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# 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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## **From the MD & CEO's desk**

### **CMA DR S.K GUPTA**

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Parliament passed amendments to the insolvency law that will help ring-fence successful bidders of insolvent companies from risk of criminal proceedings for offences committed by previous promoters. The Insolvency and Bankruptcy Code (Amendment) Bill, 2020 was passed by voice vote in RajyaSabha. It was approved by LokSabha on March 6. The Bill replaces an ordinance. The bill seeks to remove bottlenecks and streamline the corporate insolvency resolution process. The need for amendment in the IBC arose because of "changing requirement" and "requirement of fine tuning" the law.

The Insolvency and Bankruptcy Code (IBC) came into effect in 2016, becoming the preferred debt default resolution route before we had the IBC, the legal regime was tilted in favour of the debtors. To make sure it doesn't go the way of debt recovery tribunals, there is a need to make sure creditors and debtors don't have an 'equality of arms'. In order to ensure that the IBC does not go the way of the debt recovery tribunals, it is imperative that we build on the unique design of the IBC. The IBC should not revert back to the adversarial legal system where the debtors and creditors have 'equality of arms' and debtors with better resources are able to delay cases. The IBC will escape the bane of case overload if changes in the law and practice are made in the direction to make it more along the lines of an inquisitorial system.

A big advantage with the IBC is that corporate defaults "are being sought to be resolved in actual rather than camouflaged structures". But even bigger advantage is that the promoters of corporate debtors (CDs) are now genuinely scared of losing control over their company, which is resulting in resolution of disputes even before they are taken to the NCLT. With the IBC in place, there is an expectation of responsible borrowing and lending. "That shift in credit culture has been the real gain from the IBC".

# IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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# ARTICLES

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# Section 29A of IBC-Key Issues and Challenges

**-By UrvashiShahi  
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One of the underlying objectives of Insolvency Laws is to ensure higher standards of business and commercial morality. Insolvency laws provide easy exit and fresh start to the genuine entrepreneurs; however, it also makes sure that it does not become an instrument of abuse in the hands of unethical and fraudulent promoters. An effective insolvency law must ensure that promoters are unable to abuse the corporate identity by intentionally pushing the company into a state of insolvency and buying back the entity at a discounted price, thereby hampering interest of all other stakeholders. However, in doing so, striking a correct balance among conflicting interests becomes very important. This is because such measures are detrimental for the economy both in the case of overreach or underreach. The former would prevent business rescues and development of a beneficial rescue culture, while the latter would harm stakeholder's interests.

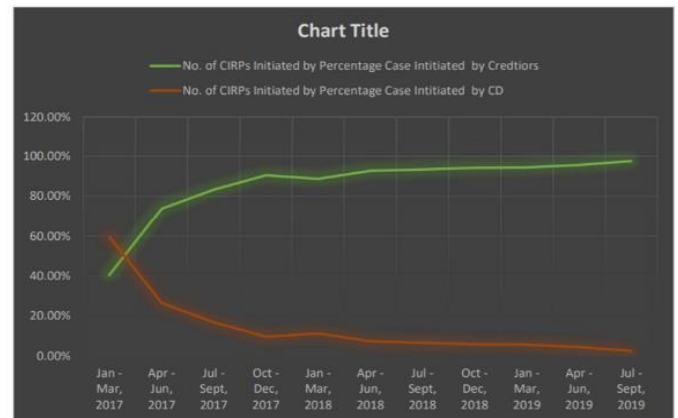
The BLRC though had envisaged such a possibility of abuse of IBC, it had not elaborated on the moral hazards inherent in such practice. Neither did the IBC specifically address it. Only after the Essar episode, the President of India promulgated the Insolvency and Bankruptcy (Amendment) Ordinance, 2017 to restrict certain categories of persons from being eligible as the resolution applicant. Consequently, with concerns being raised about the Ordinance diluting the concept of limited liability, the parliament passed Insolvency and Bankruptcy Code (Amendment) Bill, 2017, thereby, narrowing down certain provisions of the ordinance and introducing section 29A to IBC barring certain categories of persons from bidding as resolution applicants. The eligibility criteria as provided under the aforesaid provision was very wide and subjective. Consequently, the provision was amended in 2018. Since then there have been several attempts by the judiciary to clarify and narrow down the ambit of section 29A, most prominent being Swiss Ribbons case and ArcelorMittal's case, however there are still some concerns which are discussed hereinafter.

Firstly, **Section 29A has clearly failed to differentiate between genuine promoters and fraudulent unethical promoters with the guilty mind.** It accords suspicion on promoters as a class which is a very faulty proposition and is primarily based on past experience of the erstwhile regime (SICA to be specific).

Section 29A does not differentiate between intentional and unintentional wrongs. 29A(g) debars promoters and other persons in management and control where preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction have taken place and an order has been passed regarding the same. However, it is noteworthy that in establishing a preferential transaction (section 42) or undervalued transaction (section 45), the IBC does not require any *mala fide* intent on the part of the corporate debtor or its promoters. An innocuous commercial arrangement without any *mala fide* intent to defraud creditors could

still qualify as a preferential or undervalued transaction under the IBC. Furthermore, knowledge of the promoter or person in control with regard to all aforementioned avoidance transactions is immaterial which means even if the promoter had no knowledge of the same, he will still be ineligible.

Also, 29A(c) bars a person to submit a resolution plan if he has an NPA account under his management and control and a period of one year has passed from such a classification. Though the intent of this clause is laudable, the timeline of one year is questionable especially in certain sectors. Many industry segments run in business cycles and in these business cycles if you have a downturn, it may take more than a year- generally, it takes about two to three years- for this business cycle to turn around. In such a scenario, debarring the promoters or



persons in control from bidding for their erstwhile corporations would be against the objective of section 29-A. In addition to this, it fails to take into account the possibility of bidders hiving off the stake in the entity holding an NPA account, instead of paying off the dues, as attempted by Arcelor Mittal who sold its stake in Uttam Galva. Lastly, it is not necessary that trading on an NPA account for more than a year is always a case of fraud as sometimes the companies might have continued under genuine hope of revival from distress. That being said, companies which are currently undergoing CIRP have already been holding NPA's for more than a year. This provision has excluded whole class of promoters and other persons in management and control of such a company.

This has disincentivized the promoters from availing the easy exit opportunity as provided by the Insolvency and Bankruptcy Code which is very evident by the fall in the number of applications filed by promoters prior and after section 29A was notified. CIRP initiated by the corporate debtor was around 16.74% and fell to lower than 10% in the next quarter and is presently around 2% for the quarter Jul-Sept, 2019. There has been a constant rate of decline around 95% from the Oct - Dec, 2018 period till Jul Sept, 2019. (Refer the graph above)

Secondly **the ambit and reach of this provision is very wide especially in context to related party, connected persons and persons acting jointly in concert**

Section 29A is a restrictive provision. It imposes four layers of ineligibility. First layer ineligibility, where the person itself is ineligible; Second layer ineligibility, i.e. where a "connected person" is ineligible; Third layer ineligibility, i.e. being a "related party" of connected persons; and Fourth layer ineligibility, where a person acting jointly/in concert with a person suffering from first layer/second layer/third layer ineligibility, becomes ineligible.

Interestingly, the term 'person acting jointly or in concert' has not been defined in the Code and using the definition provided in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, stretches the scope of section 29A to unintended widths. In practice, it is unclear whether the term 'connected person' in clause (j) applies to only the resolution applicant



or even 'persons are acting jointly or in concert with such person'. If the latter interpretation is taken, this provision would be applicable to multiple layers of persons who are related to the resolution applicant even remotely. Further, ARCs, banks and alternative investment funds which are specifically excluded from the definition of 'connected person' provided in section 29A may be caught by the term 'person acting jointly or in concert with such person'.

Also, the definition of 'related party' in relation to an individual is extensive bringing a large number of people in the ineligibility criteria. Though, the scope of related party with regard to nexus with the business activity has been clarified in the case of Swiss Ribbons, COC and RP's are still uncertain about the same and raise objections against all any person who happens to be a relative of an ineligible person. This clause has led to more confusion and there is an immediate need of more clarity on the same, preferably by way of an express provision limiting the scope of related parties.

This results in a very wide gamut of prospective resolution applicants to fall within the criteria of ineligibility, ultimately effecting the competition and hampering recovery rates and resolution of distressed corporation.

**Lastly, it has made the process more complex causing further delay in resolution**

Delayed timelines have been the biggest challenge and roadblock for IBC and section 29-A is one of the paramount contributors to the same. Pursuant to its introduction, considerable litigation has been filed in relation to the eligibility of resolution applicants, leading to delays in the resolution process of insolvent entities, thereby undermining the intent of the Code.

### **Suggestion**

We must realize that IBC is not a magic wand to correct all commercial wrongs. The problem which 29A seeks to address is more of a governance issue. Promoters are able to abuse the corporate identity mainly because of differential voting rights. DVR allows them to take decisions which serve their own interest rather than the interest of corporation and other stakeholders at large.

Besides, the core objective of IBC as also envisaged in its preamble is value maximization of corporate debtor. Commercial morality on the other hand is only an underlying aim to ensure long-term value in corporation. Hence due care must be taken that overemphasis on underlying object must not defeat the purpose of the code.

Therefore, there is a dire need to narrow down the scope of section 29A to ensure its economic feasibility. There must not be a blanket ban on connected and related parties. However certain safeguards must be imposed to avoid benami transaction in the garb of relations/connections.

Also, just because of few unscrupulous promoters, whole class must not always be seen under the lens of suspicion.

# RUNNING CORPORATE DEBTOR AS A GOING CONCERN

By Ashok Kumar Gulla,  
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## 1. Background:

1.1 The Insolvency and Bankruptcy code, 2016 ("Code") is an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish the Insolvency and Bankruptcy Board of India for regulating the implementation of Code, and for matters connected therewith or incidental thereto.

1.2 Section 20 of Code on "Management of Operations of Corporate debtor as a going concern" lays down the responsibility on the Insolvency Professional to make every effort to ensure the continuity of going concern status of the Corporate Debtor. Section 20 is reproduced below:

(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority-

(a) To appoint accountants, legal or other professionals as may be necessary;

(b) To enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;

(c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property: Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and

(e) To take all such actions as are necessary to keep the corporate debtor as a going concern

1.3 The main emphasis of the Act is to arrive at resolution of the Corporate Debtor in a time bound manner for maximization of values of assets. This can be better achieved if the

corporate debtor continues to maintain its status as a going concern entity ensuring a considerable value for the entity. Hence, the role of the Resolution Professional is to make all efforts that the corporate debtor continues to remain as a going concern.

1.4 The Corporate Debtor on admission to Corporate Insolvency Resolution Process(CIRP) is behest with liquidity issues as it does not have adequate funds to meet its liabilities. Thus it faces problems in getting adequate credit from suppliers, vendors and also service providers to run its business. The continuation of the operations of the Corporate Debtor is a challenge for the Resolution Professional. The Resolution Professional ought to have adequate negotiation skill and understanding of business profile and financial of the corporate debtor for managing the business operations.

1.5 The Resolution Professional is thus required to understand business profile, negotiate with various stakeholders including customers, suppliers and employees/workers; Manage working capital; monitor cash flows to take necessary steps for improving productivity and liquidity position and to seek approval of Committee of creditors on issues as laid down in Code. All these efforts are required to keep corporate debtor as a going concern.

## **2. Review of Business Profile:**

Each business has its peculiarities in terms of competition, availability of inputs, customer profile, production issue and obsolete items, workmen/employees, flow of orders and terms of trade and regulatory compliance. In order to take control of the operations of the corporate debtor as a going concern, it is pertinent to have a broad understanding of these business dynamics that are explained below:

### **2.1 Competition:-**

Level of Competition and whether the Corporate Debtor has developed niche market. How the Corporate Debtor has been able to cater to the market and face competition in terms of delivery, quality, price and credit terms and how does it compare with the competitors. Discussion with the employee/workmen, customers and visit of various facilities will facilitate understanding of these issues.

### **2.2 Availability of Inputs:-**

The Corporate Debtor engaged in manufacturing or service sector is dependent on various inputs like Raw Materials including spares and tools, power, labour, water and other services to continue with the operations. Each Industry/business has different challenges in terms of availability of these inputs. The Resolution Professional is required to have an immediate review and take measures for timely availability of these inputs.

### **2.3 Customer Profile:-**

The Corporate Debtor is dependent on the orders from customers and have to cater to their requirement in terms of delivery, quality and price. The Resolution Professional will have to understand the customer profile of the Corporate Debtor in terms of length and value of relationship, regularity in receipts of payment, proportionate of total requirement of

products/services by a particular customer and any major issues faced in the past while dealing with these customers. All the information can be gathered by discussing with the concerned employees/workers in sales, marketing and production department. Further, the information can be known on perusal of sales ledger, account recoverable and customer wise ledger. This information will be useful to know the extent a customer is vital for the Corporate Debtor, while negotiating with them on various terms of trade.

#### **2.4 Production issues and obsolete items:-**

The Corporate Debtor is expected to be facing financial crunch when admitted to CIRP. It is likely that it may be facing issues in terms of repairs and maintenance, adherence to quality standards, shortage of various spares, timely availability of raw material and obsolete finished goods that may not be put in use. The understanding of production process through discussion with employees/workers dealing at factory will provide insight on the critical issues that need to be tackled for ensuring that the production does not come to halt.

#### **2.5 Productivity of workmen/employees:-**

The role of workmen/employees in continuing the business of the Corporate Debtor as a going concern is critical. The Resolution Professional will need to carry a dialogue with the employees/workers to seek their co-operation and support. Genuine concerns of workmen/employees need to be understood and they be appraised of various efforts required to keep the Corporate Debtor as a going concern for eventual resolution to protect interest of various stakeholders including workmen/employees. Wherever required excess staff need to be redeployed to improve productivity.

#### **2.6 Flow of orders and terms of trade:**

The Resolution Professional will have to examine all the pending orders and make efforts to get fresh orders from existing and new customers. As the Corporate Debtor is in financial stress, it is likely that the inputs may be offered at a high rate and terms of payment may not be favourable with customers as well as suppliers. The Resolution Professional will have to peruse each such order and examine whether any such orders are at a loss. This will require verification of various costs and terms of trade. The RP may also examine general trade practice in the product/services provided by the corporate debtor to help in further negotiation with the customers and suppliers.

#### **2.7Regulatory compliances:-**

The Resolution Professional will have to understand and ensure various compliances that are required in terms of renewal of various licenses required for operating the business activity, Payment of statutory dues, filings with ROC, stock exchanges and other authorities, finalisation of financial statements, holding meetings at regular intervals as per the requirement of various laws applicable on the Corporate Debtor and such other compliances as are applicable from time to time.

### **3. Working Capital Management**

Effective Working Capital management is a crucial factor in managing various business activities especially in the manufacturing industry. It requires understanding of business cycle. The Corporate Debtor requires raw materials which have to be processed and then converted into

finished goods. These will be dispatched and will be converted into sales (Sundry debtors) and payment will be received based in terms of the credit. Hence Working Capital will be required in maintaining optimum level of stock of raw material, stores and spares, stock in process, finished goods and sundry debtors.

The Corporate Debtor will have to assess total Working Capital requirement so as to sustain the production and arrange for funding accordingly. In a stress situation, managing Working Capital is a difficult proposition and require control of various expenses and negotiation with various stakeholders.

The Corporates are generally short of Working Capital funds which impact production and timely delivery. Thus it requires managing with limited Working Capital in a liquidity strain situation. To overcome this situation, optimum level of inventory and receivables have to be determined and efforts made to arrange for working capital funds to meet these requirements.

### **3.1 Inventory Holding:-**

The Corporate Debtor will have to maintain optimum level of inventory of Raw material, stock in process, Finished Goods, stores and spares. The levels are based on availability of these materials, time taken in ordering, alternate sources, minimum ordering quantity etc.

#### **a) Raw Materials**

In case raw material is available locally and there are large number of suppliers and no difficulty is envisaged in its procurement, the Resolution Professional may decide to hold a minimum level of stock of Raw Material to save on working capital. However, if there are difficulty in procuring these materials with long ordering period, sufficient inventory of Raw Material is required to avoid any production loss. The RP may be able to arrive at these levels after looking to past trend after discussion with production and marketing team. He/She also need to negotiate with major suppliers to seek their support in getting these materials in time and assuring of timely payment so that there is no discomfort/disruption in supplies. The RP may take necessary steps to sell any obsolete materials.

#### **b) Stock in process**

The Corporate Debtor will have to maintain regular production process to remain as a going concern. The level of working capital funds that remain blocked in stock in process will be based on the total time taken in production process. The RP is required to examine the time taken at various stages of production and to cut delays. This will reduce the funds blocked in stock in process. These insufficiencies generally creep in when the Corporate Debtor is in financial stress.

#### **c) Stores and Spares**

Certain item of stores and spares are found to be critical for continuity of production process and it is required to maintain their adequate stock.

#### **d) Finished Goods (FG)**

The Corporate Debtor need to maintain a minimum level of FG so as not to block the working capital funds in higher inventory. The RP and his team need to carry out analysis/scrutiny of these at regular intervals so as to minimize funds blocked in finished goods.



### **3.2 Receivables Management:-**

The Corporate Debtor may have long pending receivables which need to be followed up so as to improve cash flows. Further, RP and his team needs to have a relook on the credit afforded to various customers and whether payments are received as per credit terms. The Corporate Debtor may examine various measures required to reduce funds blocked in receivables by offering discounts and concentrating on those customers who are regular in making payment. A regular follow up with customers to realize payment is of paramount importance and various employees in sales/marketing need to be entrusted to discharge the role.

### **3.3 Supplier's credit:-**

The Corporate Debtor procure raw materials and various services either on credits or on an immediate cash basis. Availability of credit on purchases reduces the strain on the working capital requirements. Thus the RP should contact with various creditors for suppliers in this regard and also assist them in submitting claims during CIRP for any pending dues. The RP should also make arrangement for making payment to these suppliers during CIRP Period, as also recently amended in Code. All these measures will help to gain credibility of Corporate Debtor with their suppliers.

### **3.4 Managing working capital:-**

Despite the availability of orders in hand for sale, Corporate Debtor may not be in a position to procure sufficient quantity of raw material and execute the orders, mainly due to paucity of funds. Hence, working capital management is crucial to maintain "going on concern" status of Corporate Debtor. This can be achieved by control on various components of current assets and current liabilities that go in continuing Production/ Services.

## **4. Monitoring Cash Flows:**

The Resolution Professional is required to have a strict control on cash flows of the Corporate Debtor. He/She needs to coordinate with various banks where the Corporate Debtor maintains account and extract all relevant information regarding the current position of such accounts. The banks need to be communicated regarding permitting outflow from these bank accounts only with approval of RP and include his/her name in the authorised signatory.

- a) Cash budget for minimum next three months will provide insight on the availability of funds and their utilization. The employees will need to follow up for realization and comparing it with budgeted level and finding specific areas which need to be monitored. Follow up meetings could be arranged to discuss the receipt and payments position. If any funds shortage is observed, corrective measures should be initiated to reduce any other expenses.
- b) Proving Payments - The RP need to devise mechanism depending on the specific requirement of each Corporate Debtor to approve payment either by him/her or his/her team member so that effective control on the operation and cash flows is maintained. The RP need to seek specific approval of Committee of Creditors(CoC) as per section 28(h) of IBC,2016 for delegating its authority to any other person, if required.

- c) Follow up of sale proceeds - The Corporate Debtor will be in a position to continue as a going concern only when it is proactive in follow up in sales realization. The RP need to assign this task to various employees in accounts and finance/sales and marketing so that this important task does not remain unattended. Regular meetings need to be conducted with the concerned employees to follow up on these issues.

## **5. Interim Finance:**

- a) It is likely that the Corporate Debtor may be facing liquidity issues due to various reasons including losses and funds blocked in obsolete stock and bad debts. It may not be possible to manage the business operations with the internal cash flows and thus it may require interim finance for funding the business.
- b) The RP needs to examine the financial position of the Corporate Debtor including available cash flows and determine minimum working capital fund requirement to arrive at possible options. A cash budget needs to be prepared that will project deficit in the short term range (3-6 months) that need to be funded.
- c) The RP will have to first satisfy that the Corporate Debtor can generate orders and execute them at a positive EBITDA level. If it results in negative EBITDA, it is reflective of the non-viability and cannot sustain for a long period. Thus RP will have to first satisfy that the going on concern status will be at positive EBITDA level or not.
- d) These issues needs to be discussed in meeting of CoC and specific approval as required under Section-28 of IBC,2016 needs to be obtained for raising such finance.
- e) The RP may put forth his views/analysis with the CoC regarding need for such Interim financing that could help in maximization of value of Corporate Debtor.
- f) Interim financing may come with creation of security interest on assets of Corporate Debtor. The assets of the Corporate Debtor that are already charged in most cases with Financial Creditors (Banks), hence, prior approval of existing lenders are required to be obtained for extending charge on such assets for securing Interim Funding. Generally, the interest rate charged by NBFC and Banks who are active in providing Interim funding for Corporate debtor who are in CIRP is very high. The RP should examine all the pros and cons of raising interim funding.

## **6. Dealing with Committee of creditors (CoC):**

The Committee of Creditors (CoC) has a crucial role in approving various actions to be initiated by RP and also in approving Resolution Plan. The aim of the Code is to facilitate resolution of the Corporates that are undergoing insolvency. The efforts in this direction include continuity of the operations as a going concern.

Section 28(1) of Code lays down the actions where approval of CoC is required for further carrying out the process that also include following:

- a) Raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;
- b) Create any security interest over the assets of the corporate debtor;  
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- f) Undertake any related party transaction;  
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- h) Delegate its authority to any other person;  
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In furtherance to above, Regulation 29 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 allows resolution professional to sell unencumbered asset(s) of the corporate debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realisation of value under the facts and circumstances of the case. A sale of assets under this Regulation shall require the approval of CoC.

Keeping in view the role of CoC in the resolution process under Code, RP is expected to apprise the CoC about every relevant information/data pertaining to Corporate Debtor enabling the members of CoC to take appropriate action wherever necessary. Also, the RP shall evaluate the assets of the Company and its current status

to decide whether there are any assets that can be sold in terms of Regulation 29 and place the matter before CoC. This shall enable the RP to dispose of such assets and realise a better value to the Corporate Debtor.

The Resolution Professional may also provide facts w.r.t. operations of the Corporate Debtor to CoC, that includes following:

- Monthly performance giving details of Sales, EBITDA, PBT & PAT;
- Monthly cash flows;
- Details of account recoverable;
- Details of various litigations;
- Pending statutory dues and compliances;
- Details of Interim finance approved and availed; and

Any other such information, as relevant for the Corporate Debtor

All the above information is vital for continuing corporate debtor as a "going concern". The Resolution Professional may take necessary feedback from members of CoC on these issues as it will help in bringing transparency in the entire process.

### **Conclusion**

The continuation of Corporate Debtor as a going concern is dependent on various permutations and combinations and no specific approach may be applicable in every case. The suitable strategies have to be devised depending on each case and have to negotiate with all the stakeholders to seek their cooperation with the broader aim of bringing value to each stakeholder. The employees/workers are interested to continue the Corporate Debtor as a going concern so that their jobs are not impacted. The RP may demand support/cooperation from workers/employees. The suppliers may be benefitted if Corporate Debtor continues as a going concern and generate adequate revenues. To negotiate with the suppliers for affording higher credit. The expertise RP gains over a period of time goes long in resolving these issues that will work well for the Corporate Debtor to continue as a going concern and eventual resolution under CIRP

# COMPANIES UNDER IBC-QUARANTINE, GET GST-REBIRTH

**By Vinod Kothari**  
**Vinod Kothari Consultants**

Resolution is not a re-birth of an entity – it is simply like nursing a sick entity back to health. It is almost akin to putting the company under a quarantine – immune from onslaught of creditor actions, while the debtor and/or the creditors prepare a revival plan. The objective is that the entity revives – in which case, it is out of the isolation, and is back as a healthy entity once again.

This process is not unknown in insolvency laws world-over. However, in India, revival under insolvency framework has taken a completely unique trajectory. First was section 29A, cutting the company from its promoter-lineage for all time to come. The next was section 32A – redeeming the company from the past burden of civil as well as criminal wrongs, thereby giving it a new avatar, with a new management.

Now, the initiation of a CIRP proceeding will be akin to a new birth to the company, at least for GST purposes. Therefore, irrespective of whether the revival process succeeds or not, at least for GST purposes, the entity becomes clean-slate entity. This is the result of the new GST rule announced on 21st March, 2020. However, the new rules do not seem to have envisaged several eventualities, and we opine the intent of giving an immunity from past liabilities might have better been carried out by appropriate administrative instructions, rather than the new registration process.

## **Background and the new GST registration requirement**

The 39th GST council meeting held on 14th March, 2020 addressed various issues relating to extension of time for annual returns, changes in GST rates and other measures. One of the important decisions presented in the meeting was relating to the rules pertaining to entities undergoing Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC). The GST Council has notified new rules providing a special process of a new registration for CIRP companies vide notification 11/2020 [1] on 21st March, 2020.

The move of the GST Council in notifying the said rules can be seen as a resolution of the issues/difficulties being faced by entities under CIRP, particularly the inability to claim ITC for the CIRP period without clearing all past tax liabilities. This difficulty arose from the setting of the GST rules whereby past tax liabilities have to be cleared before seeking any input tax credit or other benefit. Thus, the intent of the above notification may be noble: to permit the revival proceedings to continue without having to be burdened with past liabilities, which, obviously, become a claim to be filed along with those of other liabilities of the corporate debtor. It seems that there have been several representations in this regard.

Assume the following situation: X Ltd goes into CIRP and a resolution professional takes over. On the date of commencement of the CIRP, X Ltd had pending GST dues of Rs. 5 crores in a particular jurisdiction. Now, during the CIRP period, the RP still makes outputs; he makes purchases too. He pays GST on the inward supplies, and charges GST on the outward supplies. He wants to make a payment of the current GST liability. However, when he makes a payment, there is an issue since utilisation of the cash ledger is first done to clear the pending dues of the Corporate debtor, post which the regular return can be filed. Thus, the RP is neither able to comply with the requirement of GST returns, nor is able to pay the GST dues during the CIRP period. In essence, the burden of the past dues continues to spill over during the CIRP period as well.

In the case of *R. Ravichandran, RP vs. The Asst. Commissioner (ST) Kilpauk Assessment Circle & 12 Ors*[2], the National Company Law Tribunal, Chennai Bench (NCLT), held that held that a corporate debtor can access its GST Portal Account for filing GST Returns generated after the commencement of the corporate insolvency resolution process ("CIRP") period before clearing the pre-CIRP dues. The NCLT observed that blocking the access to the GST Portal will result in barring the corporate debtor to generate bills related to GST. The NCLT also stated that if the corporate debtor is allowed to run on going concern basis then it should be allowed to pay taxes as well. The NCLT also held that the Tax Authorities fall within the ambit of Operational Creditors and they can recover the GST dues, for the period prior to the CIRP, by making a claim to the resolution professional against the corporate debtor as per the provisions of IBC.

To address the above issue, the GST Council has come up with the notification with the special procedure to be followed by corporate debtors undergoing CIRP.

### **Overview of the Notification**

The Notification provides that the registered persons who are corporate debtors as per IBC undergoing the CIRP and the management of whose affairs are being undertaken by Insolvency Resolution Professional (IRP) or Resolution Professional (RP) shall follow the procedures as explained below from the date of appointment of the IRP/RP till the period they undergo CIRP:

- **Registration:**
- **Cases initiated under IBC post 21st March, 2020**

With effect from the date of appointment of IRP / RP, the entities are required to be treated as a distinct person, that is, seek a separate registration in each of the States or Union territories where the corporate debtor was registered earlier, within 30 days of the appointment of the IRP/RP.

### **Example:**

Let us suppose X Ltd., is registered for GST purposes in multiple states/ Union Territories (UTs)

In all, this means registration in states/ UTs where the company sells its outputs and has registrations.

Now, if X Ltd gets into CIRP on 1st April, 2020, the IRP/RP will have to apply for a new GST registration for all the above registrations, within 30 days for commencement on CIRP.



As everyone knows, the first 30 days are also the period for transitioning from the IRP and the RP. Hence, it is not clear whether the IRP will do this job, or leave this for the RP, who may actually come into office only near-about the expiry of the 30-day period.

The registration dates back to the date of appointment of the IRP, that is, to the date of commencement of CIRP.

### **Cases under CIRP as on 21st March, 2020**

Where the IRP/RP has been appointed prior to the date of this notification, he shall take registration within 30 days from the commencement of this notification, that is, by 20th April, 2020. The registration will date back to the date of his appointment as IRP/RP.

### **Returns:**

After obtaining registration, the person shall file the first return which shall be pertaining to period from the date of commencement of CIRP, till the date on which registration has been granted.

### **Input tax credit(ITC):**

The registered person shall be eligible to avail ITC for the supplies received during the period from the date of commencement of CIRP, even though such supplies are bearing the GSTIN of the erstwhile registered person, subject, of course, to the usual conditions for availing ITC. Likewise, those persons who have acquired goods or services from the erstwhile registered period shall get input tax credit, subject to usual conditions.

There is nothing in the Notification about carried forward ITC of the erstwhile registration, as on the date of commencement of the CIRP. One would have expected that the carry-over of ITC with the corporate debtor is available for set off on the date of commencement of the CIRP, and therefore, this should have also been allowed to be availed by the newly registered entity. However, the Notification clearly mentions about "the supplies of goods or services or both, received since his appointment as IRP/RP", which makes it clear that the benefit of the carry forward of ITC shall not be available to the new registration.

### **CBIC clarification**

The Central Board of Indirect Taxes and Customs has issued a clarification dated 23rd March, 2020[3]. While it seeks to address some of the concerns of CIRP entities – particularly about cancellation of registration, or taking of coercive steps by the Tax department for continuing GST defaults, it does not provide any clarity on any of the issues raised above.

### **Our Analysis**

The Notification of the GST Council has several gaps, and will create massive confusion.

First of all, the 30 days' time after initiation of CIRP is the time for the IRP to receive claims and call for meeting of the creditors. The IRP is not firmly footed into the process, as his own appointment is not yet ratified. In many cases, the IRP is succeeded by a new RP.[4] The new RP may come, say, on the 29th day of the initiation of the CIRP. The IRP had 30 days' time for seeking new registration – which he may not have done so far. The RP will have barely a day. Therefore, the 30-day time itself is impractical.

The idea behind the Notification was to unburden the CIRP entity from the past liabilities. That could have better been done by an administrative instruction, rather than by seeking a new registration. Even if a new registration was considered logistically necessary, the same may have been optional. For instance, there may have been a carry forward of ITC, rather than unpaid taxes. Unfortunately, the Notification does not leave any discretion at all.

The opening para of the Notification talks about seeking new registration "from the date of the appointment of the IRP/RP *till the period they undergo the corporate insolvency resolution process*" (*emphasis supplied*), which seems to suggest that the new registration is a purely temporary measure, and pertains only to create a hiatus between the CIRP period, and the pre-CIRP or post-CIRP period. Does this mean that once the CIRP period is over, the erstwhile registration will once again come back to life? If that is the intent, then the very purpose of protecting the entity under CIRP from the burden of existing liability will not be fructified. If this is not the intent, then the notification should have talked about continuation of the new registration.

CIRP may result into several possible evolutionary possibilities:

- The entity may get revived under a resolution plan
- The entity may slip into liquidation
- The CIRP proceedings may get withdrawn following the process of sec. 12A
- The CIRP initiation itself may get reversed by NCLAT or further appeals.

The Notification has not envisaged what will be the consequences in each of the above situations.

For example, if the CIRP proceedings get withdrawn, does it mean the erstwhile registration will once again come back to life? In that case, what will happen to the new registration?

Even worse will be the case where the initiation of CIRP itself is quashed on appeal. In that case, the initiation process itself is completely erased out, so that there was no CIRP *ab initio*. Surely there cannot be any consequence of such initiation in such cases. Hence, the IRP/RP's office ceases immediately. In many cases, appeal orders are received after months of the initiation. So, in the meantime, the IRP/RP may have sought registration already. That new registration will now have to merge with the erstwhile registration. Once again, this is completely unnecessary burden.

## Conclusion

The above notification may have been inspired by noble intent, but it leaves several issues unanswered.

[1] <http://egazette.nic.in/WriteReadData/2020/218849.pdf>

[2] MA 1298/ 2019 in IBA/ 130/ 2019- [https://nclt.gov.in/sites/default/files/final-orders-pdf/KIRAN%20GLOBAL%20CHEM%20LTD%20-%20MA1298%20IN%20IBA130\\_0.pdf](https://nclt.gov.in/sites/default/files/final-orders-pdf/KIRAN%20GLOBAL%20CHEM%20LTD%20-%20MA1298%20IN%20IBA130_0.pdf)

[3] <http://www.cbic.gov.in/resources//htdocs-cbec/gst/circular-cgst-134.pdf>

[4] It may be noted that prior to Amendment introduced in section 5 (12) read with 16 (1) *vide* IBC (Amendment) Bill, 2020, the date of appointment of IRP and commencement of CIRP did not necessarily coincide, and hence would have led to a gap in implementation of the GST registration requirements. However, given that w.e.f. 28.12.2019, the IRP shall be appointed on the same day as commencement of CIRP, the said loophole has been removed

# AMENDMENTS

## ***Here are key announcements made by Finance Minister Mrs. Nirmala Sitharaman for Indian Inc:***

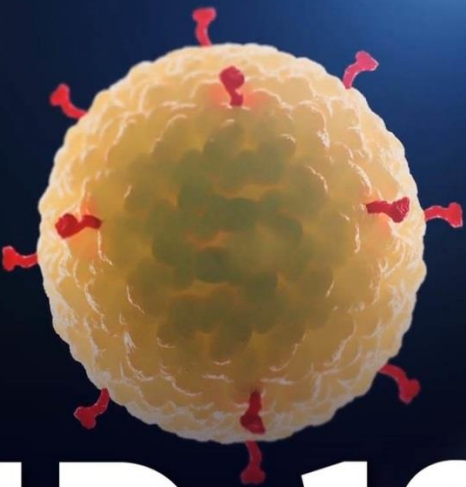
- For the companies with less than Rs 5 crore turnover, no interest or late fee or penalty will be charged for late filing of GST return. For bigger companies, penalty will be charged at a lower rate.
- In a bid to protect smaller companies, the existing threshold for Insolvency and Bankruptcy Code (IBC) raised to Rs 1 crore from Rs 1 lakh earlier.
- If the situation continues beyond April 30, sections 7, 9 and 10 of IBC may be suspended for six months to stop firms being forced to insolvency.
- Requirement of holding board meetings has been relaxed for 60 days for two quarters.
- Newly incorporated companies will be given additional 6 months for declaration of commencement of business.
- For 2019-20, if independent directors have not been able to hold a single meeting, it will not be seen as a violation.
- Moratorium on MCA-21 registry from April 1, 2020.
- The government to reduce bank charges for digital trade transactions for all trade finance consumers.
- Deadline for investing 15 per cent of debentures maturing during a particular year into specified instruments extended to June 30.
- Directors who do not comply with the minimum residency requirement of 182 days will not be held in violation.
- Applicability of companies auditors' report order 2020 extended to 2020-21.
- Customs clearance will operate 24X7 up to June 30 as an essential service.
- Due dates for issue of notice, intimation, notification, approval order, sanction order, filing of appeal, furnishing of returns, return statements, applications, reports, and any other documents have been extended to June 30, 2020.
- • All compliance by the taxpayers, including investment and savings instruments for rollover benefit of capital gains under Income-tax Act, Wealth Tax Act, Prohibition of Benami Property Transaction Act, Black Money Act, STT law, CTT law, Vivad Se Vishwas law, and others, have been extended to June 30, 2020.

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COVID-19

*Government of India is  
taking all necessary steps  
to ensure that we are  
prepared well to face the  
challenge and threat  
posed by the growing  
pandemic of COVID-19  
the Corona Virus*



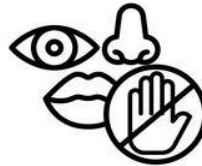
# COVID-19



**WASH YOUR HANDS** often with soap and water for at least 20 seconds, especially after going to the bathroom; before eating; and after blowing your nose, coughing, or sneezing.



If soap and water are not readily available, use an alcohol-based hand sanitizer with at least **60% ALCOHOL**. Always wash hands with soap and water if hands are visibly dirty.



**AVOID TOUCHING** your eyes, nose, and mouth with unwashed hands.



**AVOID CLOSE** contact with people who are sick.



**STAY HOME** when you are sick.



Cover your cough or sneeze with a tissue, then **THROW THE TISSUE IN THE TRASH**.



**CLEAN AND DISINFECT** frequently touched objects and surfaces using a regular household cleaning spray or wipe.



Wear N95 face **MASKS**





Ministry of Health & Family Welfare  
Government of India

# Novel Coronavirus

## Frequently Asked Questions

Q) What is 2019 Novel Coronavirus ?

Ans- 2019 Novel Coronavirus, or 2019-nCoV, is a new virus first identified in Wuhan, Hubei Province, China. It is named novel as it has not been previously identified.

Q) What is the source of 2019 Novel Coronavirus ?

Ans- At present exact source of infection of 2019 novel Corona virus has not been identified. Coronaviruses are a large family of viruses, some causing illness in people and others that circulate among animals. Initially, many of the patients in the outbreak in Wuhan, China reportedly had some link to large seafood and animal market, suggesting the virus likely emerged from an animal source.

Q) What are the initial symptoms of Novel Coronavirus ?

Ans- Current symptoms reported for patients with 2019-nCoV include acute onset of fever, cough, and difficulty in breathing.



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Call Centre/Helpline for any technical query on #nCoV



Ministry of Health & Family Welfare  
Government of India

# Novel Coronavirus

## Frequently Asked Questions

**Q) How does the virus spread ?**

**Ans-** The specific modes of transmission of the virus is not clear yet since it is a novel virus. This virus probably originally emerged from an animal source but now seems to be spreading from person-to-person. It's not clear yet how easily 2019-nCoV spreads from person-to-person. It is thought to have happened mainly when an infected person coughs or sneezes, similar to how influenza and other respiratory pathogens spread.

**Q) What is Govt doing about 2019-nCoV ?**

**Ans-** A 24\*7 helpline has been setup by the Govt at NCDC, New Delhi to answer all queries regarding the disease. The Govt is closely monitoring the situation and has ascertained the level of preparedness in every State of India. As this is an emerging, rapidly evolving situation the Govt will continue to provide updated information as it becomes available.

**Q) Is there a vaccine to get protection from 2019 novel Corona Virus ?**

**Ans-** Currently, there is no vaccine available to protect against 2019- novel Corona Virus.



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Ministry of Health & Family Welfare  
Government of India

# Novel Coronavirus

## Frequently Asked Questions

Q) Is it safe to travel to Wuhan, China or other countries where 2019-nCoV 2019 cases have occurred?

Ans- All nonessential travel to China is to be avoided.

If the travel is unavoidable- At all times follow the simple public health measures

- Observe good personal hygiene
- Monitor your health closely
- Seek medical attention promptly if you feel sick
- If you feel sick during travel, inform airline crew about your illness and seek mask from the airline crew
- For further details kindly check Travel advisory issued by MoHFW, GoI available on website ( [www.mohfw.gov.in](http://www.mohfw.gov.in))

Q) What are the treatments ?

Ans- There is no specific antiviral treatment available for 2019- novel Corona Virus infection. People infected with 2019- novel Corona Virus should receive supportive care to help relieve symptoms.



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Ministry of Health & Family Welfare  
Government of India

# Novel Coronavirus

## Frequently Asked Questions

Q) How can I help protect myself ?

Ans- There is currently no vaccine to prevent 2019-nCoV infection. The best way to prevent infection is to avoid being exposed to this virus.

- All non-essential travel to China or affected countries\* to be avoided.
- Observe good personal hygiene.
- Practice frequent hand washing with soap.
- Cover your mouth when coughing and sneezing.

\*The list of affected countries is available on WHO website ([www.who.int](http://www.who.int)) and would be updated time to time.

Q) What should I do if I had close contact with someone who is a confirmed case of 2019-nCoV?

Ans- Self monitor your health starting from the day of last contact with such a case and continue for 28 days. Watch for the development of acute onset of signs and symptoms

- Fever
- Cough
- Shortness of breath or difficulty in breathing

If you observe any of the above symptoms visit the nearest health facility for further advice and treatment. Further you must furnish the details of exposure of such patient to your health care worker .



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Call Centre/Helpline for any technical query on #nCoV





Ministry of Health & Family Welfare  
Government of India

# Novel Coronavirus

## Frequently Asked Questions

Q) Should I be tested for 2019- novel Corona Virus ?

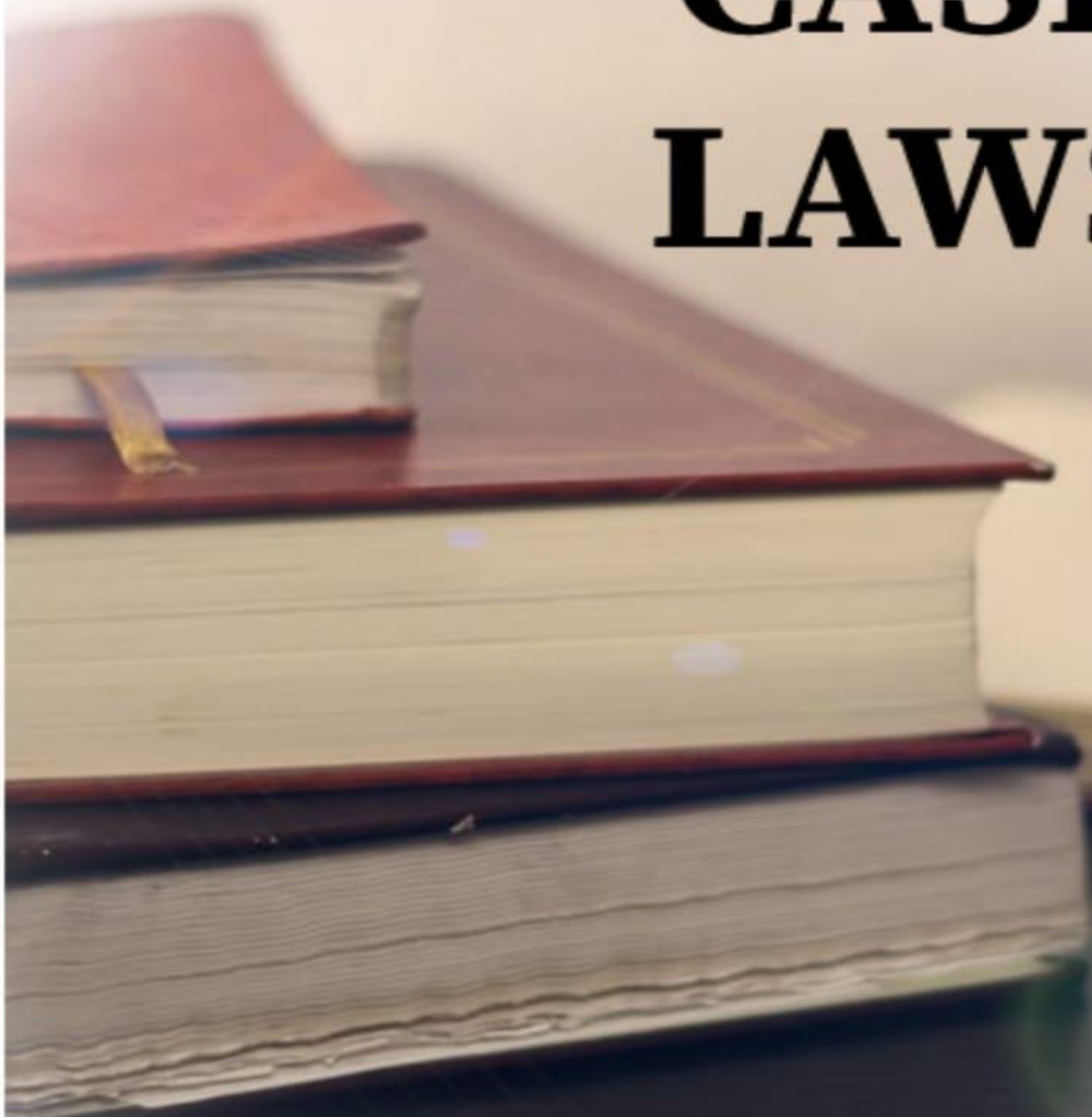
Ans- If you develop acute onset of fever and symptoms of respiratory illness, such as cough or shortness of breath, you should visit nearest health facility and the doctor's will decide if you need to be tested for 2019- novel Corona Virus depending upon your history of travel to China/ affected countries or contact with any suspected/ lab confirmed case.



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# CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY  
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA



## **SECTION 70 - CORPORATE PERSON'S OFFENCES AND PENALTIES - PUNISHMENT FOR MISCONDUCT**

- **Mahesh Kumar Panwar v. Mega Soft Infrastructure (P.) Ltd. - [2019] 108 taxmann.com 401 / 155 SCL 489 (NCL-AT)**

Where contempt proceedings were initiated against Ex-Directors of corporate debtor on account of allegation of Resolution Professional that they did not cooperate in CIRP, in such a situation appeal filed by those Ex-directors questioning working of Resolution Professional was to be dismissed with a direction to Ex-directors to raise their grievances before Adjudicating Authority. One 'A' was appointed as Resolution Professional/Liquidator of the respondent-corporate debtor. 'A' filed an application by invoking provisions of section 425 of the Companies Act, 2013, read with sections 70 and 72 before the Adjudicating Authority wherein it was alleged that despite directions by the Adjudicating Authority from time to time, Ex-Directors of the 'corporate debtor' were willfully disobeying to cooperate. The Adjudicating Authority thus initiated contempt proceedings against Ex-Directors of the corporate debtor. It was in such circumstances, the appellant, one of Ex-Director of the corporate debtor, contending that they had fully cooperated with the Resolution Professional, filed an application questioning his working as 'Liquidator'. The Adjudicating Authority rejected said application thus, instant appeal was filed.

Held that in view of the fact that contempt proceedings had already been initiated against Ex-Directors of the corporate debtor, instant appeal was to be dismissed with a direction to the appellant to raise all issues before the Adjudicating Authority.

**Case Review :** Neelam Singh v. Mega Soft Infrastructure (P.) Ltd. [2019] 108 taxmann.com 400 (NCLT - New Delhi), affirmed.

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## **SECTION 238A - LIMITATION PERIOD**

- **Vashdeo R Bhojwani v. Abhyudaya Co-operative Bank Ltd. - [2019] 109 taxmann.com 198 / 156 SCL 539 (SC)**

Where recovery certificate for non payment of loan amount was issued in year 2001, petition filed under section 7 on 21-7-2017 i.e., beyond three years, from default was time barred.

The respondent No. 2 was declared NPA on 23-12-1999 by bank for default in payment of loan amount. A recovery Certificate dated 24-12-2001 was issued for that amount. A petition under section 7 was filed by the bank on 21-7-2017 before the NCLT which was admitted by the NCLT stating that as default continued, no period of limitation would attach. The NCLAT upheld said order.

Held that since recovery certificate was issued on 24-12-2001, default had occurred over three years prior to date of filing CIRP application and, therefore, claim in application was time barred in terms of article 137 of Limitation Act, therefore orders of NCLT and NCLAT were to be set aside.

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## **SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM**

### **- GENERAL**

➤ **Rotomac Global (P.) Ltd. v. Deputy Director, Directorate of Enforcement - [2019] 108 taxmann.com 397 / 155 SCL 250 (NCL-AT)**

Section 14 is not applicable to proceedings under Prevention of Money Laundering Act, 2002. The Bank of Baroda initiated 'Corporate Insolvency Resolution Process' against the appellant (Corporate Debtor). After the conclusion of the 'corporate insolvency resolution process' in absence of any viable and feasible resolution plan, the Adjudicating Authority ordered for liquidation of the 'Corporate Debtor'. The liquidator found that the Directorate of Enforcement had provisionally attached property of the corporate debtor under the Prevention of Money Laundering Act, 2002. The Liquidator filed an application for direction on Directorate of Enforcement for release of assets of the 'Corporate Debtor'. The Adjudicating Authority rejected said application.

Held that since Prevention of Money Laundering Act, 2002 and its provisions relate to proceeds of crime, section 14 of the I&B Code is not applicable to proceedings under the said Act.

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

**BattulaAnjaneyulu v. DBM Geotechnics& Constructions (P.) Ltd. - [2019] 108 taxmann.com 403 / 155 SCL 39 (NCL-AT)(MAG)**

Where much prior to issuance of demand notice, corporate debtor raised a dispute regarding work done by operational creditor, application under section 9 was rightly rejected by Adjudicating Authority

The corporate debtor was specialized in creation of port infrastructure. It accepted contract to carry out piling work and other related civil works under the tender floated by the Government and outsourced said work to the operational creditor. The operational creditor raised bills and invoices. Part payments were made by the corporate debtor, however, the corporate debtor failed to make payment of outstanding amount. In response to the demand notice, the corporate debtor raised a dispute that the operational creditor failed to maintain desired progress of works and as a result, completion periods of projects were prolonged, which attracted imposition of liquidated damages, termination of principle contract, forfeiture of security deposits etc. It was also alleged that since, the operational creditor was not forthcoming for making good losses despite various request, it filed a suit before the High Court. Further, prior to issuance of demand notice various emails were sent by it to the operational creditor in this regard.

Held that there being pre-existing dispute, instant petition to initiate CIRP against the corporate debtor was rightly rejected by the Adjudicating Authority.

**Case Review** :BattulaAnjaneyulu v. DBM Geotechnics& Constructions Ltd. [2019] 108 taxmann.com 402 (NCLT - Mum.), affirmed.

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## **SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS – DISPUTE**

**Karpara Project Engg. (P.) Ltd. v. BGR Energy Systems Ltd. - [2019] 108 taxmann.com 502 / 155 SCL 289 (NCL-AT)**

Where there was provision for levy of liquidated damages in work order for delay in execution of work by operational creditor, and a dispute regarding levy of liquidated damages was existing much prior to issuance of demand notice, CIRP was uncalled for

Under two work orders, the operational creditor was awarded contract by the corporate debtor for execution of pre-assembly, erection, testing and commissioning of boiler and other plants in respect of Thermal Power Project. In contract there was a provision of liquidated damages for delay in execution of work. After completion of works, the operational creditor raised retention bill and also sought return of bank guarantees. Upon issuance of demand notice by the

operational creditor, the corporate debtor made counter claim of liquidated damages as per work order for delay in execution of work by the operational creditor.

Held that since there was pre-existing dispute much prior to issuance of demand notice thus, triggering of corporate insolvency resolution process at instance of operational creditor was uncalled for.

**Case Review** :Karpara Projects Engg. (P.) Ltd. v. BGR Energy Systems Ltd. [2018] 97 taxmann.com 536 (NCLT - Hyd.), affirmed.

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## **SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS – DISPUTE**

➤ **Girish Surajmal Chandak v. Nandlal Giridhar Popat - [2019] 108 taxmann.com 507 / 155 SCL 492 (NCL-AT)**

Where lessee entered into a lease deed with lessor and issued some post dated cheques towards compensation payable to lessor, however, alleged payment to lessor were withheld for want of performance in terms of said lease deed, since, there was a pre-existence of dispute application under section 9 was to be rejected.

The corporate debtor entered into a lease deed with operational creditor. As per lease deed the corporate debtor issued some post-dated cheques towards compensation payable to the operational creditor, but same were dishonoured on presentation. In response to the demand notice, the corporate debtor raised a dispute that the operational creditor had failed to fulfil its obligations in terms of said lease deed and, thus, much prior to issuance of demand notice, it filed a civil suit and sought to restrain the operational creditor from en-cashing cheques for want of performance of obligations in terms of said Lease deed.

Held, that since there was pre-existing dispute between parties, instant application to initiate CIRP against the corporate debtor was to be rejected.

**Case Review** :NandlalGiridharPopat v. Samadhan Marketing [2019] 108 taxmann.com 506 (NCLT - Mum.), set aside.

## **SECTION 9 - CORPORATE INSOLVENCY RESOLUTION PROCESS - APPLICATION BY OPERATIONAL CREDITOR**

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➤ **NUI Pulp and Paper Industries (P.) Ltd. v. Roxcel Trading GMBH - [2019] 108 taxmann.com 356 / 155 SCL 462 (NCL-AT)**

*Once a CIRP application is filed, Tribunal need not await hearing of parties and it can pass interim order restraining corporate debtor misusing process of Tribunal.*

The operational creditor filed an application under section 9 against the corporate debtor before the Adjudicating Authority. The corporate debtor sought time to file reply. The operational creditor submitted that there was an apprehension that the corporate debtor and its directors were intending to sell the assets of the corporate debtor to defeat the purpose of the Code and cause wrongful losses to all the creditors. When the Tribunal asked for submitting an undertaking to this effect, the corporate debtor denied to give any such undertaking stating that it would act taking into consideration the necessity of the corporate debtor company for its day to day functioning. The Tribunal, exercising the power conferred under rule 11 of the NCLT Rules, 2016, passed an interim order restraining the corporate debtor and its directors from alienating, encumbering or creating any third party interest on the assets of the corporate debtor company. The corporate debtor preferred appeal contending that before admission of an application under section 7 or 9, the Tribunal had no jurisdiction to restrain the corporate debtor and its directors from alienating, encumbering or creating any third party interest on the assets of the corporate debtor.

Whether once an application under section 7 or 9 is filed before Adjudicating Authority, it is not necessary for Adjudicating Authority to await hearing of parties, or for passing of order of 'Moratorium' under section 14; it is always open to Tribunal to pass appropriate interim order to ensure that one or other party may not abuse process of Tribunal and ends of justice are met.

**Case Review** :Roxcel Trading GMBH v. NUI Pulp and Paper Industries (P.) Ltd. [2019] 108 taxmann.com 355 (NCLT - Chennai), affirmed.

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**SECTION 30 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - SUBMISSION OF**

➤ **Hero Fincorp Ltd. v. Rave Scans (P.) Ltd. - [2019] 109 taxmann.com 225 (NCL-AT)/[2020] 157 SCL 183 (NCL-AT)**

*Where, in revised resolution plan there had been discrimination in distribution of claimed amount to appellant, a 'Secured Financial Creditor' with similarly situated 'Financial Creditors', revised*

resolution plan being violative of section 30(2)(e), similar treatment as provided to other similarly situated 'Financial Creditors' was to be provided to appellant

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

➤ **Saravana Global Holdings Ltd. v. Bafna Pharmaceuticals Ltd. - [2019] 108 taxmann.com 358 / 155 SCL 240 (NCL-AT)**

*Where promoter of corporate debtor, an MSME, offered a viable resolution plan maximizing assets and balancing all stakeholders, it was open to CoC to admit said resolution plan and to defer issuance of information memorandum*

The corporate debtor was an MSME. CIRP proceeding against respondent-corporate debtor was initiated. The resolution plan submitted by promoter of said MSME was approved by the CoC and the Adjudicating Authority. The resolution plan met all requirements of section 30(2)

Held that since corporate debtor was a MSME, its promoters were eligible in terms of section 29A. Further, since promoters had offered a viable and reliable plan maximising assets of corporate debtor and balancing all stakeholders, it was open to CoC to defer process of issuance of information memorandum and at instant stage no opportunity was to be given to other creditors to file their offer.

**Case Review** :Aries v. Bafna Pharmaceuticals Ltd. [2019] 108 taxmann.com 357 (NCLT - Chennai), affirmed.

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

➤ **B. ArunEashwar v. OPG Power Generation (P.) Ltd. - [2019] 108 taxmann.com 574 / 155 SCL 297 (NCL-AT)**

Where prior to constitution of CoC, parties had reached settlement, order admitting application under section 9 was to be set aside

Application by the operational creditor to initiate CIRP against the corporate debtor was admitted by the NCLT. The CoC had not been yet constituted when parties reached to a settlement.

Held that NCLT should close CIRP proceedings and terms of settlement should be complied with by parties in its letter and spirit.



**Case Review** :OPG power Generation Pvt. Ltd. V. Balu Spinning Mills Pvt. Ltd. [2019] 107 taxmann.com 474 (NCLT - Chennai), reversed.

## **SECTION 18 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INTERIM RESOLUTION PROFESSIONAL - DUTIES OF**

➤ **Sri Krishna Constructions v. Vasudevan - [2019] 108 taxmann.com 530 / 155 SCL 280 (NCL-AT)**

CIRP process cannot be converted into adjudication forum to settle claims already in dispute in Court; where IRP did not find that operational creditor made out its claim with support of appropriate documents, impugned order passed by Adjudicating Authority rejecting claim of appellant could not be interfered with.

CIRP application under section 7 was admitted in case of the corporate debtor and the IRP was appointed. The appellant claiming to be an operational creditor moved to the IRP with its claim of more than 17 crores. It was noted that as per section 18, the IRP is required to receive and collate all claims submitted by creditors and for collating, the IRP has to receive claims and examine same.

Held that, in instant case while examining, the IRP did not find that claim was made out by the appellant with support of appropriate documents and the Adjudicating Authority did not find anything wrong with act of collating done by the IRP, therefore, there were no reason to interfere with impugned order passed by the Adjudicating Authority rejecting claim of the appellant.

**Case Review** :Sri Krishna Constructions v. Vasudevan [2019] 106 taxmann.com 369 / 154 SCL 66 (NCLT- Chennai ), affirmed.

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## **SECTION 238A - LIMITATION PERIOD**

➤ **GauravHargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd. - [2019] 109 taxmann.com 395 / 156 SCL 397 (SC)**

Where respondent filed an application under section 7 on 3-10-2017 to recover debt from respondent No. 2 which had been declared NPA on 21-7-2011, said application was time barred as time began to run on 21-7-2011.

Respondent No. 2 was declared NPA on 21-7-2011. The State Bank of India assigned aforesaid debt to the respondent No. 1. Respondent No. 1 filed application under section 7 on 3-10-2017 in order to recover debt together with interest.

Held that in instant case an application was filed under section 7, same was to fall within residuary article 137 of Schedule to Limitation Act providing for three years of period of limitation and since time started from 21-7-2011, CIRP application filed after six years was time barred.

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

### ➤ **Shyam Kumar Garg v. Sunrise 14-A/S Denmark - [2019] 109 taxmann.com 113 (NCL-AT)**

*Where parties had reached settlement much prior to constitution of 'Committee of Creditors', application filed by operational creditor under section 9 was to be dismissed as withdrawn*

An application filed under section 9 in case of the corporate debtor was admitted by the Adjudicating Authority. Before constitution of the CoC, parties had reached settlement.

Held that the operational creditor was to be allowed to withdraw said application filed under section 9 which had already been admitted by the Adjudicating Authority.

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

### ➤ **VandanaGarg v. Reliance Capital Ltd. - [2019] 108 taxmann.com 581 / 155 SCL 477 (NCL-AT)**

CIRP Process could not proceed in absence of RP; thus, where there was delay in appointing RP in place of IRP, said delay was to be excluded for counting 270 days

CIRP was initiated against the respondent-corporate debtor. On recommendation of the CoC, the Interim Resolution Professional was removed and Resolution Professional was appointed in place of Interim Resolution Professional. There was delay of 35 days in appointing Resolution Professional.

Held that since corporate insolvency resolution process could not proceed in absence of Resolution Professional, period of delay was to be excluded in counting limitation period for completing Resolution Process.

## **SECTION 3(12) OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 – DEFAULT**

### ➤ **State Bank of India v. Visa Infrastructure Ltd. - [2019] 109 taxmann.com 469 (NCL-AT)**

Where members of instant Bench were equally divided on material issue of debt and default matter was to be placed before third judge for his opinion

Company VSL borrowed money from the financial creditor bank. The corporate debtor stood as a conditional guarantor whose liability would be valid till principal borrower VSL brought in additional equity of Rs. 125 crores over and above contribution of Rs. 325 crores by the promoters of VSL. The financial creditor submitting that the corporate debtor in his capacity as a corporate guarantor failed to repay principal amount along with interest to the financial creditor, filed application under section 7. Said application was rejected by the Adjudicating Authority on ground that the corporate debtor discharged obligation as per terms of guarantee and therefore, there was no debt due from the corporate debtor. However, on appeal it was found that members of instant bench differed in their judgments and were equally divided on material issue of debt and default. As per the Judicial member, VSL had merged with another company VBL and Corporate Debt Restructuring Forum led by the financial creditor had approved merger. On amalgamation, assets valued for an amount of Rs. 575 crores were infused in VSL and since instant merger had resulted in infusion of Rs. 125 crores by way of asset valuations, obligation of the corporate debtor as a guarantor was discharged and there would be no debt due to the financial creditor from the corporate guarantor. Thus, according to him, no debt being payable, question of default did not arise at all and conclusions drawn by the Adjudicating Authority leading to rejection of application under section 7 could not be termed erroneous. However, according to the technical Member on amalgamation of VBL and VSL, only 35 per cent share of net assets of VBL had been merged in borrower company VSL amounting to Rs. 11.052 crore which was less than additional equity of Rs. 125 crore. Thus, he came to the conclusion that debt was due as claimed by the financial creditor from the corporate debtor.

Held that registry was to immediately place record before chairperson for constituting an appropriate Bench (Third Judge) for his opinion so that judgment could be rendered in accordance with opinion of majority.

**Case Review** :State Bank of India v. Visa Infrastructure Ltd. [2019] 102 taxmann.com 261 (NCLT - Kolkata), reversed.

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## **SECTION 5(20) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL CREDITOR**

➤ **P.R. Earnarst v. Ajantha Flat Owners Association - [2019] 109 taxmann.com 149 (NCL-AT)**

Where flat owners association had neither supplied any goods nor given services to builder, it could not be claimed to be operational creditor

The corporate debtor/builder had entered into a Joint Development Agreement (JDA) with members of the respondent Association for construction of apartments. The corporate debtor completed structure of apartments, but failed to complete substantial work related to other facilities including provisions for two gensets. The corporate debtor asked the respondent to complete pending work on their behalf and whatever cost incurred, same would be paid by them to the respondent. In this way, the respondent incurred cost of Rs.4 lakhs for purchase of two generators. The corporate debtor failed to honour its commitment thus, the respondent filed application to initiate CIRP against the corporate debtor. It was noted that respondents had neither supplied any goods nor given services, thus, they could not claim to be operational creditor. Further, parties had settled matter and in terms of settlement, expenditure incurred by the respondent for installation of generator had been paid.

Held that impugned order passed by the Adjudicating Authority admitting CIRP application under section 9 was to be set aside.

**Case Review** :Ajanta Flat Owners Association v. Green Peace Construction (P.) Ltd. [2019] 109 taxmann.com 148 (NCLT - Chennai), reversed.

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