [Sec 43(4)(a)]; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date? [Sec 43(4)(b)]
5. As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?

Q5)When would a transaction/transfer be considered as an excluded transaction?

A5) Sub-section (3) of Section 43 specifically excludes some of the transfers from the ambit of sub-section (2). Such exclusion is provided to:

(a) a transfer made in the ordinary course of business or financial affairs of the corporate debtor or transferee;

(b) a transfer creating security interest in a property acquired by the corporate debtor to the extent that such security interest secures new value and was given at the time specified in sub-clause (i) of clause (b) of Section 43(3) and subject to fulfillment of other requirements of sub-clause (ii) thereof. The meaning of the expression "new value" has also been explained in this provision.

In other words, in terms of sub-section (3) of Section 43, any such transaction of transfer of property or an interest thereof of the corporate debtor entered into during the ordinary course of business of the corporate debtor or transferee or resulting in

acquisition of new value for the corporate debtor shall be an excluded transaction. A proviso to this sub section also provides that any transfer made in pursuance of order *of Court, ipso facto cannot be deemed as precluded from avoidance of preferential transaction**.***

Q6)What is the meaning of new value?

A6)In terms of the explanation to sub-section (3) of Section 43, "new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

Q7)Has the term "ordinary course of business" been defined in the Code?

No, the same has not been defined.

A7)However, the SCC order has observed that it remains trite that an activity could be regarded as 'business' if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive. The Hon'ble Supreme Court, thus observed, that a transaction would become a part of "ordinary course of business" of a particular corporate entity only if it falls in place as part of the undistinguished common flow of business done and is not arising out of any special or particular situation.

Q8)Is clause (a) of sub section (3) of Section 43, seemingly disjunctive of corporate debtor on one hand and transferee on the other and is required to be read as "and" so as to be conjunctive?

A8) Clause (a) of sub section (3) of Section 43 of the Code excludes a transaction from being preferential if the same is made in the ordinary course of business or financial affairs of the corporate debtor or transferee.

The question in the context is whether the word "or" between the words corporate debtor and transferee should be read as "and" keeping in view the intention and object of the Code. This question has been deliberated and examined in detail in the aforesaid SCC order dated 26th Feb, 2020. Prior to the said order, the aforesaid NCLT Mumbai Order dated 25th July 2017 while dealing with an application filed for avoidance of preferential transaction has also examined this question in detail.

The aforesaid Adjudicating Authorities, after providing a detailed rationale have concluded that the contents of clause (a) of sub section (3) of Section 43 of the Code calls for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature and achieves the avowed objectives. Therefore, the expression "or" appearing as disjunctive between the

expressions "corporate debtor" and "transferee" should be read as "and, so as to be conjunctive of the two expressions i.e. "corporate debtor" and "transferee".

The NCLT Mumbai order states that "If "OR" is read as given in the legislation, it will not only remain absurd, but it takes the main provision of avoidance of preference transaction from the Rule Book"

The SCC order concluded that, "Thus read, clause (a) of sub-section (3) of Section 43 shall mean that, for the purposes of sub-section (2), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the corporate debtor and the transferee. Only by way of such reading of "or" as "and", it could be ensured that the principal focus of the enquiry on dealings and affairs of the corporate debtor is not distracted and remains on its trajectory, so as to reach to the final answer of the core question as to whether corporate debtor has done anything which falls foul of its corporate responsibilities."

The readers may find it interesting to read both the SCC order as well as the NCLT Mumbai order referred above in this note which has dealt the above question/issue in detail.

Q9)When would the transaction qualify to be preferential within the meaning of Sec 43 of the Code?

A9)The transaction of transfer of property or an interest thereof of the corporate debtor in terms of the provisions of Sec 43 of the Code shall be deemed to be preferential if

a)it is for the benefit of a creditor or a surety or a guarantor of the corporate debtor [Sec 43(2)(a)];

b)it is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor [Sec 43(2)(a)];

c)it has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53 of the Code [Sec 43(2)(b)];

d)it has happened within and during the specified time referred to as "relevant time" of 2 years (in case of related party) and 1 year (in case of unrelated party) as reckoned in sub section (4) of Section 43 of the Code; and

e)it remains outside the ambit of exclusion provided in sub section (3) of Section 43 of the Code.

Q10)What is the significance of the term "deemed to be preferential"?

A10) Sub sections (2) and (4) of Section 43 of the Code are deeming provisions. The Hon'ble Supreme Court, for the purpose of

Section 43 of the Code has dealt the same in SCC order. The court after consideration of the relevant provisions has concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) of Sec 43 of the Code is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so.

Further, the learned court also observed that even when the above-stated indicting parts of Section 43 as occurring in sub-sections (4) and (2) are satisfied and the corporate debtor is deemed to have given preference at a relevant time to a related party or unrelated party, as the case may be, such deemed preference may yet not be an offending preference, if it falls into any or both of the exclusions provided by sub-section (3) i.e., having been entered into during the ordinary course of business of the corporate debtor or transferee or resulting in acquisition of new value for the corporate debtor.

Q11)How relevant is the desire or intention of Corporate Debtor in deciding whether a transaction is preferential within the meaning of Sec 43 of the Code?

A11) The NCLT Mumbai order observed that "Under Indian Law, i.e. Insolvency & Bankruptcy Code, intention or desire of the Corporate Debtor is irrelevant in deciding whether such transaction is preferential transaction or not. As to other Bankruptcy Laws, more specially under UK Law, the desire of the Corporate Debtor has to be proved but that is not the case in our country whereby, the ratio decided by the foreign courts cannot blindly be taken as precedent to decide the case under this code. If such transaction has effect of providing any beneficial position to a person received benefit of it more than what he is entitled to under Section 53, it is to be deemed that such transaction is a preferential transaction." The Hon'ble Supreme Court is also of similar view as discussed in the immediately previous question.

Q12)What are the salient provisions of Section 44 of the Code?

A12)Section 44 provides for the consequences of an offending preferential transaction i.e., when the preference is given at a relevant time. Under Section 44, the Adjudicating Authority may on an application made by the Resolution Professional or Liquidator under sub section (1) of Section

43 of the Code, pass such orders as to reverse the effect of an offending preferential transaction. Amongst others, the Adjudicating Authority may require any property transferred in connection with giving of preference to be vested in the corporate debtor; it may also release or discharge (wholly or in part) any security interest created by the corporate debtor. The consequences of offending preferential transaction are, obviously, drastic and practically operate towards annulling the effect of such transaction.

Q13)What are the duties of Resolution Professional in CIRP as per Section 25 of the Code for the purpose of Section 43 of the Code*?*

A13)The duties of the Resolution Professional (RP) is illustrated as follows

Step 1-In first place, sifting through the entire cargo of transactions relating to the property or an interest of Corporate Debtor (CD) backwards from the date of commencement of CIRP and up to the preceding two years. Thereafter, identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of section 5(24) and another of the remaining persons

Step 2-Then, the RP ought to identify as to in which of the said transactions of preceding 2 years, the beneficiary is related party of the CD and in which the beneficiary is not a related party, with each sub- set requiring different analysis. The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding 1 year from the date of commencement of insolvency.

Step 3-After having two sub-sets, the further steps would be to examine every transaction in each of these subsets to find :(i) as to whether the transaction is of transfer of property or an interest thereof of the CD; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the CD. These steps shall lead to short-listing of such transactions which carry the potential of being preferential.

Step 4-The said shortlisted transactions would be scrutinized to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the CD. The transactions which are so found would be answering to section 43(2)(a).

Step 5-Such of the scanned and scrutinized transactions that are found covered by section 43(2)(a) shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it

does not fall within the exclusion provided by sub-section (3) of Section 43.

Step 6-Then, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the clauses (a) and (b) of sub-section (3) of Section 43

Step 7-After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall be required to apply to the AA for necessary order/s in relation to the transaction/s that had passed through all the positive tests of sub-section (4) and subsection (2) as also negative test of sub-section (3) of section 43.

Q14) Can a Resolution Professional file a composite application before the Adjudicating Authority for preferential, undervalued, extortionate and fraudulent transactions?

A14)A combined application should not be filed as the degree of examination in each such type of transactions is different.

Q15)What are the duties of Adjudicating Authority upon an application being filed before it for the purpose of Section 43 of the Code?

A15) The Adjudicating Authority, after steps taken by RP and application to it, shall have to examine if the referred transactions answers to all the descriptions noted above and shall then decide to what order is required to be passed for avoidance of such transactions under Section 44 of the Code.

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LATEST AMENDMENTS INTRODUCED BY IBBI IN REGULATIONS

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020

Insertion of Regulation 40C : Special provision relating to time-line

Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process.

https://ibbi.gov.in/uploads/legalframwork/3d8c8efd906d320e296833445c91a0a4.pdf

Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2020

1) For the financial year 2019-2020, an insolvency professional shall pay the fee under this clause to the Board on or before the 30th June 2020.(Regulation 7 (2)(ca) of IBBI (IP) Regulations,2016)

2)When an individual ceases to be its director or partner, as the case may be, on and from the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2020 and ending on the 31st December 2020, the insolvency professional entity shall inform the Board, within thirty days of such cessation. (Regulation 13(2)(b) of IBBI (IP) Regulations,2016)

3)When an individual joins as its director or partner, as the case may be, on and from the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2020 and ending on the 31st December 2020, the insolvency professional entity shall inform the Board, within thirty days of such joining. (Regulation 13(2)(c) of IBBI (IP) Regulations,2016)

4) For the financial year 2019-2020, an insolvency professional entity shall pay the fee to the Board on or before the 30th June 2020.

https://ibbi.gov.in/uploads/legalframwork/ac467ecac3ad7a0f66433d3cbedfa03d.pdf

Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2020

1) An application received on and from the date of commencement of the Insolvency and Bankruptcy Board of India (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2020 and ending on the 30th September 2020, if the authorisation for assignment is not issued, renewed or rejected by the Agency within thirty days of the date of receipt of application, the authorisation shall be deemed to have been issued or renewed, as the case may be, by the Agency. (Clause 12 A (5) of the Schedule of IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016)
2) An application for issue of authorisation for assignment has been rejected by an insolvency professional agency, on and from the date of commencement of the Insolvency and Bankruptcy Board of India (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2020 and ending on the 30th September, 2020, the applicant aggrieved of an order of rejection may appeal to the Membership Committee within thirty days from the date of receipt of order.(Clause 12 A (7) of the Schedule of IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016)

https://ibbi.gov.in/uploads/legalframwork/685f38c7444a9a6b8ddad11ac23c90cf.pdf

Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020

Insertion of Regulation 47A: Exclusion of period of lockdown

Subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of computation of the timeline for any task that could not be completed due to such lockdown, in relation to any liquidation process.

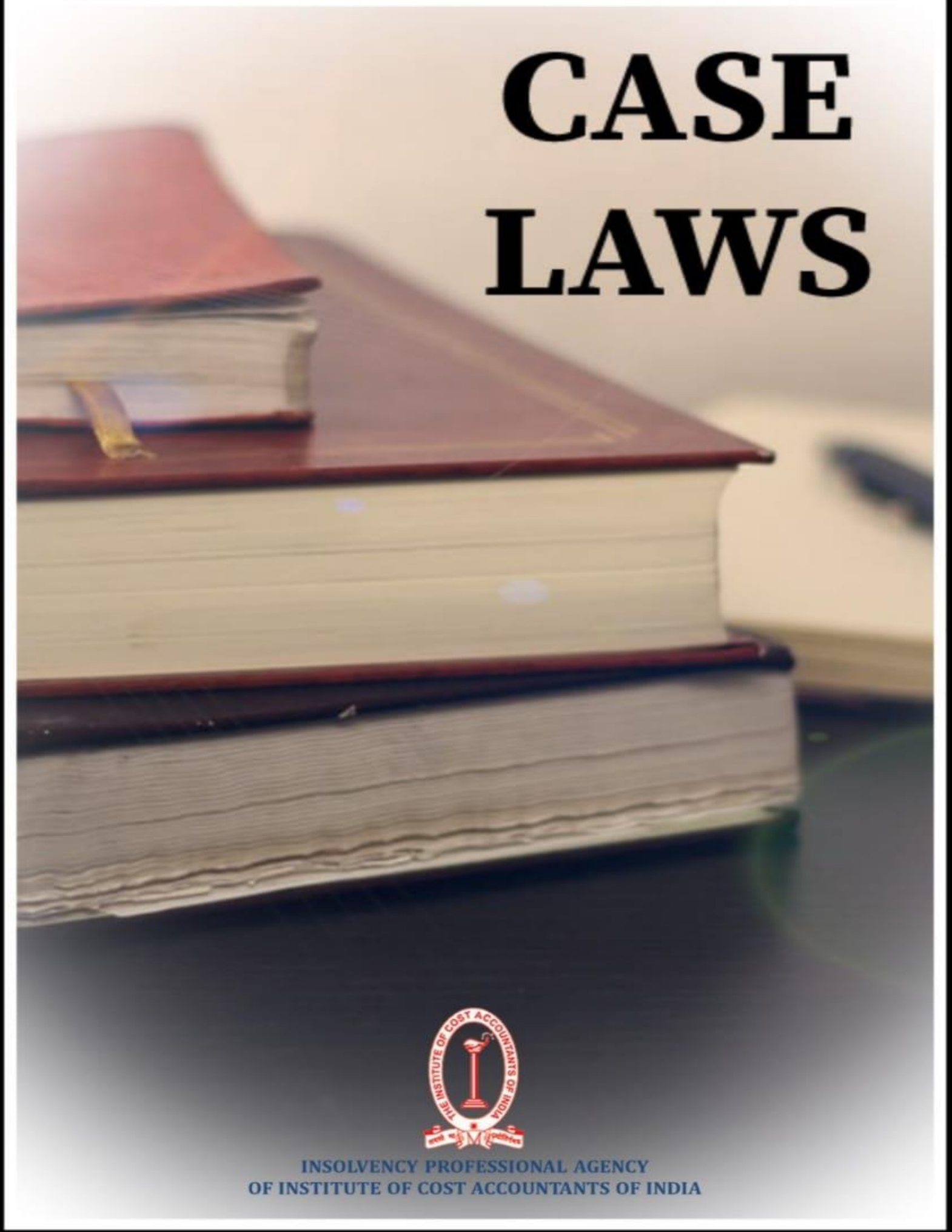
https://ibbi.gov.in/uploads/legalframwork/51250311f7791102b612ff9c9810b997.pdf

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2020

The last date for the modification of the CIRP forms on IBBI Portal have been extended till 30th October 2020, post which a fee will be applicable for the modification of the forms.

https://ibbi.gov.in/uploads/legalframwork/ba2702f58a4ed1841e0e7a9a71ba40ec.pdf

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **TapanBasu Roy v.Blue Star Ltd. - [2019] 109 taxmann.com 25 /[2019] 155 SCL 473 (NCL-AT)**

Where parties settled matter before CoC was constituted, and corporate debtor was ready to pay fee and cost of resolution professional, CIRP order declaring moratorium against corporate debtor was to be set aside.

Application under section 9 filed by the operational creditor was admitted and moratorium was declared. The appellant-director of the corporate debtor filed instant appeal in which parties submitted that matter was settled between them. The CoC was not yet constituted and the appellant-corporate debtor was ready to pay cost of RP.

Held that terms of settlement were to be accepted and order declaring CIRP and moratorium against the corporate debtor was to be set aside.

Case Review : Blue Star Ltd. v. Westwind Engineers (P.) Ltd. [2019] 109 taxmann.com 24 (NCLT - New Delhi), Set aside.

SECTION 5(7) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL CREDITOR

- **T. Johnson v. Phonix ARC (P.) Ltd. - [2019] 109 taxmann.com 129 (NCL-AT)**

Assignment of debt is recognized by Code as a valid mode of transfer of right across ambit of section 5(7); same could not affect liability or obligation of corporate debtor to discharge debt.

The corporate debtor secured a loan of Rs. 59.35 crore from State Bank of Traven core somewhere in 1999 by pledging its core immovable assets, receivables, etc. Said credit facility was renewed or enhanced from time to time. On account of non-payment, account of the the corporate debtor was declared as NPA by the bank. The bank assigned account of the corporate debtor to Phoenix ARC, instant financial creditor.

Held that assignment of debt essentially being a transaction between creditor and assignee and assignment being recognized by the Code as a valid transfer of right across ambit of section 5(7), same could not affect liability or obligation of the corporate debtor to discharge debt.

Further, consideration amount for assignment of debt is of no relevance insofar as liability and obligation on part of corporate debtor is concerned.

Case Review : Phoenix Arc (P.) Ltd. v. John Freight Systems Ltd. [2019] 101 taxmann.com 198 /[2019] 151 SCL 435 (NCLT- Chennai) (para 8), affirmed.

SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

- **Maruti Ferrous (P.) Ltd. v. Sunil Ispat& Power Ltd. - [2019] 109 taxmann.com 147 /[2019] 156 SCL 34 (NCL-AT)**

Where in a resolution plan, approved by CoC, financial creditors were proposed to be paid 9 per cent of their dues, they could not be discriminated by directing to pay 100 per cent to operational creditors (including Government dues and taxes) who did not contribute in operation of company but were entitled under existing laws.

In CIRP against the corporate debtor, the successful resolution applicant submitted resolution plan which was approved by the CoC with 100 per cent voting shares. Said resolution plan was placed before the Adjudicating Authority for approval. In said resolution plan, financial creditors were proposed to be paid 9 per cent of dues whereas in terms of order passed by the Adjudicating Authority, operational creditors (including Government dues and taxes) had been directed to be paid 100 per cent of dues.

Held that financial creditor could not be discriminated in manner as suggested by the Adjudicating Authority by directing to pay 100 per cent to operational creditors who otherwise did not contribute in operation of company but were entitled under existing laws.

Case Review: Asset Reconstruction Co. India Ltd. v. Sunil Ispat& Power Ltd.[2019] 109 taxmann.com 146 (NCLT - Kol.), Partly affirmed

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SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITY - APPEALS AND APPELLATE AUTHORITY

- **CA KannanTiruvengadam v. Deputy Commissioner, Special Disposal cell (Port), Custom - [2019] 109 taxmann.com 167 (NCL-AT)**

Where RP filed application seeking status quo with respect to goods of corporate debtor which was in custody of customs authorities and Adjudicating Authority issued notice granting time to Customs Authority to file reply, as application was still pending, Appellate Tribunal could not give any opinion.

The Resolution Professional filed application seeking interim relief to maintain *status-quo* in order to restrain the Customs Authorities from disposing off goods belonging to the corporate debtor which were allegedly in custody of the Customs Authorities. The Adjudicating Authority issued notice to the Customs Authority and granted time to file reply. However, no interim relief was granted stating that *status-quo* as on date was uncertain. The Resolution Professional filed instant appeal before the Appellate Authority assailing order of the Adjudicating Authority.

Held that since application was still pending with the Adjudicating Authority, no opinion could be given by instant Tribunal with regard to interim relief as sought for; however, the Customs Authorities were expected to not to sell or alienate properties to make interim application of resolution professional infructuous.

Case Review :UCO Bank v. BRG Iron & Steel (P.) Ltd. [2019] 109 taxmann.com 166 (NCLT - Kol.), affirmed.

SECTION 5(20) OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL CREDITOR

- **RMS Employees Welfare Trust v. Anil Goel - [2019] 109 taxmann.com 169 (NCL-AT)**

Adjudicating Authority cannot direct Central or State Government to consider case of waiver of Government dues.

The Adjudicating Authority, while approving the resolution plan submitted by the appellant observed that matter related to the waiver of Government dues, including waiver of MAT liability under section 115J would be considered by the respective Government Department.

Held that debt payable to Central Government and State Government arising out of existing law are 'operational debt' within meaning of section 5(21) and are payable in accordance with section 30(2)(b) and Adjudicating Authority cannot direct Central or State Government to consider case of waiver of Government dues including Income-tax and GST

Case Review : Recorders and Medicare Systems (P.) Ltd. v. Anil Goel [2019] 109 taxmann.com 168 (NCLT - Chandigarh) (para 8), reversed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- **Milind Dixit v. Elecon Engineering Co. Ltd. - [2019] 109 taxmann.com 215 /[2019] 156 SCL 464 (NCL-AT)**

Very edifice of CIR process or subsequent events can't be assailed when entire process of CIRP is over culminating in liquidation as no authority or forum is vested with jurisdiction to order extension of CIRP period.

On an application filed under section 9 by the operational creditor, the Adjudicating Authority initiated CIRP against the corporate debtor on 4-12-2017. However, the Interim Resolution Professional was appointed on 18-6-2018. Since the CIRP could not be completed within statutory period of 180 days, same was extended by 90 days. The CoC held various meetings and after deliberation, the resolution plan submitted by a resolution applicant was rejected with 100 per cent voting share. In the opinion of the CoC, the value of said resolution plan was less than the average liquidation value as assessed by the valuers. The CoC recommended that the corporate debtor be liquidated as a going concern. The Adjudicating Authority passed an order of liquidation at instance of the Resolution Professional. In instant appeals, the appellants, claiming to be promoters/shareholders and erstwhile directors of the corporate debtor, assailed the said order of liquidation on a variety of grounds including irregularity in appointment of the Resolution Professional, collusion between the Resolution Professional and the CoC, bias and fraud.

Held that once CIRP period expired before order of liquidation, no authority or forum created under Code is vested with jurisdiction to order extension of such period or start a *de novo* process thereby frustrating objects of Code. Decision of CoC recommending liquidation of the corporate debtor being purely a commercial/business decision of an expert body of financial creditors having expertise in relevant filed is not amenable to judicial scrutiny. Where promoters/shareholders and erstwhile Directors of the corporate debtor assailed liquidation order on grounds of irregularity in appointment of RP, collusion between RP and CoC, bias and fraud, but they were unable to demonstrate any material irregularity of substance, it was not open to appellants to assail very edifice of process or subsequent events when entire process was over and had culminated in liquidation. And where the CoC recommended for liquidation of the

corporate debtor as a going concern, the Adjudicating Authority landed in error in directing that liquidation order would be deemed as a notice of discharge to officers, employees and workmen of the corporate debtor.

Case Review : Vipul K. Choksi v. Invent Asset Securitization and Reconstruction (P.) Ltd. [2019] 109 taxmann.com 214 (NCLT - Mum.), affirmed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- **ArokiasamyJoseb Raj v. PathukasahasramRaghunathan Raman - [2019] 109 taxmann.com 217 (NCL-AT)**

During liquidation process, steps are to be taken for revival of corporate debtor and on failure, for outright sale of corporate debtor.

Held that during liquidation stage, liquidator is required to take steps for revival of corporate debtor by compromise or arrangement with creditors, or class of creditors or members of class of members in terms of section 230 of the Company Act, 2013 and on failure, is required to take step for outright sale of the corporate debtor so as to enable its employees to continue. Also, during proceeding under section 230, if any, objection is raised, it is open to the Adjudicating Authority which has power to pass order under section 230 to overrule objections, if arrangement and scheme is beneficial for revival of the corporate debtor. And while passing such order, the Adjudicating Authority is required to play dual role, one as the Adjudicating Authority in matter of liquidation and other as a Tribunal for passing order under Section 230.

Case Review : ArokiasamyJoseb Raj v. PathukasahasramRaghunathan Raman [2019] 109 taxmann.com 216 (NCLT - Chennai), affirmed.

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

- **National Spot Exchange Ltd. v. Anil Kohli RP of Dunar Foods Ltd. - [2019] 109 taxmann.com 268 (NCL-AT)**

Appeal against order of Adjudicating Authority with a delay of 44 days beyond 45 days is barred by limitation because only 15 days can be condoned over 30 days period of filing appeal

The appellant preferred claims before the Resolution Professional which was rejected on ground that such claims were related to a sister concern of the corporate debtor. Decision of the Resolution Professional was affirmed by the Adjudicating Authority i.e. NCLT. The instant appeal had been preferred before NCLAT with a delay of 44 days beyond 45 days.

Held that state provides for only 15 days which could be condoned over period of appeal of 30 days; hence, instant appeal was barred by limitation and the appellate authority had no jurisdiction to condone such delay.

Case Review : National Spot exchange Ltd. v. Anil Kohli [2019] 109 taxmann.com 267 (NCLT - Mum.), affirmed.

SECTION 8 - CORPORATE INSOLVENCY RESOLUTION PROCESS - DEMAND BY OPERATIONAL CREDITOR

- **Krystal Integrated Services (P.) Ltd. v. Indiaontime Express (P.) Ltd. - [2019] 109 taxmann.com 270 (NCL-AT)**

Where demand notice issued under section 8 could not be served upon respondent and was received back with endorsement 'addressee' left', application filed under section 9 was rightly dismissed by adjudicating authority for reason of non-compliance with procedural requirements as laid down under section 8(1), read with section 9(5)(ii)(c).

The appellant filed an application under section 9 against the respondent company. The Adjudicating authority rejected said application on ground that notice under section 8 had not been served upon the respondent company. It was noted that demand notice served under section 8 was received back with endorsement 'addressee left'. Even notice sent on alternate address was returned with endorsement 'No Such Firm'.

Held, that in absence of service of demand notice upon the respondent whose existence at given address itself was doubtful, the appellant was not entitled to seek triggering of CIRP, therefore, instant appeal was to be dismissed for reason of non-compliance with procedural requirements as laid down under section 8(1), read with section 9(5)(ii)(c).

Case Review : Krystal Integrated Services (P.) Ltd. v. India ontime Express (P.)Ltd. [2019] 109 taxmann.com 269 (NCLT - Beng.), affirmed.

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **Dinesh Kishinchandgajria v. Kanan Graphics (P.) Ltd. - [2019] 109 taxmann.com 272 (NCL-AT)**

Application filed under section 9 against corporate debtor was allowed to be withdrawn where parties reached a settlement regarding payment of debt prior to constitution of committee of creditors.

The respondent filed an application under section 9 against the corporate debtor which was admitted. Subsequently, the appellant, a director of the corporate debtor filed instant appeal contending that amount of debt had already been paid to the respondent and parties had arrived at a settlement.

Held that in view of fact that parties had reached settlement prior to constitution of Committee of Creditors, impugned order was to be set aside and the respondent was to be allowed to withdraw application filed under section 9.

Case Review : Kanan Graphics (P.) Ltd. v. Print Plus (P.) Ltd. [2019] 109 taxmann.com 271 (NCLT - Mum.), reversed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- **ArvindGarg v. Committee of Creditors of Moser Baer Solar Ltd. - [2019] 109 taxmann.com 274 (NCL-AT)**

Order of liquidation would not effect corporate debtor's eligibility for subsidies from Central Government as corporate debtor would continue as a going concern even during liquidation process

The NCLT ordered liquidation of the corporate debtor as there was no resolution plan and permissible period of 270 days required for completion of CIRP had also

completed. Against said order the corporate debtor raised a plea that it was eligible for subsidies from the Central Government, which was likely to be released in near future and if the Central Government came to know that it had gone for liquidation, they would not allow subsidy to the corporate debtor.

Held that it was still open to the Central Government to release subsidy, if otherwise permissible, as in spite of order of liquidation, the corporate debtor was to continue as a going concern even during liquidation process.

Case Review : ArvindGarg v. Moser Baer Solar Ltd. [2019] 109 taxmann.com 273 (NCLT - New Delhi), affirmed.

SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

- **Manibhadra Polycot v. AbhishekCorpn. Ltd. - [2019] 109 taxmann.com 407 (NCL-AT)**

Where CoC approved revised resolution plan, in view of fact that 700 workmen could be saved from retrenchment, period wasted during CIRP was to be deducted from CIRP period of 270 days and liquidation order passed by NCLT was to be set aside.

In absence of approved resolution plan within 270 days period, the RP sought for order for liquidation of the corporate debtor, which was granted. However, the resolution applicant and the financial creditor challenged said liquidation order seeking exclusion of certain period wasted during CIRP period which was granted. In an urgent meeting, the CoC approved revised resolution plan with 71.03 per cent voting shares.

Held that since 700 employees of corporate debtor could be saved from retrenchment, revised resolution plan, which was already approved by CoC, was to be approved and CIRP period was to be extended and therefore order for liquidation of the corporate debtor was to be set aside and case was to be remitted to RP to place approved resolution plan before the Adjudicating Authority for approval.

Case Review : KarvirNivasiniMahalaxmiIspat (P.) Ltd. v. AbhishekCorpn.Ltd. [2019] 108 taxmann.com 591 (NCLT - Mum.) (para 6), reversed.

SECTION 12 - CORPORATE INSOLVENCY RESOLUTION PROCESS - TIME LIMIT FOR COMPLETION OF

- **Daiyan Ahmed Azmi v. RekhaKantilal Shah - [2019] 109 taxmann.com 408 (NCL-AT)**

Where erstwhile RP stopped functioning and there was delay in taking charge by newly appointed RP, said period was to be excluded for purpose of counting period of 270 days.

The license of erstwhile Resolution Professional was canceled and a new Resolution Professional was appointed. There was delay in taking, charge by new Resolution Professional. He had to place application under section 12A before the committee of creditors.

Held that for purpose of counting period of 270 days, the Adjudicating Authority should have allowed intervening period when erstwhile Resolution Professional stopped functioning till new Resolution Professional took charge.

SECTION 238A - LIMITATION PERIOD

- **Good Luck Traders v. Valley Iron & Steel Co. Ltd. - [2019] 109 taxmann.com 443 (NCL-AT)/[2019] 156 SCL 28 (NCL-AT)**

Where respondent disputed amount claimed by appellant in course of proceedings under section 9, Adjudicating Authority wrongly relied on ground of delay to dismiss appellant's application and, thus, impugned order was to be set aside and, matter was to be remanded back to Adjudicating Authority to pass an appropriate order on merits of case.

The appellant supplied shredded metal scrap to the respondent. On account of respondent's future to make payment for goods supplied, a demand notice was issued under section 8. In response to the said notice, the respondent submitted that total amount due had already been paid. The appellant, however, filed an application under section 9. The Adjudicating Authority took a view that the appellant's claim pertained to year 2012, which was beyond limitation period of 3 years, thus, application filed under section 9 was dismissed.

Held that in view of fact that in respect of amount due, the respondent made certain payment in February 2018, application filed under section 9 could not be regarded as, barred by limitation and even otherwise, when amount claimed itself was disputed, ground of delay was wrongly

shown by the Adjudicating Authority, therefore, impugned order was to be set aside and matter was to be remanded back to the Adjudicating Authority to pass an appropriate order on merits of the case.

Case Review : Good Luck Traders v. Valley Iron & Steel Co. Ltd. [2019] 109 taxmann.com 442 (NCLT - New Delhi), reversed.

SECTION 12 - CORPORATE INSOLVENCY RESOLUTION PROCESS - TIME LIMIT FOR COMPLETION OF

- **Committee of Creditors of Amtek Auto Ltd. v. Dinkar T. Venkatsubramanian - [2019] 109 taxmann.com 454 /[2019] 156 SCL 492 (SC)**

Earlier resolution plan having failed, resolution professional was to be permitted to invite fresh offers within a period of 21 days in view of Amendment Act, 2019 with effect from 16-8-2019 as per which period for completion of resolution process was available upto 15-11-2019.

The Committee of Creditors submitted that a resolution plan was prepared that had failed owing to non-fulfilment of commitment by the resolution applicant. It was further submitted that earlier process had consumed time which was available as per provisions contained in section 12. However, it was pointed out that by virtue of the Amendment Act, 2019 with effect from 16-8-2019, resolution process may be permitted to be completed within 90 days from date of commencement of the Amendment Act. Thus, by virtue of the Amendment Act, time was available upto 15-11-2019.

Held that keeping in view that an earlier offer had been invited and considering time limit of 15-11-2019, the resolution professional was to be permitted to invite fresh offers within a period of 21 days instead of 30 days for submission of offer.

SECTION 238A - LIMITATION PERIOD

- **Jignesh Shah v. Union of India - [2019] 109 taxmann.com 486 /[2019] 156 SCL 542 (SC)**

Trigger point for period of limitation for filing of winding up petition under section 433(e) of Companies Act, 1956 is date on which default is committed, on account of which company is unable to pay its debts.

A share purchase agreement was executed between 'MCX-SX' and IL&FS, whereby IL&FS agreed to purchase 442 lakh equity shares of MCX-SX from MCX. Pursuant to this agreement, La-Fin, as a group company of MCX, issued a 'Letter of Undertaking' to IL&FS on 20-8-2009 stating that La-Fin or its appointed nominees would offer to purchase from IL&FS the shares of MCX-SX after a period of one year, but before a period of three years, from the date of investment. This period of three years expired in August, 2012. IL&FS, therefore, by its letter dated 3-8-2012, exercised its option to sell its entire holding of shares in MCX-SX, and called upon La-Fin to purchase these shares in accordance with the Letter of Undertaking. On 16-8-2012, La-Fin replied that it was under no legal or contractual obligation to buy the aforesaid shares. The cause of action for the suit - as stated in the plaint - arose on 16-8-2012, i.e., the day La-Fin purportedly refused to honour its obligation under the Letter of Undertaking. Single Judge of the Bombay High Court passed an injunction order restraining La-Fin from alienating its assets pending disposal of the suit, subject to attachments of La-Fin's properties that had been made by the Economic Offences Wing of the Mumbai Police ('EOW') during the pendency of the suit. An appeal against that order was dismissed by a Division Bench of the Bombay High Court. On 3-11-2015, a statutory notice under section 433 and 434 of the Companies Act, 1956 was issued by IL&FS to La-Fin, referring to the attachment by the EOW, and stating that La-Fin was obviously in no financial position to pay the sum which, according to IL&FS, was owing to them. In reply, La-Fin disputed the fact that any amount was due and payable. On 21-10-2016, a winding up petition was then filed by IL&FS against La-Fin in the Bombay High Court under section 433(e) of the Companies Act, 1956. The Code came into force on 1-12-2016, and as a result, as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the winding up petition was transferred to the NCLT as a section 7 application under the Code. The statutory form under these Rules, was filled up by IL&FS indicating that the date of default was 19-8-2012. The said winding up petition was admitted by the NCLT as an application under section 7 of the Code, stating on a reading of the share purchase agreement and the Letter of Undertaking that a financial debt had, in fact, been incurred by La-Fin. The NCLAT dismissed the appeal filed by the shareholder of La Fin against the aforesaid admission order, agreeing with the NCLT that the aforesaid transaction would fall within the meaning of 'financial debt' under the Code, and that the bar of limitation would not be attracted as the winding up petition was filed within three years of the date on which the Code came into force, viz., 1-12-2016. The petitioner-shareholders of La-Fin filed instant writ petition before Supreme Court, assailing the order of the NCLT admitting a winding up petition that was filed by IL&FS against La-Fin before the Bombay

High Court, which was transferred to the NCLT and then heard as a section 7 application under the Insolvency and Bankruptcy Code, 2016.

Held that trigger point for period of limitation for filing of winding up petition under section 433(e) is date on which default is committed, on account of which company is unable to pay its debts - Held, yes - Whether where default in repayment of debt occurred on 19-8-2012, petition for winding up filed on 21-10-2016 i.e., beyond three years, was barred by limitation.

Case Review : Pushpa Shah v. IL&FS Financial Services Ltd. [2019] 103 taxmann.com 242 (NCL-AT), set aside.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.