AUGUST 2024

THE INSOLVENCY PROFESSIONAL

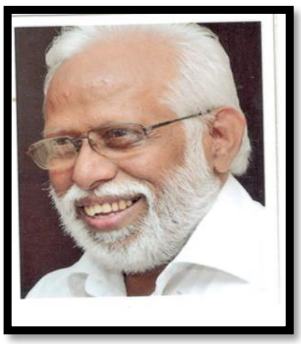
Your Insight Journal

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA-ICMAI) is a Section 8 Company incorporated under the Companies Act-2013 promoted by the Institute of Cost Accountants of India. We are thefrontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll there under solvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelinesissued thereunder and grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee. We are established with a vision of providing quality services and adhering 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.

BOARD OF DIRECTORS



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IBC DOSSIER
Bulletin on Landmark Judgments

CASEBOOK

TABLE OF CONTENTS

BOARD OF DIRECTORS

MESSAGE FROM THE DESK OF MANAGING DIRECTOR

Dear professional,

Greetings to you from all of us in Insolvency Professional Agency of the Institute of Cost Accountants of India (IPA-ICMAI). This journal is one of the publications regularly published by the Publications Division of IPA-ICMAI. This journal seeks to carry interesting articles and opinions that not just inform but provide an enlightened insight into issues of vital interest in the domain of insolvency and bankruptcy, corporate restructuring and rejuvenation and related subjects. The profession of IPs, being still in infancy, is continuously evolving with numerous court rulings from various courts apart from regulatory changes and hence demands a high level of attention of IPs in the midst of assignments and related preoccupations.

Professional development happens through continuous professional education including updates on changes in code, relevant laws and regulations as also new case laws. The equally important side of professional development is expression of a professional's knowledge and experience and competent sharing with fellow professionals. The professional strength we gain and the satisfaction from the intellectual exercise in working for and preparing an opinion/ article shall drive us to be active participants in professional development activities.

At IPA-ICMAI, we strive to make our publications relevant, informative, interesting and lucid. The three articles in this issue of the 'Insolvency Professional – Your Insight Journal' brings an article on the moratorium in the IBC processes by CMA (Dr. M. Govindarajan, IP, an informative article on interplay between Companies Act, 2013 and IBC, 2016 with particular reference to scheme of compromises vis a vis liquidation by Shri M.L. Kabir, IP and a humorous take on Economic Reform with IBC 2016 BY Shri Sunil Dhingra.

I welcome your comments, observations and critiques on the published articles in this journal. Your response will contribute to better understanding of the issues in the articles as also better appreciation of different perspectives. I welcome you to contribute with your updates that would help our fellow IPs and opinions from your experiences that all of us can benefit from. Such responses will also be published in the journal in future to generate a healthy discussion and as also an expression of the appreciation of the author.

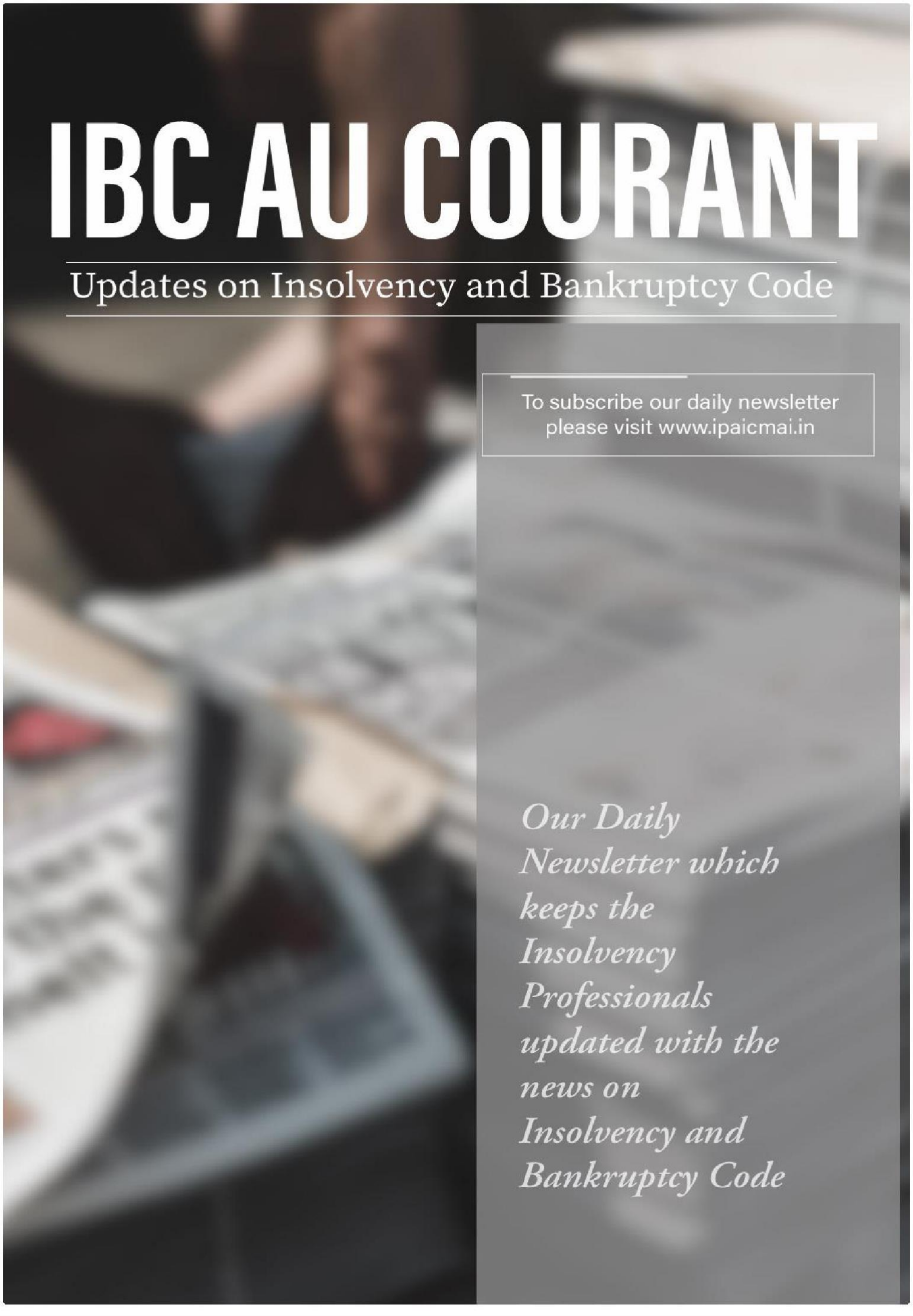
Your rejoinder/ response/ feedback may be sent to publication@ipaicmai.in.
Wish you all happy reading.

Mr. G.S. Narasimha Prasad
Managing Director

PROFESSIONAL DEVELOPMENT INTIATIVES

AUGUST 2024

Date	Events
03rd August 2024	**Learning Session on "Unlocking the Power of Commercial Wisdom; Effective Decision Making by CoC"**
08th August 2024	**65th BATCH OF PRE-REGISTRATION EDUCATIONAL COURSE (Online Course) was held on August 8, 2024**
11th August 2024	**Workshop on "Not Readily Realisable Assets (NRRA)"**
13th August 2024	**Seminar on Navigating Insolvency: ARC's Expertise Asset Resolution**
18th August 2024	**Workshop on "Compliances to be made by IPs under IBC, 2016."**
20th August 2024	**Discussion on Filing of Liquidation & Voluntary Liquidation Forms**
24th August 2024	**Workshop on "Role & Responsibilities of Authorized Representatives under IBC 2016"**
30th August 2024	**Workshop on "Judicial Pronouncements under IBC 2016".**
31st August 2024	**Workshop On Guidelines for Committee of Creditors**



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

MORATORIUM UNDER SECTION 14 AND SECTION 33 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

CMA. DR. M. GOVINDARAJAN
PCS & Insolvency Professional

Synopsis

The Insolvency and Bankruptcy Code, 2016 provides for the declaration of moratorium by the Adjudicating Authority during the Corporate Insolvency Resolution Process under Section 14 of the Code and also under Section 33 of the Code in case of liquidation process. During that period certain restrictions have been imposed on the stakeholders. Section 14 and Section 33 may be similar in some respects but differ in many aspects. The impact of the moratorium under both sections is briefly discussed by NCLAT in the discussed case law and gives a clear picture and guidance to stakeholders.

Moratorium Under Cirp

The Insolvency and Bankruptcy Code, 2016 provides the procedure for initiation of corporate insolvency resolution process ('CIRP' for short) against a corporate debtor by a Financial Creditor or by an Operational Creditor or by the Corporate Applicant itself. The Adjudicating Authority, on being satisfied that the application for CIRP is perfect in all aspects, may admit the application. One admitting the application the Adjudicating appoints Interim Resolution Professional. The admission order also will declare the moratorium under Section 14 will be in operation from the date of order to the date of end of CIRP. The moratorium shall prohibit the following activities-

- the institution of suits or **continuation of pending suits or proceedings** against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.
- transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein.
- any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002).
- the recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor.

Moratorium Under Liquidation

The Adjudicating Authority may pass the order of liquidation of the corporate debtor on the application filed by the Resolution Professional, if the CIRP ends of no resolution plan has been received by the Resolution Professional or the Committee of Creditors recommends for the liquidation of the corporate debtor. On receipt of an application by Resolution Professional for liquidation of corporate debtor, if the Adjudicating Authority determines that the corporate debtor is liable for liquidation it may order for liquidation of the corporate debtor.

Section 33(5) of the Code provides that subject to Section 52 of the Code (Secured creditors in liquidation proceedings) when a liquidation order has been passed, **no suit or other legal proceeding shall be instituted by or against the corporate debtor.** A suit

or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

Issue

The issue to be decided in this article – what are the impacts of moratorium under Section 14 and Section 33 on the corporate debtor and creditors. Whether the income tax department can continue its proceedings against the corporate debtor and can adjust the income tax refund due to the corporate debtor against the outstanding dues for any assessment year?

This issue has been discussed in **'Avil Menezes, Liquidator of Sunil Hi Tech and Engineers Limited v. Principal Chief Commissioner of Income Tax, Mumbai'** – 2024 (7) TMI 763 – NCLAT, New Delhi.

Case law

In the above said case law CIRP was initiated against the corporate debtor 'Sunil Hi Tech and Engineers Limited'. The said application was admitted by the Adjudicating Authority on 10.09.2018. Later the Corporate Debtor was admitted into liquidation by the Adjudicating Authority on 25.06.2019. The Adjudicating Authority appointed the appellant Avil Menezes as the liquidator.

The appellant made a public announcement, calling for claims from the creditors of the company on 01.07.2019. The liquidator analyzed the Annual Information System ('AIS' for short) of the company on the Income Tax portal and found that the corporate debtor was entitled a refund of income tax to the tune of Rs.5.84 crore plus interest Rs.11.46 lakhs for the assessment year 2021-22. The Income Tax Department adjusted the said refund against the dues for the assessment years 2010-11 and 2011-12. The corporate debtor was also entitled to a refund of Rs.60.79 lakhs which was also adjusted by the Department against the dues.

The liquidator sought for refund of income tax for the above said financial years which have been adjusted. The said amount has to be added to the liquidation asset of the corporate debtor. The liquidator filed an application before the Adjudicating Authority seeking for the adding of the income tax refunds to the liquidation estate. The Adjudicating Authority dismissed the said application filed by the liquidator on 22.11.2023. The liquidator filed an appeal before the National Company Law Appellate Tribunal ('NCLAT' for short) against the order of Adjudicating Authority.

The appellant submitted the following before NCLAT-

- The income tax refund amount could not have been adjusted by the Respondent towards Income Tax dues and that the said amount should have formed part of the liquidation estate of the Corporate Debtor.
- In terms of Section 36(3)(b) of the Code, assets which may or may not be in possession of the Corporate Debtor also constitute part of the liquidation estate and hence the amount available with the Respondent did not belong as such to the Respondent but belonged to the stakeholders and therefore should form part of the liquidation estate.
- The Income Tax Department did not have the right to adjust past income tax demands with tax refunds since the said amount fell under the asset of the Corporate Debtor as held by NCLAT in '***Devarajan Raman v. Principal Commissioner Income Tax, (Mumbai-1)'*** - Company Appeal (AT) (Insolvency) No. 977 of 2023- NCLAT, New Delhi Bench.
- The liquidation order had already been passed by the Adjudicating Authority, recovery of income tax dues by invoking Section 245 of the Income Tax Act was illegal and improper.
- In view of the non obstante clause and over-riding provision of the Code as contained in Section 238, the right of setoff of the Respondent – Income Tax Department was subject to the manner of set-off as prescribed under Regulation 29 of the Liquidation Regulations.

- The Respondent–Income Tax Department is an Operational Creditor, and required to file their claim with the Liquidator in Form D in accordance with Regulation 18 of Liquidation Regulations for recovery of dues in the requisite form and could not have *suo-moto* adjusted or set-off the refund amount against past dues.
- The Respondent had erred in not filing any claim with the Liquidator despite the Liquidator having invited claim from all stakeholders through public announcement.
- Section 245 of the Income Tax Act does not expressly create a charge or a security interest.
- The finding of the Adjudicating Authority that the right to set-off under Section 245 of the Income Tax Act creates a charge is perverse as it is opposed to the scheme of the Code which recognizes set-off and security interest as separate and distinct concept.

The Department submitted the following before the NCLAT-

- The dues of the Income Tax come under the ambit of security interest.
- The definition of secured creditor in the Code does not exclude government or governmental authority and hence the act of the Respondent for set-off was lawful. Section 3(30) of the Code defines secured creditor to mean a creditor in favor of whom security interest is created and such security interest can be created by operation of law.
- The dues of the Income Tax Department are government dues and hence the Income Tax Department is a secured creditor. It has also been contended that since the dues of the Income Tax Department – Respondent are secured dues and have been availed by invoking Section 245(1) of the Income Tax Act wherein the Respondent has security interest, the provision of Section 238 of the Code would not apply.
- As required under Section 245(1) of the Income Tax Act, a notice for set-off was issued to the Corporate Debtor and to that extent there has been no breach of the procedure prescribed for set-off under the Income Tax Act.
- The set off was rightly done by the Respondent in accordance with Regulation 37 of Liquidation Regulations.

The NCLAT considered the submissions to the parties to the present appeal and perused the records available. The NCLAT considered the following questions to be answered in the present appeal-

1. Whether such continuation of pending proceedings is permissible after liquidation orders have been passed?
2. Whether the Respondent is a secured creditor having security interest under Section 245 (1) of the Income Tax Act, 1961?
3. Whether there was any infirmity in the *suo-motu* action of the Respondent in appropriation of the income tax refund amount and in setting-off the said amount against the tax arrears of pre-CIRP period determined during the liquidation proceedings.

The NCLAT analyzed the provisions of Section 14 and section 33 of the Code. The NCLAT on analyzing the above said provisions observed that on the order of liquidation having been passed, the moratorium placed under Section 14 came to an end. Instead, a fresh moratorium in terms of Section 33(5) of IBC came into place. A close examination of these two statutory provisions would reveal that both these sections are, however, entirely distinct in their sweep and application. While Section 14 prohibits both institution and continuation of pending suits or proceedings against the Corporate Debtor, Section 33(5) of Code is only a bar on the institution of new suits during the liquidation process. If a fresh suit or legal proceeding is to be instituted, the Liquidator is required to obtain specific permission and prior approval of the Adjudicating Authority. In terms of Section 33(5) of the Code, the moment liquidation proceedings commence, there would be a bar only in respect of fresh suits/proceedings while pending suits/proceedings can continue. The Liquidator can, therefore, continue to pursue or defend any already existing proceeding without having to seek any permission from the Adjudicating Authority in terms of Section 35(1)(k) of the Code. There is no moratorium on continuation of suits/proceedings already instituted earlier.

The NCLAT held that the words 'continuation of pending suits or proceedings' is consciously omitted in Section 33(5) of the Code in contrast to Section 14 of the Code where it is explicitly stated that moratorium applies both to the institution of suits or proceedings or the continuation of

pending law suits or proceedings against the Corporate Debtor. There is no bar in a suit or a legal proceeding continuing along with liquidation proceedings as pending suits or legal proceeding have not been included within the scope of moratorium under Section 33(5) of the Code.

The NCLAT held that the income tax department was legally entitled to continue with the Income Tax assessment proceedings during the liquidation process.

In regard to the second and third questions the NCLAT observed that in terms of the provisions of the Income Tax Act including Section 245 thereof, there is no such basis to claim in the case of the Income Tax Department to be a secured Operational Creditor. Section 245 (1) of the Income Tax Act does not create any charge or security interest in favor of the Respondent. The creation of a charge by operation of law must be apparent from the express words of the statute. The NCLAT held that the Adjudicating Authority had erred in holding that the Respondent – Income Tax Department had acquired security interest in terms of Section 245 (1) of the Income Tax Act, 1961.

There is no restriction, prohibition or embargo placed by the Code on the principle of set-off during liquidation proceedings. The right of set-off is available to the Respondent under Regulation 29 of Liquidation Regulations. The concept of set-off in the liquidation process stands on the premise of mutual credits and dealings undertaken between the parties. In the present case, the set-off has been claimed after passing of the liquidation order which is legally permissible under Chapter III Part II of Code.

The NCLAT relied on the Supreme Court judgment in ***'Sundaresh Bhatt, liquidator of ABC Shipyard v. Central Board of Indirect Taxes and Customs***' – 2022 (8) TMI 1161 – Supreme Court in which the Supreme Court held that while statutory authorities can take steps to determine the tax, interest, fines or any penalty which is due, it cannot enforce a claim for recovery of the tax due during the period of moratorium. Extending the ratio of this judgement, we hold that the Income Tax authority enjoys limited jurisdiction of continuing with assessment proceedings and in determining the quantum of Income Tax dues but does not enjoy the jurisdiction and power to *suo motu* initiate recovery of dues or execute their claim unilaterally by adjusting the income tax refund amount with past tax dues.

The NCLAT held that the Adjudicating Authority has been partially correct in allowing the principle of set-off in the liquidation proceedings but partially incorrect in allowing the *suo-motu* set-off without the claims having been filed by the Respondent before the Appellant-Liquidator in terms of the Liquidation Regulations. The NCLAT was of the view that there has been a clear infirmity on the part of the Respondent in unilaterally and *suo-motu* appropriating the income tax refund amount by setting-off the said amount against the tax arrears of pre-CIRP period determined during the liquidation proceedings.

The NCLAT, therefore, was of the view to remand the matter back to the Adjudicating Authority to examine afresh the quantum of set-off of Income tax refund against pre-CIRP tax dues which has been allowed to the Respondent as against their claim entitlement in the liquidation proceedings. If it is found by the Adjudicating Authority that the amount set off by the Respondent – Income Tax Department exceeds their claim entitlement in the liquidation proceedings, the Respondent may be directed to refund the excess amount so adjusted, within a reasonable period to be decided by the Adjudicating Authority, which may be added to the liquidation asset. If, however, the income tax refund amount adjusted by the Respondent is found to be less than their claim entitlement, the income tax refund adjustment so made will hold ground and remain undisturbed with the *caveat* that balance if any shall stand extinguished since the Respondent did not file their claims before the Liquidator in the liquidation proceedings.

Conclusion

From the above discussed article, it can be inferred that the tax authorities can continue their assessment proceedings even during the mortarium period of CIRP/liquidation. But the Authorities cannot proceed to recover the outstanding dues of tax or adjust the eligible refund of the corporate debtor against the due of any other assessment year. The NCLAT clearly described the impact of moratorium under Section 14 and section 33 of the Code.

Insolvency and Bankruptcy Code, 2016: A Bollywood Drama of Economic Reform

Mr. Sunil Dhingra
Registered Valuer

Introduction

Picture this: The year is 2016, and India's economy is like a classic Bollywood hero—down on its luck, surrounded by creditors demanding their money back, and tangled in a web of outdated laws. Enter the Insolvency and Bankruptcy Code (IBC), 2016, the fearless heroine ready to save the day. The IBC didn't just arrive on the scene quietly; it made a grand entrance with all the fanfare of a blockbuster film. With the IBC, the script was about tochange—dramatically.

"Tera kya hoga, NPAs? (What will happen to you, NPAs?)"

The Pre-IBC Era: A Chaotic Masala Mix

Before the IBC, India's insolvency process was like watching an old masala movie—full of unnecessary twists, endless delays, and subplots that didn't make sense. Businesses in trouble had to navigate a maze of laws, each one adding a fresh layer of confusion. The Companies Act of 1956, SICA 1985, RDDBFI 1993—it was a potboiler of legal drama wherenothing ever got resolved.

Imagine creditors watching their investments vanish while the hero—sorry, debtor—danced around in legal loopholes. The situation was so bad that even foreign investors thought, "Better stay away from this movie."

The Birth of a Game-Changer: IBC, the New Scriptwriter

Into this mess stepped the IBC, ready to rewrite the script. The IBC was like a skilled scriptwriter who knows how to bring together a chaotic plot into a tight, compelling story. Its objectives were clear: streamline all those messy laws into one neat package, make sure resolutions were quick, and give creditors the power they desperately needed.

Key features of the IBC:

1. **Consolidation of Insolvency Laws**: The IBC threw out the old script, bringing all insolvency laws under one umbrella. Finally, creditors and debtors were workingfrom the same playbook.
2. **Time-bound Resolution Process**: The IBC introduced a 180-day deadline to resolve insolvency cases, with an optional 90-day extension. No more dragging the story intoa never-ending sequel.
3. **Creditor-in-Control Model**: Gone were the days of debtor-friendly laws. The IBC handed the reins over to creditors, making them the new stars of the show.
4. **Priority to Secured Creditors**: The IBC flipped the traditional hierarchy, ensuring that secured creditors were paid first, finally giving them their long-overdue close-up.
5. **Insolvency Professionals and Agencies**: The IBC introduced a new cast of characters—Insolvency Professionals (IPs) and Insolvency Professional Agencies (IPAs)—to manage the process
6. **Adjudicating Authorities:** The National Company Law Tribunal (NCLT) and Debt Recovery Tribunal (DRT) became the judges, jury, and executioner in this legal drama.

7. **Cross-border Insolvency**: While the IBC hinted at tackling cross-border insolvency, this part of the story is still waiting for its big break.

The Drama Unfolds: The Insolvency Resolution Process in Action

The IBC was like a high-stakes reality show where companies fought to stay in business. Every step of the process had its own tension, drama, and plot twists.

1. **Initiation of Proceedings**: The drama kicks off when a creditor or debtor files for insolvency. In corporate insolvency cases, a minimum default of ₹1 crore is required.

   Example: The **Essar Steel** case was like the opening episode of a blockbustershow, with financial creditors launching the first attack.

2. **Moratorium Period**: Once the NCLT admits the case, a moratorium is declared. Alllegal battles are paused, giving everyone a moment to catch their breath.

   Example: When **Jet Airways** was grounded, the moratorium gave it a briefrespite from the legal storm.

3. **Appointment of Interim Resolution Professional (IRP)**: The IRP takes over the company, manages operations, and assembles the Committee of Creditors (CoC)—the ultimate decision-makers.

   Example: In the **Bhushan Steel** saga, the IRP's appointment was like the entry of a strong supporting character who takes charge.

4. **Committee of Creditors (CoC)**: The CoC, made up of financial creditors, decides the company's fate. Will it be a happy ending or a tragic finale?

   Example: **Electrosteel Steels** found its savior in Vedanta Limited, thanks to the CoC's green light.

5. **Resolution Plan**: Resolution applicants submit their plans—like contestants presenting their cases to the judges. The CoC's approval is the ticket to the nextround.

   Example: The battle for **Essar Steel** reached its climax when ArcelorMittal's resolution plan won the CoC's approval.

6. **Adjudication and Implementation**: The NCLT's final approval is like the judge's gavel coming down. The resolution plan is set in motion, and the IRP ensures it's carried out.

   Example: The Bhushan Power & Steel resolution plan, implemented by JSW Steel, was the satisfying conclusion everyone was waiting for.

The Impact: IBC's Blockbuster Success

The IBC didn't just change the rules of the game; it changed the entire playing field. Its impact on the economy was like a film that breaks all box office records.

"IBC at the box office: Breaking records and setting new benchmarks!"

1. **Improved Recovery Rates**: Under the IBC, creditors started seeing real returns ontheir investments, something that seemed impossible before.

   Example: **Binani Cement** was a massive hit when UltraTech Cement's acquisition ensured nearly 100% recovery for financial creditors.

2. **Reduction in NPAs**: The IBC was the hero that India's banking sector desperately needed, reducing non-performing assets (NPAs) and bringing hope back to the financial system.

Example: The acquisition of **Amtek Auto** by Liberty House was a big win forthe IBC, as it helped banks clean up their balance sheets.

3. **Enhanced Ease of Doing Business**: The IBC played a starring role in improving India's ranking in the World Bank's Ease of Doing Business Index, especially in the "Resolving Insolvency" category.

   Example: India's jump in rankings post-IBC was like winning a prestigiousaward—proof that the reform was working.

4. **Promotion of Entrepreneurship**: The IBC gave entrepreneurs the confidence to take risks, knowing that there was a safety net if things went south.

   Example: The swift resolution of **Alok Industries**, where Reliance Industries and JM Financial stepped in, was a morale booster for other entrepreneurs.

5. **Development of a Robust Insolvency Ecosystem**: The IBC didn't just create a law—itbuilt an entire ecosystem, complete with professionals, agencies, and a specialized judiciary.

   Example: The role of Insolvency Professionals in cases like **Bhushan Steel** highlighted how essential they were in the new system.

The Plot Twists: Challenges and Criticisms

But like any great movie, the IBC's journey wasn't without its challenges. There were plot twists, unexpected setbacks, and a few villains trying to derail the story.

"Just when you thought everything was going smoothly with the IBC..."

1. **Delays in Resolution**: Despite the 180-day deadline, some cases dragged on, turning into unwanted sequels that no one asked for.

   Example: The **Jaypee Infratech** case became infamous for its delays, ascreditors and homebuyers waited anxiously for a resolution.

2. **Burden on NCLT**: The NCLT was like the overworked hero, trying to handle too many cases at once, leading to backlogs and frustration.

   Example: The **Videocon Industries** case highlighted how the NCLT was stretched thin, causing delays that affected the whole process.

3. **Haircuts for Creditors**: In some cases, creditors had to accept significant losses, or "haircuts," on their claims. It was like the hero sacrificing for the greater good, but it didn't always sit well with everyone.

   Example: In the **DHFL** case, creditors had to take a substantial haircut, leadingto debates over whether the IBC was fulfilling its promise of equitable resolutions.

4. **Challenges in Cross-border Insolvency**: The lack of a comprehensive framework for cross-border insolvency remains a glaring gap, complicating resolutions in an increasingly globalized economy.

   Example: The **Videocon** case, with its assets spread across multiple jurisdictions, underscored the urgent need for a clear and effective cross- border insolvency framework.

5. **Ambiguities in the Code**: The IBC's provisions, though revolutionary, have not beenwithout controversy. Ambiguities have led to varying interpretations and legal battles, creating uncertainty.

   Example: The **Jaypee Infratech** case ignited debate over the status of homebuyers as financial creditors, eventually forcing an amendment to thecode to settle the issue.

6. **Treatment of Operational Creditors**: The

perceived unequal treatment of operational creditors under the IBC has sparked criticism, with calls for reform growing louder.

Example: The **Essar Steel** case brought this issue to the forefront, as operational creditors demanded a more equitable share of the resolution proceeds, leading to a landmark Supreme Court judgment.

The Sequel: What's Next for the IBC?

As with any great film, the end of one story is just the beginning of another. The IBC's journey is far from over. To keep the momentum going, there are a few key steps that must be taken:

"The IBC: Ready for the sequel, coming soon!"

1. **Strengthening the NCLT**: To ensure timely resolutions, the NCLT needs more judges and additional benches. It's like hiring more editors to speed up post-production.

2. **Enhancing Cross-border Insolvency Framework**: India must urgently adopt a comprehensive cross-border insolvency framework, aligned with global standards, to tackle complex cases involving multiple jurisdictions.

3. **Reducing Delays**: Streamlining procedures and reducing the burden on the NCLT can help minimize delays and ensure swift resolutions.

4. **Balancing Stakeholder Interests**: The IBC must evolve to provide a more equitable treatment of all creditors, including operational creditors, to enhance fairness and effectiveness.

5. **Capacity Building for Insolvency Professionals**: Continuous training and development for Insolvency Professionals will be key in handling increasingly complex cases.

6. **Public Awareness and Education**: Raising awareness about the IBC, especially among small and medium enterprises (SMEs), can lead to better understanding and utilization of the code.

Conclusion: The IBC's Star-Studded Legacy

The Insolvency and Bankruptcy Code, 2016, is more than just a legal reform—it's the blockbuster hit that India's economy desperately needed. It's transformed the insolvency landscape, given creditors a fighting chance, and brought order to a system that was on the brink of collapse.

"When the IBC finally saves the day and everyone gets their money back!"

As India marches forward, the IBC will play a pivotal role in shaping the nation's economic destiny. Like any great film, it has its challenges, but it's also full of promise. The IBC is a powerful testament to the idea that out of chaos, order can be forged—and that in the face of adversity, transformation is not just possible, but inevitable.And so, the credits roll, but the story continues. Stay tuned for the next exciting chapter in the saga of the Insolvency and Bankruptcy Code!

"A Study into The Interplay Between IBC & Companies Act Re: Scheme of Compromise U/s 230 Vis-à-vis Liquidation"

Mr. Mohammad Lutful Kabir
Insolvency Professional & Social Auditor

Synopsis

I. IBC, as it has been conceptualized by the BLRC (Banking Law Reforms Committee) is expected to function as a standalone code which would be both exhaustive and inclusive. The purpose was to make the code efficient enough to unlock the blocked capital through resolution into the economy in a time bound manner. In this article an attempt has been made to explore into the relational interplay between Sec-230 of the Companies Act 2013 with IBC 2016 in a manner that analyzes (i) the various provisions of the Act and the Code as are made applicable to winding-up, liquidation with respect to compromise and arrangement under section 230 ; (ii) the various judicial pronouncements with respect to the same in pre-IBC and post-IBC period; (iii) to explore the underlying legislative intent that emerges from the various judicial pronouncements of NCLT/NCLAT/High Court and Supreme Court. Introduction:

IBC as it has been conceptualized by the BLRC (Banking Law Reforms Committee) is expected to function as a standalone code which would be both exhaustive and inclusive. The purpose was to make the code efficient enough to unlock the blocked capital through resolution into the economy in a time bound manner. From its inception till date this intent is well reflected when we see that a number of Acts were subsumed or amended to ensure speedy disposal of CIRP cases.

However even with the above perspective in view we often find issues that come on the way of smooth functioning of the code through the long process of judicial proceedings and interpretations of the code vis-à-vis its applicability with respect to other laws – be it Companies Act, PMLA, IT Act, GST & others.

In this article an attempt has been made to explore into the relational interplay between Sec-230 of the Companies Act 2013 with IBC 2016 in a manner that analyzes (i) the various provisions of the Act and the Code as are made applicable to winding-up, liquidation with respect to compromise and arrangement under section 230 ; (ii) the various judicial pronouncements with respect to the same in pre-IBC and post-IBC period; (iii) to explore the underlying legislative intent that emerges from the various judicial pronouncements of NCLT/NCLAT/High Court and Supreme Court.

II. A historical perspective of Compromise and Arrangements in Companies Act and its linkages to IBC:

Section 230 of the Companies Act 2013 provides for a compromise and arrangement scheme thru' which the company can engage itself into a host of activities like mergers, amalgamations, de-merger, reduction of capital, restructuring et al with its creditors and/or members of any class to strategically restructure its business and operations. The powers that ae conferred under section 230 of the present Act were earlier covered under Sections 390 to 394A of the Companies Act 1956. In the pre-IBC period also, the Judiciary had

strongly favoured this methodology in the cases like ***Meghal Homes(P)Ltd. v Sreeniwas Girni KK Samity, Mihir H Mafatlal v Mafatlal Industries Ltd. and also in the case of Rasiklal Mardia v Amar Dye Chemicals Ltd***., since this could still promote the revival of the company . The section allows the liquidator of the company in the event of a winding up order to propose a scheme of compromise and arrangement, thereby offering itself to be the last resort to revive the company and preserve its 'going-concern' status. In fact, the primary linkage of the operation of Sec–230 with respect to IBC Code could be drawn from this point of winding-up and liquidation under IBC. In the next section that follows we shall take a deep insight into the provisions under the IBC Code as regards its various provisions with respect to Compromise and Arrangement under Sec-230 of the Companies Act 2013 at a stage when a CIRP has reached the liquidation stage.

III. Compromise or Arrangement as perceived and envisaged under IBC:

Under the code there are 2 important regulations namely Regulation 2B and Regulation 39BA that handle intimately the working and applicability of Sec-230 with respect to the code. Regulation 2B of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation 2016 provides that:

(1) Where a compromise or arrangement is proposed under Section – 230 of the Companies Act 2013, it shall be completed within 90 days of the order of liquidation under Sec-33.

The above provision however was further amended by the IBBI (Liquidation Process) Amendment Regulation 2020 and 2022 to include the following points:

(a) provided that a person, who is not eligible under the code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise and arrangement and

(b) provided further that where the recommendation to explore proposal of compromise or arrangement has been made by the committee under Regulation 39BA of the IBBI (Insolvency Resolution Process of Corporate Persons) Regulation 2016, the liquidator shall file the proposal within 30 days of the order of liquidation.

With respect to the above Regulation 2(B), the Companies Act 2013 ("the Act") envisages compromise or arrangements. Section 230 thereof, as amended by the Code, enables compromise or arrangement on the application by a liquidator appointed under the Code, as under: -

"230. Power to compromise or make arrangements with creditors or members –

a) where a compromise or arrangement is proposed –

b) between a company and its creditors or any class of creditors; or

c) between a company and its members or any class of members;

the Tribunal may, on the application of the company or any creditor or members of the company or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code 2016, as the case may be, order a meeting of creditors or of the class of creditors or of the members or class of members as the case may be, to be

called, held and conducted, in such manner as the Tribunal directs…..".

Hence the liquidator appointed under IBC Code 2016, can submit application under the above-mentioned section of 230 under the Companies Act 2013.

While we dealt above with the provision of Regulation 2B of IBBI (Liquidation Process) Regulation 2016, it is time now to explore the provisions under Regulation 39BA of the code which was introduced by the IBBI (Insolvency Resolution Process of Corporate Persons) (Fourth Amendment) Regulation 2022, that came into effect from 16th September, 2022. Regulation 39BA provides as under: -

1) While deciding to liquidate the Corporate Debtor under Sec-33, the Committee shall examine whether to explore compromise or arrangements as referred to under Sub-Regulation (1) of Regulation 2B of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation 2016 and the resolution professional shall submit the Committee's Recommendation to the Adjudicating Authority while filing application under Sec 33.

2) Where a recommendation has been made under sub-regulation (1), the Resolution Professional and the Committee shall keep exploring the possibility of compromise and arrangement during the period the application to liquidate the Corporate Debtor is pending before the Adjudicating Authority.

Accordingly, in pursuance of the above, second proviso of Regulation 2B as inserted by the IBBI (Liquidation Process) (Second Amendment) Regulation 2022 w.e.f. 16-9-2022 provides that where the recommendation to explore proposal of compromise or arrangement has been made by the Committee under Regulation 39BA of the Insolvency and Bankruptcy Board of India(Insolvency Resolution Process of Corporate Persons) Regulation 2016, the liquidator shall file the proposal within 30 days of the order of liquidation.

IV. Judicial pronouncements and legislative intent:

As now we have thoroughly explored the various provisions of "the Act" as well as the "Code", it is now time to deep dive into the various judicial pronouncements in this regard and arrive at a conclusion with relation to the 'legislative intent' as well the purpose that are expected to be served through these provisions.

While we deal here with several judicial pronouncements in the matter of compromise and arrangements in winding up as well as liquidation under IBC, we have categorized the same under pre-IBC and post-IBC cases thereby covering also cases that were decided under the old Companies Act 1956.

(a) Pre-IBC:

(i) ***Rasiklal S. Mardia v. Amar Dye Chemicals Ltd. & Others*** – In this case, a shareholder had filed a petition seeking revival of the company in liquidation thru' compromise with the creditors. The Hon'ble NCLT in the captioned matter held the view that it is the liquidator alone who is authorized to file the company petition either for compromise or arrangement in respect of the company in liquidation. This judgment was challenged and NCLAT while nullifying the decision of NCLT held that "National

Steel and General Mills V Official Liquidator makes it quite clear that liquidator is only an additional person who can move application under Sec – 391 of the old Act when the company is in liquidation . Looking to these judgments we are unable to support the view taken by NCLT that the applicant could not have file the Petition under Sec-391 of the old Act".

The above decision was further supported by High Court judgment in the same case when the Hon'ble Court said "…….In case of liquidation of a company, in case the liquidator exclusively is interpreted to mean to have a right to move under Sec-391 of the Act, and the company is not to have such a right, there would be direct conflict between Sec-391(1) and 446(2)(c) of the Act which would not be in consonance of the principle of harmonious interpretation of statutes. Therefore, the only rational interpretation, which can be put is that in case the company is wound up, liquidator is the additional person who can move the application under Section 391 of the Act apart from members, creditors and the company".

(ii) ***Meghal Homes (P) Ltd. V Shree Niwas Girni K.K. Samiti*** - Hon'ble Supreme Court had also taken the same view in this case by holding that "…. it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the official liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Sec-391 of the Act or any of the contributories or creditors also can come forward with such an application." Further, in the judgment of the Apex Court we find the underlying 'legislative intent' when it says "…… it also does not appear to be necessary to restrict the scope of the provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive."

(iii) ***Rajendra Prasad Agarwalla & others V Official Liquidator*** – The Hon'ble High Court in the case spelt out in the judgment that "A plain reading of the section clearly indicates that the legislature intended that if any compromise or arrangement is proposed, the company or any creditor or any member of the company will be entitled to make the application and in the case when the company is being wound up, as the Board has ceased to function and is no longer there and the company is represented by the liquidator, the liquidator will also be entitled to make the application. The right which is conferred on the contributories or the creditors is not intended to be taken away when the company has gone into liquidation and in such a case an additional right is also conferred on the liquidator."

(b) Post-IBC:

As we see in part (a) for pre-IBC cases detailed above, the judicial pronouncements laid more emphasis on the purpose than the process intricacies and remained always focused o the revival of the corporate debtor. Now in the following judicial pronouncements that we shall discuss below we again find a renewed focus and tone from the judiciary on revival even when the corporate debtor is undergoing a winding up or liquidation phase in the matter.

(i) ***S.C. Sekaran v Amit Gupta & Others***. - In this case the Hon'ble NCLAT held that "……. we direct the 'Liquidator' to carry on the business of the 'corporate debtor' for its beneficial liquidation etc.as prescribed under 35B of the I&B Code…. before takin steps to sell the assets of the 'corporate debtor(s)' (company herein), the Liquidator shall take steps in terms of Sec – 230 of the Companies Act 2013.

(ii) ***Arcelor Mittal India (Pvt)Ltd. v Satish Kumar Gupta & Othrs***. – In this case the Hon'ble Supreme Court while relying on Regulation 32(e) held "What is interesting to note that the Preamble does not in any manner, refer to liquidation, which is only availed as a last resort if there is either no resolution plan or the resolution plan submitted is not up to the mark. Even in liquidation the liquidator can sell the business of the corporate debtor as a 'going concern'…….. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor by protecting the 'Corporate Debtor' from its own management and from a corporate death by liquidation."

(iii) ***Y. Shivram Prasad v S. Dhanpal*** -In this case the Hon'ble NCLAT observed as under- ":…we hold that the liquidator is required to act in terms of the aforesaid direction of the Appellate Tribunal and take steps under Sec-230 of the Companies Act. If the member of the 'CD' or the 'Creditor' or a class of creditor like 'Financial Creditors' or 'Operational Creditors' approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the liquidator on behalf of the company will move an application under Sec-230 of the Companies Act 2013 before the Adjudicating Authority i.e. NCLT Chennai Bench in terms of the observation as made in above……"

(iv) ***Jindal Steel and Power Ltd***. v ***Arun Kumar Jagatramka*** – In this case where a promoter of the CD sought authorization in a scheme of compromise under Sec-230 to 232 of the Companies Act 2013, the Hon'ble NCLT directed the liquidator to call a meeting involving the shareholders and creditors of the CD. It was a fine point to decide whether during liquidation such an arrangement could be worked out under law. In fact, an unsecured creditor had filed an application to this effect challenging the order of NCLT at NCLAT. NCLAT while delivering its judgment confirming on the validity of the NCLT directive relied in the above two judgments in the case of *Y. Shivram Prasad v S. Dhanpal & S.C. Sekaran v Amit Gupta & Others* cited above. In the judgment the Hon'ble NCLAT observed that prior to initiating asset sale for the CD, the liquidator must follow the procedure laid down in Sec-230 of the Companies Act 2013. It is mandated that the liquidator concludes this process as stipulated by Sec-230 within a span of 90 days to account for the liquidation period.

V. Conclusion:

From the above reading into the "Code" and "the Act" along with the various judicial pronouncements in this regard, one can see that historically 'compromise or arrangement' has remained the preferred and favoured approach over winding up or liquidation for a debt-ridden entity. Over the years several legal promulgations as well as amendments in the law has been made to create new avenue and broadening up the existing avenues already provided therein. However, it remains important to ensure

that this additional layer of Section 230 should not prolong to delay the revival of the corporate debtor since time remains the essence to realize the objective of the Code by unlocking the blocked capital into the economy of the country. If such processes are not completed on time substantial erosion in value of the assets can take place eventually causing financial losses for all stakeholders as well as for the economy as a whole.

Reference & Resources: -

- BLRC Report dt. 4th November 2015
- Insolvency Law Committee (**ILC**)Report 2020
- Handbook on Liquidation Process by ICAI Committee on Insolvency & Bankruptcy Code – Feb 2024
- IBBI (Liquidation Process) (Amendment Regulation) 2020, w.e.f. 6-1-2020
- IBBI (Liquidation Process) (Second Amendment Regulation) 2022, w.e.f. 16-9-2022
- IBBI (Insolvency Resolution Process of Corporate Persons) (Fourth Amendment) Regulation 2022, w.e.f. 16-9-2022

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS – MORATORIUM GENERAL

Devarajan Raman Liquidator of Kotak Urja (P.) Ltd v. Principal Commissioner Income-tax [2024] 163 taxmann.com 92 (NCLAT- New Delhi)

Where during moratorium period, respondent-Income-tax Department adjusted corporate debtor's tax refund against its outstanding tax demands, such adjustment amounted to a sort of recovery, which violated moratorium and, therefore, respondent was liable to return or pay adjusted amount back to corporate debtor.

CIRP against the corporate debtor was commenced and RP was appointed. Respondent-Income Tax Department filed their claim with RP and same was admitted by RP. Subsequently, a moratorium was commenced and, during moratorium period, Rs. 90.42 lakhs received as a tax refund was adjusted by the respondent against outstanding tax demands. The appellant-Liquidator requested the respondent to refund adjusted amount and later filed an application before NCLT seeking directions to the respondent to refund amount adjusted against the corporate debtor's tax liability during moratorium.

The respondent submitted that maximum time period for CIRP had already passed. However, NCLT vide impugned order, dismissed liquidator's application. It was noted that CIRP period ended on 21-12-2020, however, CIRP process kept continuing until the liquidation order was passed on 3-10-2022.

Held that even if CIRP period was over with no resolution plan on anvil and NCLT was yet to pass liquidation order, a creditor of the corporate debtor could not avail benefit of set-off during this interregnum by claiming that moratorium had ceased to exist. NCLT committed a grave error in holding that moratorium had come to a halt during period of vacuum from expiry of permitted CIRP period till passing of liquidation order and that the respondent was entitled to conduct set-off exercise to realise security interest in terms of section 52. Therefore, refund from Income-tax fell under asset of the corporate debtor and would require to be added to liquidation assets and, therefore, adjustment of said amount towards tax demands prior to liquidation amounted to a sort of recovery by the respondent, which was in violation of moratorium. The respondent was to be directed to refund amount in question to the corporate debtor.

Case Review: Devarajan Raman v. Pr. CIT [2024] 163 taxmann.com 91 (NCLT - Mum.), reversed.

SECTION 95 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - APPLICATION BY CREDITOR

Samiksha Mahajan v. Indian Bank [2024] 163 taxmann.com 160 (Delhi)

Where petitioners challenged NCLT's order, whereby RP was appointed in proceeding initiated under section 95 on ground that it was non-speaking, un-reasoned order and time barred and, thus, not maintainable, matter was to be remanded back to NCLT to consider various objections raised by petitioners on aspect of limitation period and maintainability of section 95 application.

The respondent bank had filed a petition under section 95 seeking insolvency resolution process against petitioners-personal guarantors. NCLT vide impugned order appointed RP. Petitioners challenged NCLT's order before High Court on ground that said order was a non-speaking, un-reasoned order and was time barred and, thus, not maintainable.

Held that since personal insolvency proceedings were initiated against personal guarantors of the corporate debtor, without interfering with impugned order wherein RP was appointed, matter was to be remanded back to NCLT to consider various objections raised by petitioners on aspect of limitation and maintainability of section 95 application.

Case Review : Indian Bank v. Smt. Samiksha Mahajan [2024] 163 taxmann.com 159 (NCLT - New Delhi), Matter remanded.

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

Pratham Expofab (P.) Ltd. v. One City Infrastructure (P.) Ltd. [2024] 163 taxmann.com 206 (SC)

Where application for approval of resolution plan submitted by respondent-SRA was pending before NCLT, however, NCLT, without giving respondent an opportunity to respond directed CoC to consider settlement proposal filed by appellant-ex-director under section 12A, order passed by NCLAT rejecting such directions was to be upheld.

Corporate insolvency resolution process (CIRP) was commenced against the corporate debtor and resolution plan submitted by respondent-SRA was approved by Committee of Creditors (CoC) with 80.84 per cent voting share. An application seeking approval of resolution plan filed by RP was pending before NCLT. Meanwhile, appellant-ex-director of the corporate debtor filed an application under section 12A for settlement, which was allowed by NCLT directing respondent to deposit Rs. 1 crore in CIRP account of the corporate debtor and RP was directed to call a meeting of CoC to examine proposal made by the appellant. The respondent filed an application against NCLT's order on ground that resolution plan of the respondent was approved by CoC and there was no occasion for directing consideration of fresh settlement proposal submitted by appellant to be placed before CoC. NCLAT vide impugned order held that since proposal for settlement was submitted by the appellant when application was pending before NCLT for approval of resolution plan, NCLT ought to have given an opportunity to the respondent to submit a response to application filed under section 12A and, therefore, impugned order passed by NCLT was to be set aside.

Held that there was no reason to interfere with impugned order passed by NCLAT and, therefore, instant appeal was to be dismissed.

Case Review : One City Infrastructure (P.) Ltd. v. Pratham Expofab (P.) Ltd. [2024] 160 taxmann.com 321 (NCLAT- New Delhi), affirmed.

SECTION 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBT

Palaparty Abhishek v. Binjusaria Ispat (P.) Ltd. [2024] 163 taxmann.com 237 (SC)

Where corporate debtor failed to adhere to to terms MoU entered with operational creditor for payment of outstanding amount due and cheques issued by corporate debtor were also dishonoured, debt and default had been proved and, therefore, NCLT and NCLAT rightly admitted application filed under section 9 by operational creditor.

The Respondent-operational creditor raised invoices for supply of goods sold and delivered to the appellant-corporate debtor. An MoU was entered between parties in which the corporate debtor agreed to repay outstanding amount. However, the corporate debtor failed to adhere to terms of MoU and cheques given by the corporate debtor were dishonoured. The respondent issued a demand notice demanding outstanding amount, but in reply to said notice the corporate debtor stated that MoU and cheques were taken forcibly. Thereafter, the respondent filed an application under section 9 before NCLT, which was admitted by NCLT on ground that the corporate debtor executed an MoU and cheques given as part of MoU were dishonoured. NCLAT was of view that there was no coercion as alleged by the corporate debtor and debt and default had been proved and, thus, NCLT rightly admitted application filed under section 9.

Held that on facts, NCLT had rightly admitted section 9 application and, therefore, impugned order of NCLT and NCLAT could not be interfered with.

Case Review : Palaparty Abhishek v. Binjusaria Ispat (P.) Ltd. [2022] 145 taxmann.com 173 (NCLAT - Chennai), affirmed.

SECTION 95 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - APPLICATION BY CREDITOR

Apresh Garg v. Indian Bank [2024] 163 taxmann.com 271 (Delhi)

Where petitioners challenged show cause notice (SCN) issued by respondent-bank declaring petitioners as wilful defaulters in view of fact that, underlying documents forming basis of SCN were not provided to petitioners, petitioners having not been provided with effective opportunity to file reply to SCN, there was direct contravention to principles of natural justice and, therefore respondents were directed to provide all underlying documents, which formed basis of SCN to petitioners.

Corporate Insolvency Resolution Process (CIRP) was initiated against a principal borrower company by NCLT. Subsequently, one of consortium banks i.e., the respondent bank, issued a show cause notice (SCN) and started personal insolvency proceedings against petitioners under section 95. Petitioners filed instant writ petition seeking to set aside SCN on ground that all eleven consortium banks, including the respondent had agreed to transfer petitioner's debt to National Asset .Reconstruction Company Limited (NARCL) and despite nearing completion of this transfer, the respondent bank issued notice, allegedly ignoring RBI's guidelines on wilful defaulters and attempting to declare petitioners as Wilful Defaulters. It was noted that along with SCN notice, no documents were supplied to petitioners.

Held that it was no longer res integra that fair procedure and Principles of Natural Justice, demand that all underlying documents, which form basis of SCN, ought to be provided to concerned party so that an effective reply can be filed and if requisite documents are not provided then, it cannot be said that an effective opportunity has been provided to noticee and, thus, it would be in direct contravention to principles of Natural Justice. It was imperative that all underlying documents, which form basis of a SCN be supplied to notice. Since instant case was still at stage of SCN, respondents were to be directed to provide all underlying documents, which formed basis of SCN to petitioners, within a period of two weeks.

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

Ashish Gupta v. Delagua Health India (P.) Ltd. [2024] 163 taxmann.com 309 (NCLAT- New Delhi)

Where appellant was director of corporate debtor and in response to demand notice issued by appellant claiming outstanding dues amounting to Rs. 40.50 lakhs towards salary corporate debtor raised a dispute that appellant, without prior authorisation had made excess withdrawals aggregating to Rs. 19.33 lakhs purportedly on account of tour and travelling without supporting documents to substantiate such withdrawal, in view of fact that, dispute raised by corporate debtor was not a moonshine dispute or a bluster, NCLT had rightly dismissed section 9 application filed by appellant.

The appellant was a director of the corporate debtor since 11-2-2014. The appellant had not been paid salary from January 2016 till June 2017 amounting to Rs. 40.50 lakh. Said operational debt of the corporate debtor fell due on 30-6-2017 and the appellant tendered his resignation on 2-7-2017 with immediate effect and sent a demand notice to the corporate debtor but when the appellant did not receive any response from the corporate debtor, an application under section 9 was filed before NCLT. The corporate debtor raised a plea of pre-existing dispute stating that the appellant without prior authorisation had made excess withdrawals aggregating to Rs. 19.33 lakhs purportedly on account of tour and travelling without supporting documents to substantiate such withdrawals. Materials had been placed on record to show that the corporate debtor had requested the appellant to provide necessary proof to substantiate such withdrawals vide their e-mails, which remained unanswered. The corporate debtor also alleged that the appellant had signed a consultancy agreement with the corporate debtor and the appellant violated various clauses of said agreement having engaged himself in activities of a competing entity, causing loss to business of the corporate debtor.

Held that after seeing material on record it could be said that dispute raised by the corporate debtor was not a moonshine dispute or a bluster. Thus, NCLT had rightly dismissed said section 9 application.

Case Review: Ashish Gupta v. Delagua Health India (P.) Ltd. [2024] 163 taxmann.com 308 (NCLT - New Delhi), affirmed

SECTION 35 - CORPORATE LIQUIDATION PROCESS - LIQUIDATOR - POWERS AND DUTIES OF

Avil Menezes Liquidator of Sunil Hitech and Engineers Ltd. v. Tata Consulting Engineers Ltd. [2024] 163 taxmann.com 312 (NCLAT- New Delhi)

Where in liquidation proceedings of a corporate debtor, respondent-sub contractor sought a refund of bank guarantee amount by filing a claim, NCLT vide impugned order directed liquidator to accept respondent's claim, leading to an appeal by liquidator on ground that respondent defaulted and caused project delays, justifying invocation of bank guarantee, since there was no evidence of unresolved work or quality issues from respondent, respondent was entitled to a refund of bank guarantee paid by it.

MSPG issued a work contract in favour of the corporate debtor, following which the corporate debtor appointed respondent as a sub-contractor to provide engineering services. The respondent had submitted a Bank Guarantee in terms of the contract between the corporate debtor and the

respondent. Subsequently, the corporate debtor was brought under liquidation proceedings and the appellant was appointed as a liquidator. The respondent in the liquidation process had filed their claim before the Liquidator, which also included a refund of guarantee amount paid. However, liquidator had rejected the claim of the respondent on ground that amount had been paid against bank Guarantee without raising any objections. The respondent filed an application before NCLT seeking directions for Liquidator to accept their claim. NCLT vide impugned order had allowed said application of the respondent. Aggrieved by impugned order, the appellant filed instant appeal on ground that the respondent had defaulted in discharge of its obligations under contract and due to delayed submissions of drawing and design documents by the respondent, entire project of MSPG had been delayed and the corporate debtor had rightly invoked bank guarantee of the respondent having suffered losses. It was noted that there was no material placed on record by the appellant which showed that the corporate debtor had on any occasion denied making payments against invoices raised by the respondent, which showed that the corporate debtor was satisfied with level of services performed by the respondent and, thus, liquidator had not brought on record any substantive evidence that invocation of Bank Guarantee by MSPG was attributable to deficiency in work on part of the respondent, liquidator was to have summarily rejected claim of the respondent.

Held that since there was no communication regarding balance or pending work and there were no specific grievances with regard to inferior quality of work and, therefore, NCLT rightly held the respondent was entitled to refund bank guarantee paid by it.

Case Review: Tata Consulting Engineers Ltd. v. Sunil Hitech Engineers Ltd. [2024] 163 taxmann.com 311 (NCLT -Mum.) (para 20) affirmed See Annex

SECTION 29A - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION APPLICANT - PERSONS NOT ELIGIBLE TO BE

Sumeet Industries Ltd., In re - [2024] 163 taxmann.com 394 (NCLAT- New Delhi)

Where NCLT had rejected resolution plan on ground that it did not meet requirements of section 30, since there was no evidence or material to support finding of non-compliance with section 30(2), impugned order was to be set aside.

During corporate insolvency resolution process (CIRP) of the corporate debtor, resolution plan was submitted by SRA was approved by Committee of Creditors (CoC) with 74.90 per cent voting share. Thereafter, the appellant-Resolution Professional (RP) filed an application seeking approval of said resolution plan. However, NCLT by impugned order rejected said application holding that resolution plan as approved by CoC did not meet requirements of section 30. Aggrieved by rejection of resolution plan, the appellant filed instant appeal. It was noted that NCLT made a bare observation that plan did not confirm to section 30(2). However, there were no reasons or material given as to how plan could be said to be non-compliance of section 30(2).

Held that since there was no consideration of materials or findings based on any material or facts regarding plan being non-compliance of section 30(2), impugned order was to be set aside.

Case Review: Sumeet Industries Ltd., In re [2024] 163 taxmann.com 393 (NCLT -Ahd.), reversed

SECTION 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS – OPERATIONAL DEBT

East India Udyog Ltd. v. SPML Infra Ltd. [2024] 163 taxmann.com 426 (NCLAT-New Delhi)

Where there was a dispute between parties with respect to non-supply of goods, delay in supply and supply of defective goods by appellant-operational creditor to corporate debtor and appellant itself sent e-mail to corporate debtor seeking reconciliation of accounts, which showed that there existed a dispute between parties, NCLT did not commit any error in rejecting section 9 application filed by appellant on ground of pre-existing dispute.

The appellant - operational creditor was in a continuous business relationship with the respondent-corporate debtor, supplying them transformers and other items for which the corporate debtor had issued purchase orders. The operational creditor sent an e-mail to the corporate debtor to clear outstanding dues and requested an early release of payment for goods, but the corporate debtor refused to make payment. Since payments were not released, the operational creditor filed an application under section 9 against the corporate debtor. The corporate debtor refused to accept its outstanding operational debt and alleged that the operational creditor had defaulted in performing its part of obligations. NCLT dismissed said application on grounds of pre-existing dispute. Aggrieved by NCLT's order, the appellant filed an instant appeal. It was noted that prior to receipt of demand notice, the corporate debtor had refused to accept outstanding operational debt, inter alia, on ground of reconciliation of accounts and the operational creditor in its counter affidavit had also admitted that it had given numerous reminders to the corporate debtor prior to reconciliation of account. It was further noted that prior to issuance of demand notice, e-mails from the corporate debtor clearly substantiated that the operational creditor had been notified regarding non-supply of goods, delay in supplies and supply of defective goods, which were clear signs of pre-existing disputes.

Held that since the appellant had itself sent an e-mail to the corporate debtor for reconciliation of accounts, that by itself showed that there existed a dispute between parties regarding amount of debt due and requirement for reconciliation of accounts, as both parties had counterclaims against each other. Therefore, NCLT did not commit any error in rejecting section 9 application filed by the appellant on ground of pre-existing dispute.

Case Review: East India Udyog Ltd. v. SPML Infra Ltd. [2024] 163 taxmann.com 425 (NCLT - New Delhi), affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS – LIMITATION PERIOD

Shrenik Ashokbhai Morakhia v. Reliance Asset Reconstruction Company Ltd. [2024] 163 taxmann.com 459 (SC)

Where a Declaration cum Undertaking issued on 29-01-2018 acknowledged debt, thereby extending limitation period and Supreme Court's order in Suo Motu case excluded period from 15-3-2020 to 28-2-2022 from limitation period and therefore, application filed on 10-8-2021 was well within limitation period.

The corporate debtor obtained a credit facility from original lender i.e., bank, in which the appellant stood as a personal guarantor executed a joint deed of guarantee in favour of the Bank - Meanwhile, account of corporate debtor was declared NPA and,

bank invoked personal guarantee and demanded repayment from appellant - Appellant issued a Declaration-cum-Undertaking in favour of Dena Bank - Later, bank assigned loan facility in favour of respondent no.1 - Thereafter, respondent no.1 filed an application under section 95 against appellant, which was admitted by NCLT - Appellant appealed to NCLAT on ground that application filed under section 95 by respondent no.1 was barred by time - NCLAT upheld NCLT's order on ground that a Declaration cum Undertaking issued on 29-01-2018 acknowledged debt, extended limitation period and Supreme Court's order in Suo Motu Writ Petition (Civil) No. 3 of 2020 excluded period from 15-3-2020 to 28-2-2022 from limitation period and, therefore, application filed on 10-8-2021 was within limitation period - On appeal to Supreme Court - Whether in view of facts, instant Court was not inclined to interfere with impugned order passed by NCLAT and, therefore , instant appeal was to be dismissed.

Case Review: Shrenik Ashok Bhai Morakhia v. Reliance Asset Reconstruction Company Ltd. [2024] 163 taxmann.com 458 (NCLT - New Delhi), affirmed.s

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The articles sent for publication in the journal "The Insolvency Professional" should conform to the following parameters, which are crucial in selection of the article for publication:

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✓ The length of the article should be 2500-3000 words.

✓ The article should also have an executive summary of around 100 words.

✓ The article should contain headings, which should be clear, short, catchy, and interesting.

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