JULY,2020

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) is a Section 8 Company incorporated under the Companies Act -2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enrol 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 fulfil 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 endeavour 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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CEO MESSAGE

In view of the recent COVID situation, corporate insolvency resolution filing under IBC has been suspended for six months for any debt defaults post March 25, 2020. Therefore, many companies and lenders would not be able to utilise the restructuring framework under the IBC during these 6 months even if they wish to do so. The Delhi High Court has sought the Centre's reply on a plea challenging the Insolvency and Bankruptcy Code (IBC) ordinance which suspended proceedings against defaults arising on or after March 25 for six months in view of the COVID-19 pandemic.

A recent order of the National Company Law Appellate Tribunal (NCLAT) has rekindled the debate over what is the best option for banks and other creditors to recover their dues—resolution of the case monitored by court or out of court settlement with the lenders. NCLAT, which earlier this week allowed withdrawal of a case and allowed Burda Druck India Pvt. Ltd., a corporate debtor, to run independently on settlement of dues with an operational creditor, highlights the way a large number of India's bankruptcy cases are handled. Official data showed that since the Insolvency and Bankruptcy Code and the judicial ecosystem came into force in December 2016, the number of cases withdrawn on settlement of dues is as high as 157, while 221 and cases have been resolved under tribunals.

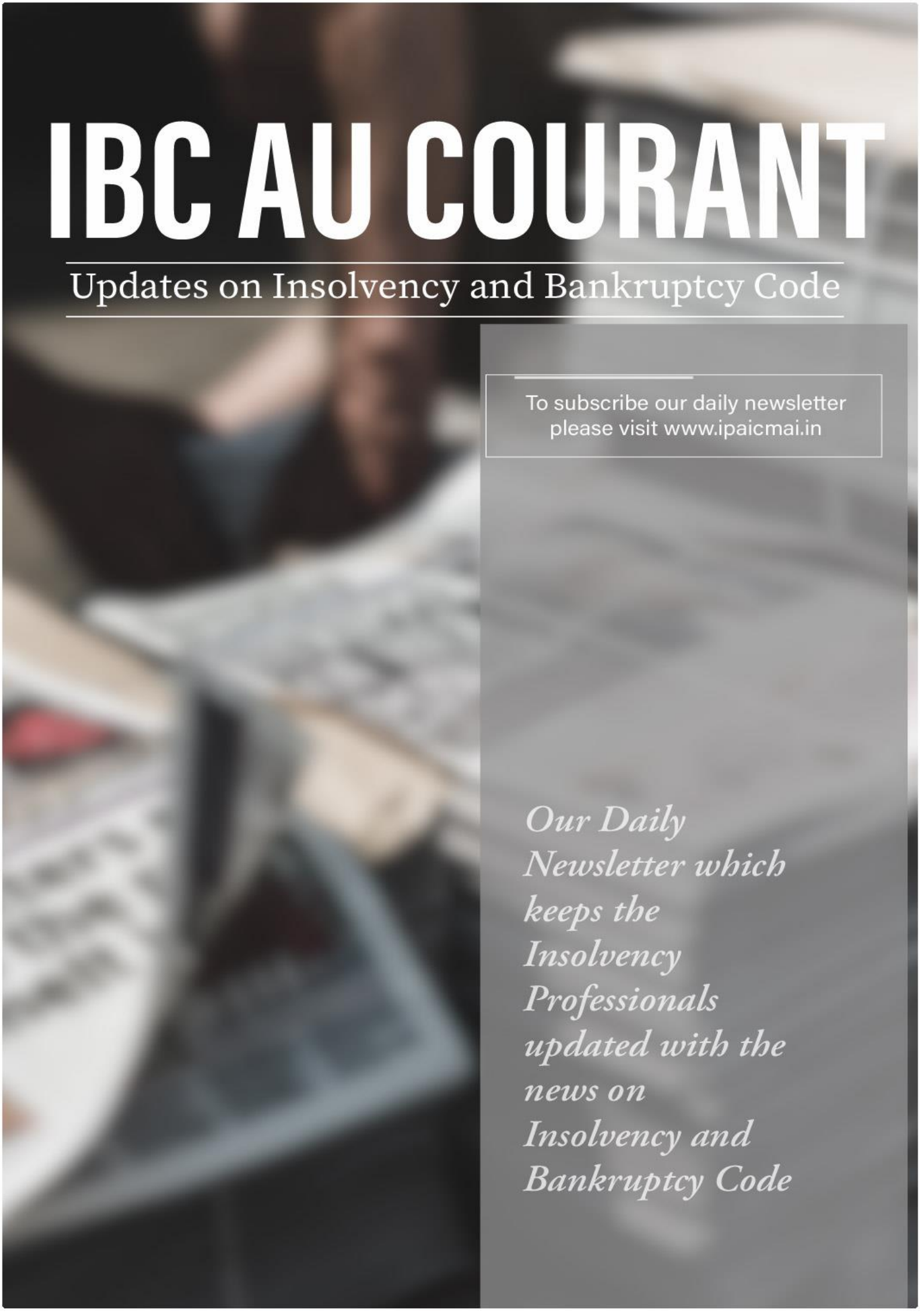
Under the Insolvency and Bankruptcy Code, resolution professionals and liquidators are required to determine whether corporate debtors concerned were subject to avoidance transactions. Against this backdrop, the Insolvency and Bankruptcy Board of India (IBBI) has come out with the detailed document titled 'Avoidance Transactions - Red Flags'. An insolvency professional is duty bound to file an application with the adjudicating authority seeking claw back of the value lost in avoidance transactions. The red flags will alert an insolvency professional if and where the corporate debtor has been subjected to avoidance transactions, and facilitate him pursue the matter further,

PROFESSIONAL DEVELOPMENT INITIATIVES

Insolvency Professional Agency of Institute
of Cost Accountants of India

EVENTS CONDUCTED

JULY,2020	
Date	**Events**
6th - 9th July 2020	Master Class on IBC
10th -12th July 2020	Preparatory Educational Course
20th- 24th July 2020	Master Class on Valuation
27th July ,2020	Round Table discussion on Avoidance Transaction



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

WHY MORE CASES GO FOR LIQUIDATION RATHER RESOLUTION UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016

Mr. Ashok Gulla

Insolvency Professional

I. Background:

The Report of the Bankruptcy Law Reforms Committee dated 4th November, 2015 was the basis for enacting Insolvency and Bankruptcy Code, 2016 ("Code"). While describing about the sound bankruptcy law, Committee pointed out that there may be many firms, being insolvent but possessing useful organisational capital, which can be protected, by way of restructuring of liabilities, and in the hands of a new management team and a new set of owners. The objective of the bankruptcy process, thus, is to create a platform for negotiation between creditors and external financiers which can create the possibility of such re-arrangements.

The Insolvency and Bankruptcy Code lays down two stages for the recovery of dues of the stakeholders whose hard earned money have been struck in these entities. The first stage calls for the resolution of the entity undergoing insolvency, through a viable resolution plan by third party (known as "Resolution Applicant") ensuring fair treatment for all class of stakeholders. Where no viable resolution is received/ approved within a time frame, the entity goes into Liquidation being the second stage for recovery of such entity.

Speed is the essence for the working of the bankruptcy code, specially, for a going concern. There are chances of better recovery in case the entity is sold as going concern through resolution and thus, Liquidation is considered as a last resort in the Bankruptcy Code. With time, the value of assets deteriorates and there is possibility the stakeholders may not get adequate value for the entity, if there is continuous delay in getting a plan and ultimately leading to liquidation. The Code, therefore, has established a time bound Corporate Insolvency Resolution Process ("CIRP") of 180 days that can stretch to maximum of 270 days. During the process, all efforts are put in reviving the going concern and inviting a viable resolution plan.

The key objective of Code is resolution of corporate persons in a time bound manner for maximization of value of their assets by way of a credible and viable resolution plan transferring its control to the new management and owners. This is a beneficial tool for both the stakeholders and the entity and also for the overall economy. Liquidation should be the last resort where no viable resolution plan received/approved for the entity. This fact has also been emphasized through various legal judgements that resolution of the corporate debtor be the first priority. However, based on the data of cases admitted in Corporate Insolvency Resolution

Process (CIRP) during last three years, more cases have ended up in liquidation rather than resolution as detailed in Para II below. An attempt has been made in this article to highlight major reason for this trend and what can be done to invite more resolutions for the corporate debtor.

II. A look at the status of cases under Code:

a. Current status of cases of CIRPs as on 31.12.2019*

Particulars	**No of Cases**
Admitted	3312
Closed on Appeal/Review/Settled	246
Closed by Withdrawal under section 12A	135
Closed by Approval of Resolution Plan	190
Closed by Commencement of Liquidation	780
Ongoing	1961

**IBBI Newsletter for Quarter ended December 31, 2019*

b. CIRP Ending with Orders for Liquidation*

State of CD at the commencement of CIRP	**No. of CIRP initiated by**			
	FC	**OC**	**CD**	**Total**
Either in BIFR or Non-functional of both	215	249	97	561
Resolution Value ≤ Liquidation Value	263	295	102	660
Resolution Value > Liquidation Value	57	31	26	114

**IBBI Newsletter for Quarter ended December 31, 2019*

c. Status of Liquidation Process as 31.12.2019*

Status of Liquidation	**No of Cases**
Initiated	780
Cancelled	4
Final Report submitted	51
Closed by Dissolution	40
Closed by Going concern sale	1
Ongoing	**725**

> Two years	22
> One year ≤ Two years	250
> 270 days ≤ 1 year	94
> 180 days ≤ 270 days	84
> 90 days ≤ 180 days	148
≤ 90 days	127

**IBBI Newsletter for Quarter ended December 31, 2019*

d. Circumstances under which AA passes an order for liquidation*

Circumstance	**Number of Liquidations**	
	Where Final Reports submitted	**Ongoing**
AA did not receive resolution plan for approval	26	317
AA rejected the resolution plan for non-compliance with the requirements	0	36
CoC decided to liquidate the corporate debtor during CIRP	25	195
CD contravened provisions of resolution plan	0	03
Total	**51**	**551**

**IBBI Newsletter for Quarter ended December 31, 2019*

III. Significant Factors leading to Liquidation:

a. Companies are defunct/dormant in nature:

From the records shown above in table (a) of Para II, 57.74% of the CIRPs, which were closed, ended in liquidation, as compared to 14.06% ending with a resolution plan. However, important thing to note is that 72.48% of the CIRPs ending in liquidation (561 out of 774 of which data is available) were earlier with BIFR and or defunct. The economic value in most of these CDs had already eroded before they were admitted into CIRP. Hence, one of the major factors for more cases going into liquidation is the large backlog of cases, which were Non Perfuming Assets (NPAs) for long period with Banks and had no activity going on gone into Liquidation. As these old cases of default are dealt with, chances are that fresh cases at the initial stage of insolvency will find resolutions.

b. Limited information disclosed at the time of EOI:

- The process submitting the resolution plan begins with identifying the Prospective Resolution Applicants ("PRAs") who are found eligible to submit a viable resolution plan for the Corporate Debtor. It commences with inviting Expression of Interests ("EOIs") in a specified format in accordance with Regulation 36A and 36B of CIRP Regulations. The Committee of Creditors ("CoC"), in consultation with Resolution Professional ("RP") as per Sec 25 (2) (h) of the Code, approves the eligibility criteria for identifying potential Applicants based on their net worth/ financials/Asset under Management and such other criteria.

- Advertisement plays a crucial role in catching the interest of the Investors. However, generally and also due to limited resources with the Corporate Debtor, publication is restricted to a particular Newspaper in the Area where registered office and principal office is located and not widely published, however, there may be Strategic and Financial Investors including Venture Capitalist Funds in various parts of the Country and other countries that may also be interest in acquiring the Entities under CIRP. In such cases, the purpose of releasing advertisement fails to gets the attention of the large number of Investors.

- There is time to submit the EOIs and there are chances that PRAs may miss out the deadline and fail to submit EOIs within the prescribed timelines. As per Regulation 36A (6) of CIRP Regulations, the EOI received after the time specified in the invitation shall be rejected and thus any PRA who shows interest after the last date is restricted to participate in the process.

- The Format in which EOI is invited contains restricted details about the Corporate Debtor such as name, incorporation date and locations of Corporate Debtor which is not sufficient enough as the Investor needs more detailed information like Business operations, product and services in which the company is engaged, Size of the company, level of Operations, details of assets and liabilities etc. to evince interest in submitting EOI.

- During the entire EOI submission process that stretches to 115 days or more under CIRP Regulations, RP is not allowed to share IM nor any other relevant information relating to Corporate Debtor with PRAs until the final list of PRAs is released under Regulation 36B. PRAs in absence of any relevant information, fail to evaluate the business potential of the corporate debtor and thus do not submit the EOIs or either asks for time extension to submit EOIs. This specifically creates an issue for PRAs being Companies as they might require approval from Board Members to express their interest in acquiring any entity.

- It is felt that a considerable time is spend in the process for inviting EOI from Prospective Resolution Applicants, preparing a Provisional list of these Applicants, seeking objections if

any to the Provisional List and thereafter issuing a Final List of these Perspective Resolution Applicants. Due to limited publicity and information available on these entities in public domain, despite efforts made by RP and his team, not many EOI may be received. Further, any PRA who wish to participate after the last date of submission of EOI is not permitted. The process of inviting EOI acts as a hindrance alluring of more resolutions and need to be suitably modified.

c. **Limited time for PRAs to carry due diligence and submit Resolution Plan**

- During the entire EOI submission process that stretches to 115 days or more under CIRP Regulations, RP is not allowed to share IM nor any other relevant information relating to Corporate Debtor with PRAs until the final list of PRAs is released under Regulation 36B. The process up to release of Final List of PRAs is to be completed with 115 days of CIRP Commencement Date. The process is further stretched by extending the date to submit EOIs for attracting more investors. The PRAs who are in the Final List are eligible to submit the resolution plan.

- In order to access Information Memorandum, access to data room, copy of Request for Resolution Plan ("RFRP") and Evaluation Matrix. and other relevant data, PRAs had to provide confidentiality undertaking under Section 29(2) of Code and in some cases a refundable deposit as per the terms of RFRP. PRAs may often delay in providing the undertaking and refundable deposit which further results in delay of due diligence.

- CIRP being a time bound process of maximum of 270 days, it leaves very less time for PRAs after getting possession of IM, to carry proper due diligence of Corporate Debtor and prepare a viable resolution plan. There might be various issues/queries pertaining to IM or Corporate Debtor raised by PRAs which might not get resolved within time.

- Further, while conducting due diligence, PRAs often come across the information related to litigations ongoing against Corporate Debtor under various statutes, status of assets owned by the Corporate Debtor, technology being used by them and business operations. PRAs require time to evaluate the impact of such information on their proposal and whether it is feasible to submit the plan or not. Also, there is no clarity in IBC or relevant law regarding continuation of such litigations, once the resolution plan gets approved.

- Owing to the limited time period to submit the plan and without having resolved such issues on time, PRAs either backs out from the process or submit a resolution plan with low resolution amount and subject to various conditions that may not be acceptable to CoC.

- Limited time available to complete due diligence and lack of clarity on how various issues pertaining to litigations and statutory dues will be dealt in the Plan also have made some PRAs to back out and not to submit any resolution Plan. A clarity on all these issues will go well in getting more resolution Plans.

d. Difficulties in Due Diligence Process:

- The timeframe to conduct CIRP is allowed for 180 days subject to one time extension of 90 days. During the aforesaid period, Resolution Professional prepares Information Memorandum Document ("IM") which is the charter documents for Prospective Resolution Applicants. While preparing the document; RP seeks documents/information/clarification/explanations from management/officers-in-charge/KMPs/employees of the company who generally do not provide full information to the RP or provides information subject to various disclaimers. Based on the available information; RP prepares IM which may not provide entire details of the Corporate Debtor holistically even after providing inclusive information as required by CIRP Regulations. Further, as per IM, RP is not required to provide any future projections of performance. The information provided by RP in IM is with disclaimers.

- Prospective Resolution Applicants in the process of due diligence find it either not worth pursuing or consider significant discounting of the assets of the company in Financial Proposal.

- Subsequently, members of CoC have limited insight till the time of receiving of Resolution Plan and concentrate on financial consideration of Resolution Plan rather than following the intent of the Code to balance the interest of stakeholders. After finding Resolution Value below the expectation of CoC due to various limitation, major chunk of cases with COC get rejected paying the path of Liquidation.

e. **Low resolution value offered by Resolution Applicant**:

- One of the important and key factor contributing in liquidation of companies under CIRP is the low resolution amount offered in Resolution Plan. As per the details shown in table (b) of Para II, out of total of 1335 cases where CIRP ended with Liquidation, in 660 cases i.e. 49.43% the resolution value offered by a resolution applicant is less than the liquidation value.

- At the initiation of CIRP of the Corporate Debtor, IRP had to prepare the Information Memorandum ("IM") in accordance with Regulation 36 of CIRP Regulations accumulating

the relevant information w.r.t. Corporate Debtor. The information has to be shared with Potential Resolution Applicants enabling them to carry out due diligence to submit a feasible resolution plan. However, IM also contained liquidation value determined by the valuers under IBC. As a result, many Applicants began to submit the resolution plan with an offer amount near to the Liquidation Value. CoC could not get fair value for the entity resulting in loss of their recovery ultimately resulting in Liquidation. The requirement to add liquidation value in IM was later removed with Amendment w.e.f. 31.12.2017.

- Pursuant to the amendment dated 31.12.2017, value of Corporate Debtor determined in CIRP is not disclosed to the Resolution Applicant. Thus, the offer amount is decided based on information shared through IM and due diligence carried out. The offer amount is further discounted considering industry trends, market position of Corporate Debtor and Applicant's assumption of future cash flows from the business of Corporate Debtor. The amount offered, thus, is either between liquidation and fair value or even lower than liquidation value.

- Additionally, there may also be situation where Resolution Applicant instead of moving through CIRP prefer to acquire assets in Liquidation at much lower price than they have to offer in CIRP. Thus due to limited competition, PRAs prefer to keep the resolution Amount low.

- Members of CoC are expected to take care of interest of all stakeholders while approving or rejecting the plan, however, in practice they are interested only to bargain on the financial offer to be received by them. Hence, many resolution plans get entangled in legal issues at the level of Adjudicating Authority thus impacting approval and implementation of resolution Plan. All these issues need to be addressed through modifications in the relevant regulations.

f. Resolution Plan not in accordance with IBC and/or conditional:

- The Resolution Professional has to ensure that the Resolution Plan is in compliance with Section 30 of Code and contains content as mentioned in Regulation 37 and 38 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"). There are instances where the Resolution Plan is not approved by CoC or AA as it does not comply with relevant provisions of IBC or the Resolution Applicant is found to be not eligible under Section 29A to submit the plan.

- Often the plan submitted by Resolution Applicant is conditional subject to various reliefs and concessions sought by Tribunal such as waivers of penalties from non-compliance

pertaining to period prior to CIRP, continuation of licenses/permits required to operate business of Corporate Debtor thus resulting in non-approval of resolution plan.

- This trend can be reversed by improving the eco system through which more PRAs are interested to participate which should include also Financial creditors, ARCs and strategic Investors; bringing clarity on various issues regarding legal and tax matters and including these in the relevant regulations and improvement in the process.

g. Significant Delay in approving the Plan by AA:

- Bhushan Power and Steel Limited, Essar Steel Limited, Ruchi Soya, Amtek Auto are the benchmark to evaluate the process under IBC and various issues that have evolved over a period of three years of the Code. The CIRP for these cases can be traced back to 2016 and 2017 and over two years have expired since then, when they ultimately got a conclusion to their CIRP.

- Multiple litigations at the stage of AA, Appellate Tribunal and Supreme Court were initiated by erstwhile promoters/directors, operational creditors, members of CoC and Resolution Applicant challenging the CIRP process, resolution plan at every possible forum. The major grounds for the litigation were non-consideration of resolution plan submitted by promoters of Corporate Debtor, low resolution amount offered to operational creditors, challenging the applicability of PRA under Section 29A of IBC to submit plan, reliefs and waivers sought in resolution plan and attachments by various authorities.

- These have resulted in an unprecedented delay in approving of resolution plan and closure of CIRP. The continuous delay on account of approval of resolution plan often loses the interest of PRAs to continue with the plan and they may back out from proceeding the same. It also results in significant loss to financial creditor in terms of interest as well as to Corporate Debtor as with time, the value of its assets deteriorate.

IV. <u>Section 230 of Companies Act, 2013 – Another Opportunity?</u>

- The main intent of IBC is maximization of value of assets of Corporate Debtor and in order to ensure the very much objective remains in force, even after CIRP fails, the law introduced provisions of selling Corporate Debtor as going concern under Regulation 32 of IBBI (Liquidation Process) Regulations, 2016 ("Liquidation Regulations") where it wants Liquidator to endeavour to sell Corporate Debtor as going concern within first three months of Liquidation.

- The law also introduced Regulation 2B in Liquidation Regulations giving another opportunity to Interested Bidders to submit a Scheme of Compromise or Arrangement under Section 230 of Companies Act, 2013 vide amendment w.e.f. 25.07.2019. The time limit to complete the process is 90 days from liquidation commencement order and during such period, liquidation is stayed. It also gives an opportunity to financial creditors to revive the company by submitting a scheme. However, no specific procedure has been defined in Code for carrying out Section 230 process. There are various NCLAT judgements supporting the process and laying out the procedure, still there is requirement of exploring the opportunity and defining a specific process. There are no case laws at present where Compromise Settlement under Section 230 for corporate debtors in Liquidation have been successfully completed.
- There are number of issues on the manner in which such Compromise offers under Sec 230 of Companies Act for corporates under liquidation need to be dealt that include (i) whether approval of the offer require 75% or 66% of voting share of each stakeholders (ii) whether approval of all the stakeholders required or to be dispensed with (iii) whether same reliefs and concessions are permitted under the scheme as allowed under CIRP (iv) treatment of litigations, tax reliefs and waivers of penalties. As we deal with these issues and more legal pronouncements are made, there is likelihood of getting more such cases for approval under the scheme. It is also felt that Compromise Arrangement under Sec. 230 of Companies Act ought to be extension of CIRP rather than Liquidation. Hence, Liquidation Order be pronounced only after this avenue is explored.

- Moreover, there are few instances found, where a Corporate Debtor is sold as going concern in Liquidation and even if it is sold, the value derived may be less as compared to the value that could have been derived under CIRP.

V. Introducing Section 32A of Code – A new light to the CIRP:

- CIRP of Bhushan Power & Steel Limited emerged as one of the landmark judgement in the IBC resolving one of the critical obstacle that come in the approval of a resolution plan. It brought another significant area that can act as a barrier for the Applicants to submit the resolution plan under CIRP which is the ongoing investigations or proceedings related to criminal offences committed by the ex-management of Corporate Debtor under various statues including ED. In absence of any clarity in the law, it became difficult to analyse whether Corporate Debtor shall be held liable for criminal offence even after being acquired by a new Resolution Applicant, who is not in any way related to Corporate Debtor or its past management.

- Similar to JSW Steel Limited (Successful PRA in Bhushan Power & Steel Limited), other PRAs also seek to acquire clean company without any baggage of previous liabilities and

litigations/offences after paying off the resolution amount as approved by CoC and then AA. Thus, it is important for the law to provide a clarity on such issues and prevent unnecessary delays in litigations resulting in timely resolution, which is the main intent of IBC.

- The Insolvency Law Committee understood the issue and to avoid any ambiguity introduced Section 32A of Code to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.

- The introduction of Section 32A will help to prevent litigations that may arise by PRAs as well as various statutes w.r.t. past offences of Corporate Debtor reducing the time gap in successful implementation of Resolution Plan.

- However, an important point to be observed is that Section 32A talks about only CIRP and not liquidation or Section 230 process. A positive view can be taken that the Amendment was intentional to attract more resolution plans and prevent Companies from going towards liquidation. However, in absence of any clarification, it may impact on chances to revive the Company under Liquidation or through Section 230 process.

VI. Amendments/ Modifications that may be considered:

a. Shift in EOI and resolution plan submission process:

The significant part of CIRP is to identify Prospective Resolution Applicant eligible and competent to submit the plan and help the PRAs in submitting a credible plan for the Corporate Debtor. For achieving this purpose, it is must for PRAs to carry out due diligence to have a detailed understanding of Company. It is suggested to eliminate the requirement of submitting EOI and directly issuing publication for submitting the Resolution Plan. This will enable PRAs to carry out detailed due diligence and submit a viable plan for Corporate Debtor. RP will get sufficient time to carry out diligence of PRAs to verify their eligibility under IBC. There will be reasonable time with CoC and also RP to negotiate with the PRAs. **Thus the window for submission of resolution Plan may be opened from around 60th day of commencement of CIRP till 150th day of CIRP or to be extended further if CoC decides.**

b. Viability of Conditional Resolution Plan:

NCLAT vide its judgement dated 24.01.2020 while approving the resolution plan for Murli Industries Limited observed that "*given Resolution Plan is conditional but since according to*

the express directions given by Supreme Court in the various cases stated above. The Adjudicating Authority per se will have to go the Commercial wisdom of Committee of Creditors".

It can be interpreted that a conditional resolution plan may be acceptable provided it complies with provision of IBC and approved by CoC. As cited by Supreme Court in various judgements, Adjudicating Authority and Appellate Authority cannot go into the feasibility and viability of the Resolution Plan which requires commercial wisdom of the Committee of Creditors.

It is important to explore the validity of a conditional plan and whether the same is acceptable where it is in compliant with IBC and provides a fair treatment to all class of stakeholders of Corporate Debtor. If the conditional plan is acceptable to all the parties involved, it may be dealt by AA. This can be done by making all the concerned parties as respondents. This includes extension of ease agreement or any other contract entered with third parties. **As relevant regulations provide clarity on key reliefs and concessions available, the extent of conditional plans will come down and it will facilitate faster deliberations at Adjudicating Authority.**

c. <u>Clarity on key reliefs and concessions sought in resolution plan:</u>

As mentioned above, the Corporate Debtor might have various litigations pending for the period prior to commencement of CIRP including non-payment of statutory liabilities, non-compliances pertaining to filings and expiry of licenses/permits required for operating business operations. Resolution Applicant in its plan seeks various reliefs and concessions for such liabilities and also for availing various benefits under statutes such as Income Tax Act w.r.t carry forward of losses. Some of them may be vital for PRA to make the plan effective and without its approval, the plan may not proceed with. It may take lot of time to approach these statutory authorities and many of them may not grant such waivers owing to past status of Corporate Debtor. This again results in delay in getting an approval from CoC and also from AA as there is no clarity in Code and other laws regarding exemption from these liabilities. Suitable amendments are required in IBC simultaneously with other laws to bring transparency and clarity on such issues.

Following key reliefs and concessions may be permitted to PRAs and suitably incorporated at relevant place in the Code and regulations. These are some of the basic waivers that are found to be sought by PRAs in their plan:

- ✓ All Litigations against the corporate debtor will stand extinguished. The approval of the resolution Plan and payment to the concerned party under the plan will result in extinguishment of the litigation.

- ✓ All licenses and approvals from various Government and Semi- Govt authorities for running the corporate debtor will be treated as valid for a period up to 12 months from the date of approval of the resolution Plan by the AA and no penalty to be levied. Resolution Applicant to follow up with these authorities for renewal of these licenses and approval during the period.
- ✓ All Statutory dues from income tax, custom duty and other authorities pertaining to the period prior to approval of Resolution Plan stand settled based on the offer provided in the Resolution Plan to meet such claims.
- ✓ All penalties and fines levied by various authorities including ROC, SEBI for various non compliances to be waived and opportunity may be given to comply with these provisions within period of 12 months from the date of approval of the Resolution Plan.
- ✓ All enquiries, investigations pertaining to the period prior to the approval of the Resolution Plan will not be carried against the PRA.
- ✓ All approvals for capital reduction is deemed to be obtained on the approval of the resolution plan,
- ✓ The existing Board of Directors is deemed to have vacated the office as on the date of approval of the resolution plan and new board of Directors are deemed to have taken charge of the Corporate debtor

d. <u>Taking Interest of all stakeholders and maintaining going concern status:</u>

- As per Sec 30 (2)(b) (i) of the code, the resolution plan is to provide for the payment of operational creditors which shall not be less than the amount to be paid to such creditors in the event of liquidation of the corporate debtor under Sec 53 of the code. The Liquidation Value for operational creditors (suppliers / workmen and employees and statutory dues) which are unsecured creditors in majority cases will be Nil as sufficient assets are not available to meet the entire claim of secured creditors.

- Members of CoC are more interested to negotiate for higher offer to them and Resolution Applicant being aware of this tries to keep offer to other stakeholders low. Hence, payment in percentage to claim amount to Operational Creditors remains low compared to what financial creditors are offered in resolution Plans. It has now been settled in the latest Supreme Court Judgements that Adjudicating Authority need not to interfere in the Commercial wisdom of CoC and hence need not to propose any change in Financial offer already approved by CoC.

- Once the Corporate debtor is inducted in CIRP and claims are sought form operational creditor, they become aware that they will get a very small percentage under the Resolution Plan. For the continuity of trade and benefit of all stakeholders, the minimum may be

delinked with Liquidation Value any may be linked to the overall offer made to Financial Creditors. For the benefit of all stakeholders, the operational creditors (suppliers) should get not less than 25% in offer in terms of offer to claim amount to financial creditors. This means if Financial Creditors get around 32% of the amount claimed in the resolution Plan, operational creditors ought not to get less than 8% of the claim amount. This will remove lot of deliberations on the Payment to be made to Operational Creditors. It should be clarified that unpaid amount of suppliers during CIRP period to be paid in priority to other debt subject to approvals from the CoC. This will infuse confidence among suppliers to maintain regular supplies.

- Similar percentage could be fixed for other Operational Creditors (workmen/ employees) and also statutory authorities. Issues pertaining to unpaid salary during CIRP and payment of Gratuity need to be clarified for the purpose of removing ambiguity.

e. Approval of Resolution Amount below Liquidation Value:

- Honb'le Supreme Court of India in the matter of *Maharasthra Seamless Limited vs. Padmanabhan Venkatesh & Ors.* has also observed that the Code has been formulated for maximisation of value of assets of stakeholders, and to balance the interests of all the stakeholders of the corporate debtor, the court observed that resolution of the corporate debtor should be given preference over liquidation of the corporate debtor. The rationale being that during resolution, the corporate debtor remains a going concern, whereby the financial creditors will have the opportunity to lend further money, the operational creditors will have a continued business and the workmen and employees will have job opportunities. In the aforesaid case; SC upheld decision of Adjudicating Authority approving Resolution Plan lower than average of liquidation value arrived by the valuers considering it in no contravention of Law.

- Liquidation Value from the registered valuers is an estimate of what the value could be fetched if the corporate debtor is to be liquidated as on the Insolvency Commencement date. This value could undergo change if the Liquidation is in piecemeal and as a going concern. The CIRP Regulations similar to Liquidation Value should provide for Liquidation Value both as a piecemeal and as a going concern, to help CoC to make a judicious judgement.

- It is presumed that with clarity on various reliefs and concessions and on determining LV (as piecemeal and going concern), most of the Plans may be found with a value higher than LV.

- There is no provision in IBC to reject a resolution plan if the offer amount is less than the liquidation value. The LV is an estimate based on various assumptions like present demand,

availability of sufficient buyers and probability of recovery of debt. The members of CoC need to look all these assumptions for deciding on the financial offer. Thus, where a resolution plan is viable and meets all requirement of IBC, CoC may consider to approve the plan considering its commercial wisdom and present status of Corporate Debtor.

f. <u>Need to submit Resolution Plans by Financial creditors, workmen/ employees, ARCs ad other strategic Investors</u>

- The concept of Insolvency Resolution Process is quite popular internationally and the idea was adopted by India through implementation of the Insolvency & Bankruptcy Code, 2016. The essence of the code is revival of the sick companies simultaneously balancing the interest of stakeholders. To achieve the motto, Resolution Professional conducts an investor finding activity as per process laid down in the code and relevant regulations. As observed in IBC Cases; foreign strategic and financial investors are finding the Indian Companies worthy by acquiring them but are still reluctant to participate in the process due to issues elaborated above. Further, Banks including other Financial Investors are not coming forward to be PRAs despite large funds blocked in these assets. There could be instances where workmen/ employees with adequate financial support and effective monitoring can be PRAs. To invite more Resolution Plans, it may be allowed to submit joint Resolution Plans by Financial Creditor, strategic investors, workmen/ employees as also some of the Operational creditors. These is need to bring some policy changes by Banks to participate in submission of Resolution Plans for maximization of value and fostering competition in the process.

- Banks may join hands with strategic investors and workmen/ employees to provide resolution Plan by converting part of debt to equity with other safeguards. Various monitoring agencies could be involved to run the operations.

- Government may give some incentives to Banks and ARCs to participate in submission of Resolution Plan either individually o jointly.

- RBI may come up with broad guidelines as how the banks could participate in the process including control, monitoring and disinvesting the portfolio.

Way forward

It has been over three years since the implementation of IBC and lot of amendments/revisions have been made in the Code and regulations in light of various issues faced by stakeholders and judgements of Tribunal and Supreme Court. These changes have brought a significant impact on working of CIRP and Liquidation and have resolved various litigations that have

prevailed over time. However, there are many areas that require further exploration and analysis to improve the process and avoid the ongoing litigations meeting the overall objective of IBC. A multi-pronged approach is required to deal with this issue.

INTRODUCTION TO BALANCED DEBT-EQUITY APPROACH AND MERITS OF IBC 2016 FOR INDIAN CORPORATES

Mr. Bibek Chowdhury
Insolvency Professional

Historically Indian corporates have a debt heavy balance sheet. The average Debt Equity ratio in India has been in the range of 84% to 93% over a period of last 5 years. Though the average Debt to Equity is not very discouraging but the dispersion among the companies is very high, reaching up to 400% of Equity. Seeing a scenario where corporates are heavily debt ridden, we often wonder why the corporates don't follow a balanced debt to equity approach. Let's have a look at the up-sides of the balanced approach and explore some of the merits of IBC 2016 which have helped Indian corporates and banks manage the growing NPAs.

Before analysing the debt in India, let's go back to the global market scenario post-recession in 2008. In the US and Europe, the corporate sector started deleveraging their debts either by issuing equity or by simply paying off from cash reserves. While deleveraging debt, it is often seen that the corporates tend to hoard cash. Most of the corporates were under pressure to deliver dividends to its member and in the process go for high return investments, leaving behind various low return projects which were critical drivers of economic growth. So, although the steps taken by US and European corporations had helped improve their retained earnings, it further slowed down the economy.

Taking a cue from the above scenario, one must be careful while deleveraging the balance sheet. Too much dependence on deleveraging could potentially result in lack of innovation and lesser job opportunities due to a more conservative approach with regards to capital expenditure. Whereas too much debt would call for higher cost of capital, higher risk and very low or negative returns in some cases.

Therefore, there should be a perfect balance between the debt and equity to have optimal cost of capital. This will ensure that the industries innovate which will lead to economic growth through new avenues, create jobs and consequently improve the purchasing power of the community. At the same time the cost of capital will be limited to the appetite of the corporates and shareholders will ultimately have dividends.

Most of the Indian corporates show unfavourable statistics with regards to Debt to Equity Ratio as explained earlier. The maximum returns are eaten up by the cost of fund, leaving no internal fund for further investment or paying off debts.

Consequently, deleveraging of balance sheet becomes more and more challenging; resulting in corporates and banks amass huge NPAs.

Year	Rupees (In Lakhs)		
	Public Sector Bank	Private Sector Bank	Total
2017	7.5	0.94	8.44
2019	7.4	1.84	9.24

To add to the woes of these corporates, the economic slowdown for last couple of years poses greater challenges to service the debts, resulting in new defaults. Consequently, the NPAs have increased by 9.4% during this period.

Because of ever-growing defaults, the growth of investment in form of capital formation in India, crucial for jobs as well as overall growth, is one of the lowest since the global financial crisis in 2008. In fact, the investment ratio declined from 35.6% to 26.4% of GDP, between 2007 to 2017. The major fall is in the area of private investment, where out of the overall fall of 6.3% point in investments in current history, 5% point fall is between the time period 2007 and 2016. This is mainly due to defaulting accounts in the corporate sector which turned bank assets into NPAs; thereby affecting the supply of credit. The burden of debt and stalled projects in the private sector negatively affected both private investment and the banks' capability to lend.

In this backdrop Insolvency and Bankruptcy code, 2016 was introduced to facilitate running the stalled projects and resolve the Non-Performing Assets (NPAs) of corporates and the banking sector. The IBC aimed to offer an efficient way to resolve the risk of outstanding debts and address the problem of insolvency and bankruptcy in the country. Provisions like time-bound resolution process (180-330 days of resolution window), shift from Debtors' Control to Creditors' Control have helped corporates and banks to refer to a more viable and efficient system like IBC. Furthermore, replacement of company's own management with independent insolvency resolution professionals (IRPs) under the Governance of Insolvency Professional Agencies (IPA) and Insolvency and Bankruptcy Board of India, make IBC an effective framework for cleaning up the NPAs and turn around investment cycles. The results so far have been encouraging. Till March 2019 IBC resolved defaulted debt of Rs.1.73 Lakh Crore which is now available in the credit market. The **Pre Pack in IBC Law** is also in the plan where the

involvement of NCLT will be minimal thereby reduce the burden on NCLT as well as resolution cycle time.

The introduction of IBC also gives India an edge over other developing countries and confidence of FDI improved .As a result post IBC 2016, India has improved its ranking in both the World Bank's Ease of Doing Business and the World Economic Forum's Competitiveness Index by more than 30 places between 2015 and 2017.

In this challenging time of COVID 19 ,Indian Government has suspended Section 7,9 & 10 of IBC 2016 for a while, We must appreciate that the Insolvency and Bankruptcy Code 2016 has brought encouraging results till now and has great prospects in terms of its impact on India's economic progress. It is to see whether the corporates and banks will be able to reap the benefits of IBC 2016 once the pandemic is over and the economy stabilizes.

AN OPPORTUNITY TO RESOLVE DEFAULT OTHER THAN IBC

Mr. Pratim bayal,

FCA, Insolvency professional

These days IBC, 2016 has been the major Instrument for resolving credit default issues of corporate. However post COVID – 19 situation, there has been lot of thought on some modifications on the traditional IBC. The aim is mainly a) to protect the companies going into Insolvency for a systematic failure such as COVI-19 and b) to find out a different means to resolve debt failures outside rigorous and time taking IBC, 2016. When the relevant authorities are trying to find out alternatives such as quicker resolution process for MSMEs and others, there is one existing option already. The companies Act 2013 do provide a very useful way to resolve the credit default issues for "promoters". The word "promoter" has a special importance as the intent of the IBC, 2016 is to derail the promoters, when there is default. So the existing promoter cannot take part in the resolution and get back his business, in most of the cases. The basic connotation here is the promoter with right intent who has defaulted for reasons beyond his control or a temporary lag in managing the commercial aspect. For them, Section 230 and 231 of the Companies Act 2013 becomes quite handy in resolving the default and stand up again on the feet. This will specifically become important in this present situation of COVID-19 where many firms would face cash inflow issue post loan moratorium period.

The legal framework

Provisions concerning to Compromises, Arrangements and Amalgamations (hereafter read as "**CAA"**) were not in force due to non-establishment of **NCLT** and **NCLAT**, non-availability of rules etc. On 7th November, 2016 Central Government issued a notification for enforcement of section 230-233, 235-240, 270-288 etc. w.e.f. 15th December, 2016. MCA vide notification dated 14th Dec, 2016 issued rules i.e. The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. w.e.f. 15.12.2016 for matters relating to Compromises, Arrangements, and Amalgamations (hereafter read as "CAA").

Meaning of Compromise and Arrangement

The term arrangement has been given a wide scope under the Companies Act 2013. According to section 230 of the Companies Act 2013, an arrangement includes a reorganization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both the methods. The Act enunciates two possibilities of scheme of arrangement.

They are

(a) between a company and its creditors or any class of them and

(b) Between a company and its members or any class of them.

Despite the tenuous difference, a scheme of arrangement with members (for amalgamation and mergers) is clearly distinguishable from a mere scheme of compromise with creditors. The primary difference between a compromise and an arrangement is that whereas an arrangement is between a company and its members or class of members, a compromise is between a company and its creditors or class of creditors. Another distinguishable feature is that in case of a compromise, there is an element of dispute present as it is done between a company and its creditors. But in case of an arrangement, there is no such element of dispute present. Thus the exact alternative in resolving credit default would be by way of a compromise. However for broader understanding both the compromise and arrangement is being discussed here.

An application for Compromise & Arrangement can be file with Tribunal (NCLT) by followings as per Section 230(1)

- The Company or
- Creditor or
- Member of the Company, or
- In the case of a company which is being wound up, of the Liquidator.

Joint application under Rule 3(2): where more than one company is involved in a scheme, such application may, at the discretion of such companies, be filed as a joint-application.

For specific case of default , the company can talk with the banks and other lender and come to a mutual understanding on how the resolution will be taken care off so that the creditors recovers a portion of its stressed loan and the company get a chance to resume the normal operation or a restart. And finally a scheme of payment can mutually be agreed and process may be initiated under the companies Act 2013 to implement the same.

Scheme of compromise can be broadly though in following steps

a) Negotiating with the lenders a scheme so that 75% of the lenders get convinced.
b) Approaching the NCLT with the scheme to get consent for a meeting of the lenders
c) Issue notice of the meeting to the lenders with a copy of the scheme, latest financial

status and valuation of shares and assets. For Listed companies, send notice to SEBI also.

d) Get the scheme approved in the meeting with 75% voting
e) Intimate the NCLT of the approval of the Scheme. NCLT approves the Scheme and the Scheme becomes binding on all the stake holders

Let's discuss the steps in detail…..

Step 1:-Initiating the meeting through court

As per Sec 230(1) Tribunal may, on the application of the company or of any creditor or member 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 the creditors or 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.

So the process start with initiating a meeting with the concerned stakeholders

As per Rule 3(1) of the CAA rules an application under sub •section (1) of section 230 of the Act may be submitted in Form no. NCLT-1 (appended in the National Company Law Tribunal Rules, 2016) along with:-

(i) A notice of admission in Form No. NCLT-2 (appended in the National Company Law Tribunal Rules, 2016);

(ii) an affidavit in Form No, NCLT-6 (appended in the National Company Law Tribunal Rules, 2016);

(iii) a copy of scheme of compromise or arrangement, which should include disclosures as per sub- section (2) of section 230 of the Act; and

(iv) Fee as prescribed in the Schedule of Fees.

(2) Where more than one company is involved in a scheme in relation to which an application under sub-rule 04 is being filed, such application may, at the discretion of such Companies, be filed as a Joint application.

(3) Where the company is not the applicant, a copy of the notice of admission and of the affidavit shall be served on the company, or, where the company is being wound up, on its

liquidator, not less than fourteen days before the date fixed for the hearing of the notice of admission.

(4) The applicant shall also disclose to the Tribunal in the application under sub-rule (I), the basis on which each class of members or creditors has been identified for the purposes or approval of the scheme.

• The application to the tribunal to disclose by affidavit—

(a) all material facts relating to the company, such as the latest financial position of the company,

The latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) Any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including— (i) a creditor's responsibility statement in the prescribed form; (ii) safeguards for the protection of other secured and unsecured creditors; (iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board; (iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and (v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

Step 2: Convening the meeting

When a meeting is called in pursuance to order of NCLT, notice of the meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by

1. A statement disclosing the details of the compromise or arrangement,

2. A copy of the valuation report, if any, and

3. Explaining their effect on creditors, key managerial personnel, promoters and non-

promoter members, and the debenture holders and

4. The effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and

5. Such other matters as may be prescribed:

Such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed: When the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company

Procedural aspects relating to notice under Rule 15.3 states that the notice of the meeting pursuant to the order of the Tribunal to be given in specified Form and shall be sent individually specifying therein, the specific points as per rule

The notice of the meeting shall be advertised in such newspapers and in such manner as the Tribunal may direct, not less than fourteen clear days before the date fixed for the meeting in form 15.5.6 of CAA rule.

Notice should provide for voting by themselves or through proxy or through postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

Step 3: Objection to the meeting, if any

Any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement. Rule 15.8 states that the consent or objections under sub-section (4) of section 230 may be conveyed in writing to the Chairperson of the meeting within a month from the date of the receipt of the notice.

Section 230(5) mandates that a the notice shall also be sent to the Central Government, the income- tax authorities, the RBI, SEBI , the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and relevant sectoral regulators or authorities .

Step 4 - Getting the approval on compromise

As per Section 230(6) when at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company

The chairman of the meeting shall, within the time fixed by the Tribunal, or where no time has been fixed, within seven days after the conclusion of the meeting, report the result thereof to the Tribunal.

An order made by the Tribunal shall provide for all or any of the following matters, namely:— (a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable; (b) the protection of any class of creditors; (c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48; (d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate; (e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangemet

Auditor's certificate

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

Section 230(8) states that the order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

Compromise in respect of buy back is to be in compliance with section 68 to obtain Tribunal's

approval

Compromise or arrangement may include takeover offer made in such manner as may be prescribed. In case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

Special power of Tribunal to Enforce and Modify a scheme

Sec 231 provides Power to the tribunal to enforce compromise or arrangement As per section 231(1) when the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it— (a) shall have power to supervise the implementation of the compromise or arrangement; and Corporate Restructuring & Insolvency

(b) May, at the time of making such order or at any time thereafter, make such modifications in the compromise or arrangement as it may consider necessary for the proper implementation of the compromise or arrangement.

Tribunal may dispense with calling of meeting of creditors Section 230(9) states that the Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

Failure of a compromise scheme

Sec 231 (2) states that if the Tribunal is satisfied that the compromise or arrangement sanctioned under section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company and such an order shall be deemed to be an order made under section 273.

Thus as explained above the Compromise scheme can well be worked out as an alternative to resolve distress situation, particularly in today's context , in a quicker way. If required the existing promoters can bring in investor also to get financial support and a scheme of compromise can be worked out taking the new Investor in loop. The above elaboration clearly indicate where there is a genuine of the company to resolve the default happened, the issue can be resolved with help of the concerned Bank and lenders and a resolution could be achieved avoiding much of the procedural hazard , time & money.

Capital Gain on Liquidation

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Section – I: Process of Liquidation

The terms "liquidation" and "dissolution" are sometimes erroneously used to mean the same thing. However, these are the two stages to bring about a lawful end to the life of a company. Liquidation is the first stage in the process whereby assets are realised, liabilities are paid off and the surplus, if any, are distributed among its shareholders. Dissolution is the final stage which brings about an end to the legal existence of the company by the law, through court order. The legal implications of the terms, liquidation and dissolution are quite different. In between liquidation and dissolution, the legal status of the company continues. Dissolution is initiated after completion of liquidation process. After dissolution, legal existence of a company comes to an end and its name is struck off from the Registrar of Companies.

For example, Company "A" in a special resolution passed on 1st June,2019 approves to initiate voluntary liquidation of the Company and appointment of liquidator under section 59 of Insolvency and Bankruptcy Code, 2016 ("IBC"). Liquidator completes liquidation process involving sale of assets, payment of all liabilities and distribution of surplus assets on 30th April,2020 and makes an application for dissolution of Company to Tribunal. Order of dissolution is passed by Tribunal vide its order dated 20th June,2020. Here for the period 1st June 2019 to 19th June,2020 Company is in liquidation and on or after 20th June,2020 Company is dissolved.

In India, prior to enactment of IBC, Section 271 of the Companies Act, 2013 provided for winding up of companies. It was a long process and did not offer economically viable arrangements. With the introduction of IBC, significant amendments were made to the provisions relating to winding up in the Companies Act, 2013 which were made effective from 15th November 2016.

These amendments are as under:

1. Definition of "Winding up": The expression "winding up" was not defined in the Companies Act,2013 or in the erstwhile Companies Act,1956. Section 2(94A) was added in the Companies Act, 2013 giving definition of "winding up" which reads as under :

"Winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.

2. Voluntary Winding up: Provisions relating to voluntary winding up as provided under

sections 304 to 323 of the Companies Act, 2013 were omitted. Voluntary liquidation is now dealt with under section 59 of the IBC.

3. Revival and Rehabilitation of Sick Companies: Chapter XIX of the Companies Act,2013, covering sections 253 to 269 on Revival and Rehabilitation of Sick companies which included winding up under section 265, was omitted. Corporate insolvency resolution process is now included in IBC to achieve the same purpose.

4. Section 271: An amendment was made in Section 271 of the Companies Act 2013, deleting the following two circumstances in which a Company may be wound up by the Tribunal.

(a) If the company is unable to pay its debts

(b) If the Tribunal has ordered the winding up the company under Chapter XIX – Revival and Rehabilitation of Sick Companies.

The substituted Section 271 now reads as under:

271. A company may, on a petition under section 272, be wound up by the Tribunal, :

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or

(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

Subsequent to the above referred amendments, in conclusion, liquidation or winding up of a Company in India is envisaged as under:

1. Voluntary liquidation under section 59 of the IBC

A corporate debtor, being a company may choose to be wound up voluntarily under several circumstances. Apart from commercial reasons for winding up, circumstances may include winding up as a result of expiry of period of operation fixed in its constitutional documents or occurrence of an event provided in its constitutional documents for its dissolution.

Section 59 of the IBC provides for the initiation of voluntary liquidation proceedings by the corporate debtor which has not defaulted on any debt due to any person or has the ability to pay its debts in full from the proceeds of assets to be sold in voluntary liquidation.

2. Liquidation under section 33 of the IBC

Liquidation under 33 of IBC gets initiated when the resolution process to revive the company is not successful. In such cases, liabilities far exceed assets i.e. assets are not sufficient to pay off all the debts and hence shareholders who rank last in the order of priority payment under section 53 of IBC, normally do not receive any amount or assets in the process of liquidation.

Section 33 of the IBC provides that liquidation can be initiated under this section where (i) no resolution plan has been received for the company within the specified period (ii) resolution plan has been rejected by adjudicating authority due to non-compliance (iii) committee of creditors approved by not less than sixty six percent of the voting share, decide to liquidate the company.

3. Winding up under section 271 of Companies Act, 2013

Section 271 of the Companies Act,2013, provides the circumstances under which a company may be wound up by Tribunal as stated above.

4. Summary procedure for liquidation under section 361 of Companies Act,2013

The summary procedure for liquidation is applicable for companies having paid up capital not exceeding Rupees one crore and belonging to such class or classes as prescribed by Central Government.

Section II - Capital Gain on Liquidation

Capital gain under Income tax Act arises on the transfer of capital assets. In the process of liquidation, the liquidator may sell the assets of the Company and hence the company may become liable to pay capital gain tax on transfer of such assets.

Similarly, in the process of liquidation when surplus, if any, are distributed among the shareholders the said distribution is against the extinguishment of the shares of the company by the shareholder. Thus, the shareholders may become liable to pay capital gain tax on extinguishment of such shares.

One must note that Income Tax Act has not used the word "dissolution" but instead, from time to time through jurisprudence has interpreted words "in liquidation" and "on liquidation" to differentiate between liquidation and dissolution.

Section II(A) - Capital Gain payable by a Company under liquidation, on sale of

assets

Capital gains made by the company on sale of the company's assets as part of liquidation process, with the object of distributing the sale-proceeds among all the claimants including shareholders, are assessable to tax in the hands of the company.

(a) Capital gain for Company under liquidation u/s 33 of IBC

All the payments by a Company under liquidation under section 33 of IBC is subject to waterfall mechanism as laid down under section 53 of IBC. Thus, we need to analyze if the capital gain tax payable by company on transfer of assets will also be subject to water fall mechanism. This matter has been recently dealt with in M/s Shree Ram Lime Products Pvt Ltd (CA – 666 / 2019 in (IB) – 250 (ND) / 2017). Hon'ble NCLT, New Delhi Bench in para 7 of the judgement held that :

"Section 53(1)(e) provides for the liability towards government dues. As per Section 238 of the Code, the provisions of the Code shall have an overriding effect on any other enactment. The dues towards Government, be it tax on income or sale of properties, would qualify for being an operational debt and has to be dealt with accordingly. The provisions of Section 178 of the Income Tax Act have also been amended in view of the provisions of Insolvency and Bankruptcy Code."

Further vide Para 9 of the Judgement it was held as under :

"We therefore hold that the tax liability arising out of the sale shall be distributed in accordance with the provision of Section 53 of the Code. The applicability of Section 178 or 192 IA will not have an overriding effect on the waterfall mechanism provided under Section 53 of the Code, which is a complete code in itself, and capital gain shall not be considered as liquidation cost."

Based on above one may conclude that government dues (State & Centre) shall be ranked 5th in the order of priority payment, just above operational creditors. Hence, capital gain arising on sale of the company's assets as part of liquidation process shall become payable by the liquidator/company only after payment of dues towards corporate insolvency resolution process cost, workmen, secured financial creditors, employees and unsecured financial creditors.

(b) Capital gain for Company under liquidation u/s 59 of IBC

For initiation of voluntary liquidation under section 59, one of the conditions required to be satisfied is that company does not have any debt or that it will be able to pay its debts out of

the proceeds of assets to be sold in voluntary liquidation. Hence, in case of voluntary liquidation under section 59 of IBC, tax liability will have to be discharged before making an application to the tribunal for dissolution.

Section 178(3)(a) of the Income Tax Act provides that the liquidator shall not, without the leave of the commissioner, part with any of the assets of the company or the properties in his hands until he has been notified by the income tax officer under section 178(2). Here, point that needs discussion is whether to file an application for dissolution to Tribunal, invitation of claims from all creditors as part of voluntary liquidation process in compliance with IBC, through public announcement or through intimation to Income Tax department is an adequate compliance on the part of liquidator or liquidator needs a 'no due certificate' from income tax department.

Though submission of 'no dues certificate' as part of the application for dissolution has been a preferred practice, author is of the view that invitation of claim through intimation to income tax department is an adequate compliance on part of liquidator under IBC, since section 238 of the Code has an overriding effect on any other enactment.

(c) Capital gain for Company under liquidation under Companies Act,2013

The Ministry of Corporate Affairs ('MCA') vide notification dated 24th January 2020, has notified the Companies (Winding Up) Rules, 2020 ('The Rules') applicable from 1st April 2020. These Rules are applicable to companies going into "winding up for the circumstances mentioned u/s 271" as well as "Summary procedure for liquidation u/s 361" of Companies Act, 2013. Winding up process and order of priority payments including government dues, for companies under liquidation under Companies Act will be governed by these Rules and the order of Tribunal.

Section II (B) - Capital Gain payable by a Company under liquidation, on distribution of assets to shareholders

In the process of distribution of assets on liquidation, though there is a transfer of assets by liquidator to shareholders, the same is not considered as transfer of assets by the Company for the purpose of capital gain as per section 46(1) of the Income tax Act. Section 46(1) specifically provides that where the assets of a company are distributed to its shareholder on its liquidation, such distribution shall not be regarded as a transfer by the company for the purposes of Section 45. Hence the capital gain on such transaction is not payable by the Company.

PART – II(C): Capital gain payable by shareholders of companies under liquidation

In the process of liquidation of a company, the shareholders may receive surplus money or assets from the liquidator. Once shareholders receive this surplus, their rights as members of the Company are extinguished. What needs to be noted here is on liquidation, return of surplus to the shareholders, who were otherwise entitled to the same as a matter of right, does not fall within the definition of transfer within the meaning of section 2(47) of Income Tax Act, 1961. It is so because on extinguishment of their rights in the shares and on their receiving cash or assets in lieu of rights which they held in the shares, no corresponding rights accrued to anyone else for that consideration. Hence, a legal fiction was created through section 46 to treat the receipt of money or assets on distribution on liquidation in the hands of a shareholder providing provisions relating to computation of capital gain on liquidation of a company. For the purpose of taxability of capital gain in the hands of shareholders, all types of winding up / liquidation as described in section I above are treated at par.
Following are the relevant Sections under Income Tax Act, 1961 which deals with the Capital Gain arising in the hands of shareholder, on liquidation of companies.

1. Section 46, Capital gains on distribution of assets by companies in liquidation.

As per section 46(2), where a shareholder on the liquidation of a company, receives any money or other asset from the company in lieu of the shares held by him, such a shareholder shall be chargeable to income-tax under the head 'capital gains' in respect of the money so received or the market value of the asset so received as on the date of distribution.

For the purpose of computing capital gain, the full value of consideration shall be money received and/or the market value of the assets on the date of distribution as reduced by deemed dividend within the meaning of section 2(22)(c).

2. Section 2(22) (c), Deemed Dividend

As per Section 2(22) (c) : Dividend includes - any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not" ;
Provided that:

a) The shareholder is entitled to participate in the surplus assets of company on liquidation.
b) Distribution is not out of the capitalized profits representing bonus shares of the company.
c) Accumulated profits do not include capital gains earned by the company.

The expression "accumulated profits" here, shall include all profits of the company up to the date of liquidation. This refers to the amount in nature of profits which company could have distributed to its shareholders and represents profits as per books of the Company. Balance in share premium account is not part of accumulated profits as the same is not available for distribution as dividend to its shareholders.

3. Section 178, Company in liquidation

As per Section 178, a liquidator of a company within 30 days of his appointment is required to give notice of his appointment to the Assessing Officer. The Assessing Officer shall, after making such inquiries or calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the Assessing Officer, would be sufficient to provide for any tax which is then or is likely thereafter to become, payable by the company. Section 178(6) provides that, the provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force except the provisions of the Insolvency and Bankruptcy Code, 2016. This means that provisions pertaining to liquidation under IBC will supersede section 178, to the extent they are inconsistent with Section 178. Here the waterfall mechanism as provided under Section 53 of IBC, to the extent applicable for liquidation under section 33 of IBC, becomes relevant.

4. Sale of Assets received on Liquidation

As per section 55(2)(b)(iii), if the asset (other than cash) acquired by the shareholder, at the time of liquidation, is subsequently transferred by the shareholder; then for the purpose of computation of capital gain of such transfer, the cost of acquisition of such asset shall be the market value of the asset on the date of distribution.

In other words, for determining the tax liability in the hands of shareholders under Section 46(2), for arriving at consideration price, deemed dividend will be deducted from the fair market value of the asset as on the date of distribution. But for determination of cost of acquisition in case of subsequent transfer of the same asset by shareholder under section 55(2)(b)(iii), deemed dividend will not be deducted from the fair market value of the asset.

Section II (D) : Computation of Capital gain

For the purpose of determining the capital gain under section 46(2) of the Income Tax Act, in

the hands of shareholder following components need to be determined :

1.Full value of consideration

Money received	xxx
Add: Market value of assets	xxx
Less: Deemed dividend under section 2(22) (c)	(xxx)
Total	xxx

2.Cost of acquisition

Cost of acquisition means the cost at which the shares were originally acquired by the shareholder, adjusted for indexation, as applicable.

3. Period of holding of capital assets i.e. shares

Period of holding of capital assets are required to determine whether the capital gain is short term or long term. As per section 2(42A) of the Income tax Act, in case of a share held in a company in liquidation, the period subsequent to the date on which company goes into liquidation should be excluded. In other words, the period of holding will be from the date of acquisition of the shares till the date of (i) passing of special resolution by shareholders of the company appointing liquidator under section 59 of IBC or (ii) passing of the order by Tribunal under Section 273 of the Companies Act, 2013 or (iii) passing of the order by adjudicating authority under section 33 of IBC for initiation of liquidation, as the case may be.

4.Year of chargeability

In which year the capital gain tax is payable? The year in which amount is received by the shareholder or the year when the liquidation process starts or the year in which order of dissolution is received in respect of the Company?

Section 46 is the charging section which is reproduced below :

46. (1) notwithstanding anything contained in section 45, where the assets of a company are distributed to its shareholders on its liquidation, such distribution shall not be regarded as a transfer by the company for the purposes of section 45.

(2) Where a shareholder on the liquidation of a company receives any money or other assets from the company, he shall be chargeable to income-tax under the head "Capital gains", in respect of the money so received or the market value of the other assets on the date of distribution, as reduced by the amount assessed as dividend within the meaning of sub-clause

(c) of clause (22) of section 2 and the sum so arrived at shall be deemed to be the full value of the consideration for the purposes of section 48.

Hon'ble Gujarat High Court in the case of Jaykrishna Harivallabhdas held that the words "on liquidation" used in section 46 must necessarily refer to the date on which the company is wound up or the winding up process is complete. Explaining further, it was observed by the Hon'ble Gujarat High Court that until the Company is finally wound up, the right of shareholders or members to receive the surplus, if any, remains intact, which is the only right that survives in a shareholder of a Company in liquidation and it comes to an end or gets extinguished only on completion of winding up. Concludingly, it was held that financial year in which the order of dissolution is passed by Court, shall be the year of chargeability of capital gain in the hands of shareholders. In case where the amounts are received by shareholders in installments over different financial years, such installments will be treated as advance and will be added to determine the full value of consideration in the year in which order of dissolution is passed.

While judgement of Hon'ble Gujrat High Court above is note-worthy, there are divergent views on the matter. There could be a significant time gap between the completion of liquidation process and receipt of order of dissolution. It is possible that the assets may be distributed in one financial year whereas the dissolution order is received in the subsequent year. It may happen that surplus funds are received by shareholders in two financial years in installments. In such circumstances depending upon the facts of the case one may decide the year in which the capital gain tax is payable, which could be an area of litigation.

Author is of the view that capital gain tax liability would arise in the year in which order of dissolution is passed as decided in Gujrat High Court Judgement.

Based on above, following dates may be relevant for the purpose of determining capital gain in the hands of shareholder on distribution of assets on liquidation.

a) Date of initiation of liquidation: For determining holding period of shares and indexation

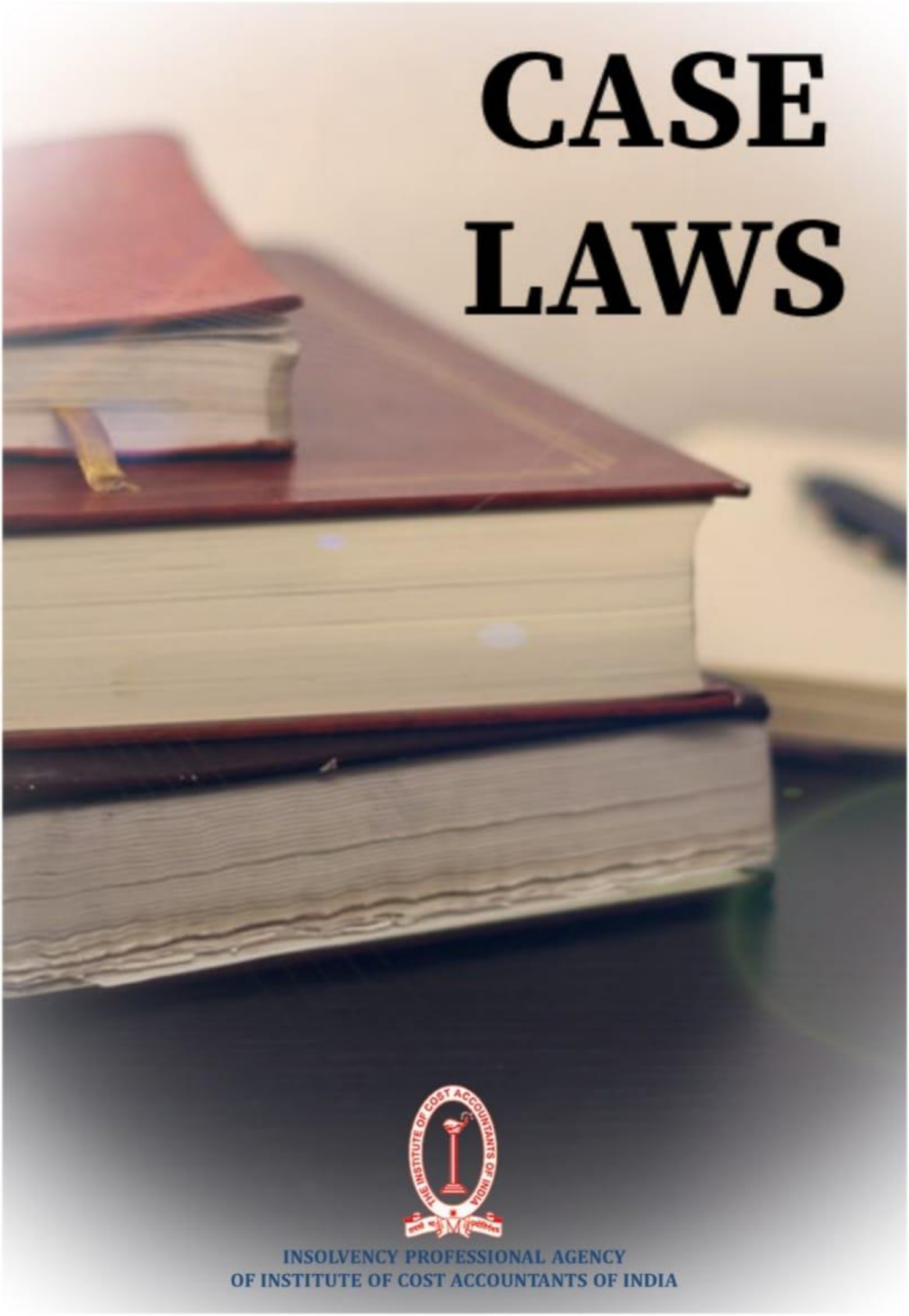
b) Date of distribution of assets: For determining market value of assets distributed by liquidator to determine the full value of consideration.

c) Date of issuance of order by Court for dissolution of company : For determining the year of chargeability of capital gain in the hands of shareholder.

Thus, the aspect of capital gain on liquidation under Income Tax Act, can be summarized as under;

<table>
<tr><th rowspan="2">Liquidation Process</th><th colspan="2">Capital gain arising in the hands of</th></tr>
<tr><th>Company</th><th>Shareholders</th></tr>
<tr><td>Under section 33 of IBC</td><td>Discharge of liability will be governed by water fall mechanism under section 53 of IBC.</td><td rowspan="4">Capital gain liability if any will have to be discharged in accordance with provisions of section 46 read with section 2(22) (c) and 56 (2)(b)(iii).</td></tr>
<tr><td>Under section 59 of IBC</td><td>Tax liability will have to discharged by the liquidator/company before making an application for dissolution.</td></tr>
<tr><td>Under section 271 of Companies Act,2013</td><td rowspan="2">Will be governed by the order of Tribunal in accordance with Companies (Winding up) Rules, 2020</td></tr>
<tr><td>Under section 361 of Companies Act,2013</td></tr>
</table>

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

- **Elektrans Shipping Pte Ltd. v. Pierre D'Silva - [2019] 111 taxmann.com 1 (NCL-AT)**

Tribunal is empowered to restore name of Company and all other persons in their respective position for purpose of initiation of CIRP under sections 7 and 9 of IBC.

An application under section 9 against the respondent corporate debtor was admitted by the Adjudicating Authority. The appellant shareholder challenged order of admission on ground that name of the corporate debtor was struck off by the Registrar of Companies on 12-9-2018, in exercise of powers conferred by section 248 of the Companies Act, 2013, hence, application under section 9 was not maintainable and the Adjudicating Authority erred in admitting application without considering status of the corporate debtor' as on date of admission.

Held that the Tribunal is empowered to restore name of the company and all other persons in their respective position for purpose of initiation of 'Corporate Insolvency Resolution Process' under sections 7 and 9, based on application, if filed by the creditor (financial creditor or operational creditor) or workman within twenty years from the date name of the company is struck off under sub-section (5) of section 248. Also, in the instant case, application under section 9 having admitted, the corporate debtor and its directors, officers, etc. were deemed to have been restored in terms of section 252(3) of the Companies Act 2013.

Case Review : *Pierre D'Silva v. Elektrans Shipping (P.) Ltd. [2019] 110 taxmann.com 527 (NCLT - Mum.), affirmed; Hemang Phophalia v. Greater Bombay Co-operative Bank Ltd. [2019] 111 taxmann.com 108/156 SCL 626 (NCL - AT), followed*

SECTION 234 - AGREEMENT WITH FOREIGN COUNTRIES

- **Jet Airways India Ltd. v. State Bank of India - [2019] 111 taxmann.com 35/[2019] 156 SCL 642 (NCL-AT)**

Where pursuant to parallel insolvency proceedings initiated in India as well as in Netherlands RP as well as Dutch trustee (Administrator) were appointed, in view of fact that Administrator was equivalent to RP of India, he had right to attend meeting of CoC; however, to avoid overlap

of powers, Administrator would attend CoC meeting only as observer and he had no right to vote.

CIRP was initiated against 'Jet Airways' in India and RP was appointed. A parallel insolvency proceedings was initiated in Netherlands wherein Dutch Trustee (Administrator) had been appointed to manage estate of 'Jet Airways'. The Appellate Tribunal directed the RP to consider prospectus of cooperation with the Administrator so as to have joint CIRP of 'Jet Airways' and further directed the RP under Indian proceedings to reach an agreement with the Administrator to extend such cooperation to each other. Pursuant to directions of the Appellate Tribunal, the Administrator and the RP of 'Jet Airways' had filed their terms and conditions of draft agreement termed as 'Cross Border Insolvency Protocol'. All clauses had been accepted by each party except the clause which related to participation of the Administrator in the CoC meeting. The clause suggested by the Administrator stated that he would be invited to participate in the meeting of CoC as an observer but would not have right to vote in such meetings. However, clause suggested by the RP at instance of the CoC stated that the Administrator would not be entitled to participate in the meeting of CoC.

Held that the Administrator was equivalent to the RP of India, and, therefore, he had right to attend CoC Meeting, however, to avoid overlap of powers, suggestion given by the Administrator that he would not have right to vote, should be part of agreement.

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

- **J.M. Financial Asset Reconstruction Company Ltd. v. G. Madhusudhan Rao, R.P. of Bheema Cements Ltd. - [2019] 111 taxmann.com 39 (NCL-AT)**

Where in view of renewal of mining leases, which was main asset of corporate debtor, Adjudicating Authority had extended CIRP period, but CoC took no step for calling fresh resolution plan in extended period, further extension could not be allowed.

The CIRP application in respect of the corporate debtor was admitted. The financial creditor contended that matter for renewal of mining leases, which was main asset of the corporate debtor, was pending therefore, in view of delay in renewal of mining lease, an additional period was to be excluded from the CIRP period. However, it was noted that during CIRP period of 180 days, mining leases were renewed by the government; and, the Adjudicating Authority extended further period of 90 days for completion of the CIR process but during extended period, the CoC took no step for calling fresh resolution plan.

Held that since 270 days had already been passed, the Adjudicating Authority had no other option but to pass order of liquidation, however, if the Central Government had moved for amendment to allow 330 days in place of 270 days, then the CoC might take advantage of the same, subject to its applicability.

***Case Review** : JM Financial Asset Reconstruction Co. Ltd. v. G. Madhusudhan Rao [2019] 107 taxmann.com 153/[2019] 155 SCL 30 (NCLT - Hyd.)(MAG), affirmed*

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

- **Jaiprakash Associates Ltd. v. IDBI Bank Ltd. - [2019] 111 taxmann.com 46/[2019] 156 SCL 782 (SC)**

In view of legislative changes which have expanded scope of resolution plan and with a view to revive corporate debtor, IRP of corporate debtor is to be allowed to invite revised resolution plan from final bidders who had submitted resolution plan on earlier occasion.

The NCLAT by order held that in corporate Insolvency Resolution Process (CIRP) of the corporate debtor, period during which matter remained pending for adjudication as to how voting share of allottees (financial creditors) would be counted for the purpose of counting 270 days, was to be excluded for the purpose of counting 270 days of the CIRP. Above judgment was assailed before the Supreme Court, questioning power of NCLT/NCLAT, as the case maybe, to exclude any period from the statutory period in exercise of inherent powers and any express provision in the I & B Code in that regard. It was found that recent amendment to the I & B Code had come into effect, thereby amending section 12 to freeze or peg maximum period of CIRP to 330 days from the insolvency commencement date. Further, recently inserted section 12A enabled the Adjudicating Authority to allow withdrawal of an application filed under section 7 or section 9 or section 10, on an application made by the applicant with approval of 90 per cent voting share of CoC. Similarly, sub-clause (7) of the regulation 36B inserted with effect from 4-7-2018, dealing with request for resolution plans unambiguously postulates that the resolution professional may, with approval of the Committee, reissue request for resolution plans, if resolution plans received in response to earlier request are not satisfactory, subject to condition that request is made to all prospective resolution applicants in final list.

Held that in view of legislative changes, which have expanded scope of resolution plan, IRP of the corporate debtor is to be allowed to invite revised resolution plan from final bidders who had submitted resolution plan on earlier occasion with a view to revive the corporate debtor.

Case Review : *Chitra Sharma v. Union of India [2018] 96 taxmann.com 216/148 SCL 833 (SC), followed*

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- **Hemang Phophalia v. Greater Bombay Co-operative Bank Ltd. - [2019] 111 taxmann.com 108/[2019] 156 SCL 626 (NCL-AT)**

In terms of amended clause (94A) of section 2 of Companies Act, 2013, a company whose name has been removed from Register of Companies, can be liquidated under Code.

The first respondent filed an application under section 7 for initiating 'Corporate Insolvency Resolution Process' against the 'corporate debtor' alleging default in repayment of loan including interest and other charges. The Adjudicating Authority admitted said application. The Appellant i.e., Ex-Director and shareholder of the 'corporate debtor', filed instant appeal contending that name of the 'corporate debtor' had already been struck-off from the Register of Companies under section 248 of the 2013 Act therefore, application under section 7 against a non-existent company ('corporate debtor') was not maintainable.

Held that in terms of the amended clause (94A) of section 2 of the 2013 Act, company, whose name has been removed from the Register of Companies can be liquidated under the I&B Code, moreover, in view of provisions of section 250(3) read with section 248 (7) and (8) of the 2013 Act, application under sections 7 and 9 will be maintainable against the 'corporate debtor', even if name of said 'corporate debtor' has been struck-off from the Register of companies.

Case Review : *Greater Bombay Co-operative Bank Ltd. v. Penguine Umbrella Works (P.) Ltd. [2019] 110 taxmann.com 525 (NCLT - Mum.), affirmed*

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

Edelweiss Asset Reconstruction Company Ltd. v. Sachet Infrastructure (P.) Ltd. - [2019] 111 taxmann.com 115/[2020] 157 SCL 328 (NCL-AT)

Where corporate debtors (landholders) in concert with principal borrower decided to develop an area by constructing infrastructure for allottees, since lands of all corporate debtors were consolidated for construction purpose, Resolution Process would not succeed if whole project was not taken over by Resolution Professional for consolidated 'resolution plan'.

Corporate debtors (landholders) in concert with the principal borrower decided to develop an area by constructing housing project for allottees. For said reason, the principal borrower had availed term loan of Rs. 170 crores from 'ECLFL' (the original financial creditor) in whose favour corporate debtors had executed guarantee to repay debt. By an 'Assignment agreement' of 'ECLFL' debts had been assigned in favour of the appellant. CIRP against the principal borrower was already initiated. The appellant submitted that CIRP could not proceed only against one of the corporate debtor i.e. principal borrower. It further submitted that the resolution process would not be completed if total area comprising of lands belonging to all corporate debtors were not developed for allottees. According to the appellant, lands of all corporate debtors were consolidated for construction purpose of housing projects. Moreover, the Resolution Professional submitted that the resolution process would not succeed if whole project was not taken over by him for consolidated 'resolution plan' as also to keep said project as a going concern.

Held that plea taken by the Resolution Professional was right therefore in view of facts, group CIRP proceedings was required to be initiated against corporate debtors apart from CIRP already initiated against the principal borrower.

SECTION 238 - OVERRIDING EFFECT OF CODE

- **Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal - [2019] 111 taxmann.com 405 (SC)/[2020] 157 SCL 477 (SC)**

Where corporate debtor had taken land on lease from Municipal Corporation of Greater Mumbai (MCGM) for construction of hospital but insolvency proceedings against corporate debtor had been initiated and resolution plan was approved, section 238 cannot override MCGM's right in its properties and, therefore, adjudicating authority could not have overridden MCGM's objections and enabled creation of a fresh interest in respect of properties and lands of MCGM.

The corporate debtor agreed to construct hospital on land leased by the Municipal Corporation of Greater Mumbai (MCGM). The corporate debtor had borrowed funds from banks and financial institutions and on default insolvency proceedings had been initiated against it. Petition for CIRP had been admitted and Resolution Professional had been appointed. MCGM opposed

resolution plan submitted by resolution applicant but the NCLT rejected objections and approved said resolution plan. The NCLAT by impugned order upheld order of the NCLT.

Held that section 238 could not be read as overriding MCGM's right as section 238 could be of importance when properties and assets are of a debtor and not when a third party like MCGM was involved. In absence of approval in terms of sections 92 and 92A of the Mumbai Municipal Corporation Act, 1888, Adjudicating Authority could not have overridden MCGM's objections and enabled creation of a fresh interest in respect of properties and lands of MCGM. The Authorities under the Code could not have precluded control that MCGM undoubtedly had, under law, to deal with its properties and land in question which undeniably were public properties. Resolution plan would be serious impediment to MCGM's independent plans and, thus, impugned order of NCLAT and NCLT were to be set aside.

Case Review : *Municipal Corporation of Greater Mumbai v. Abhilash Lal [2019] 110 taxmann.com 526 (NCL-AT); Abhilash Lal v. Sevenhills Healthcare (P.) Ltd. [2019] 109 taxmann.com 489 (NCLT - Hyd.), Set aside*

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

- **Vivek Pasricha v. Amit Sachdeva - [2019] 111 taxmann.com 423 (NCL-AT)/[2020] 157 SCL 173 (NCL-AT)**

Where respondent filed an application under section 9 on account of failure of corporate debtor to pay arrears of salary, in view of fact that respondent had already filed a petition for payment of salary under sections 241 and 242 of Companies Act, 2013, which was pending, it could be concluded that there was pre-existence of dispute even prior to issue of demand notice under section 8(1) and, in such a case, application filed under section 9 was not maintainable.

The respondent was a shareholder and was also CEO of the 'Corporate Debtor'. He was not paid salary for certain months and inspite of demand notice under section 8(1), the 'Corporate Debtor' defaulted to pay. The respondent thus filed an application under section 9 which was admitted. It was found that the respondent had earlier filed a company petition under sections 241 and 242 of Companies Act, 2013 which was pending before the National Company Law Tribunal. During pendency of the aforesaid application for payment of salary, without waiting for decision of the NCLT, the respondent issued demand notice under section 8(1) for the same amount.

Held that there was a pre-existence of dispute with regard to salary payable to the respondent and, matter was pending for decision before the 'National Company Law Tribunal' prior to issuance of demand notice under section 8(1), in such a case, application filed under section 9 was not maintainable, therefore, impugned order passed by the Adjudicating Authority admitting respondent's application was to be set aside.

Case Review : *Dr. Amit Sachdeva v. Axiss Dental (P.) Ltd. [2019] 110 taxmann.com 524 (NCLT - New Delhi), set aside*

SECTION 11 - CORPORATE INSOLVENCY RESOLUTION PROCESS - PERSONS NOT ENTITLED TO MAKE APPLICATION

- ***Pratima P. Shah v. IDBI Bank Ltd. - [2019] 111 taxmann.com 424 (NCL-AT)/[2019] 156 SCL 833 (NCL-AT)***

Company 'ARL' filed Form-6 for initiation of 'Corporate Insolvency Resolution Process' against it. The Adjudicating Authority (National Company Law Tribunal) treated the Form-6 as an application under section 10 showing 'ARL' as 'Corporate Applicant' and admitted the application.

Earlier, order of winding-up was passed by the High Court and the matter was taken up by the BIFR under section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. In terms of section 22 of the said Act, all proceedings remained stayed. However, the BIFR having refused to pass any order of restructuring, the company moved before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). On 25-11-2016, the Ministry of Finance (Department of Financial Services) issued Notification in exercise of powers conferred by sub-section (2) of section 1 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, and appointed 1-12-2016 as the date on which the provisions of the said Act was to come into force. On behalf of the company, the appellant (Promoter) filed Form-6 before the National Company Law Tribunal giving details as were required.

Held that for initiation of Corporate Insolvency Resolution Process by reference under sub-section (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, prohibition under section 11 is not applicable. There is no specific form prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for filing such reference, therefore application filed by the corporate debtor in Form-6 for initiation of CIRP against it cannot be treated as an application under section 10 and will continue to be a

reference under section 4(b) of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 and, hence, such application will not be hit by Section 11.

Case Review : *Anil Goel, In re [2019] 103 taxmann.com 77 (NCLT - Mum.) Set aside*

SECTION 5(6) OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

- **Pedersen Consultants India (P.) Ltd. v. Nitesh Estates Ltd. - [2019] 111 taxmann.com 425 (NCL-AT)**

In an application under section 9, it is always open to corporate debtor to point out existence of dispute and existence of dispute must be pre-existing i.e. prior to issuance of demand notice or invoice.

Held that in an application under section 9, it is always open to the corporate debtor to point out existence of dispute and existence of dispute must be pre-existing i.e. must exist prior to issuance of demand notice or invoice. If it comes to notice of the Adjudicating Authority that the operational debt is exceeding threshold limit of Rs.1 lakh and application to initiate CIRP shows that debt is due and payable and has not been paid, in such case, in absence of existence of a dispute between parties, the application under section 9 cannot be rejected.

Case Review : *Pedersen Consultants India (P.) Ltd. v. Nitesh Estates Ltd. [2019] 108 taxmann.com 150 (NCLT-BENG), reversed*

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

- **Sunil Choudhary v. Hubergroup India (P.) Ltd. - [2019] 111 taxmann.com 433 (NCL-AT)**

Where parties had settled matter prior to constitution of CoC, operational creditor was to be allowed to withdraw section 9 application.

The respondent-operational creditor filed application under section 9 for initiation of the CIRP against the corporate debtor which was admitted by the Tribunal. The parties reached the settlement and 'Terms of Settlement' had been filed moreover till that time and no Committee of Creditors (CoC) had been constituted. The Interim Resolution Professional accepts that the

CoC had not been constituted and the 'Terms of Settlement' reached between the parties and in terms thereof the admitted dues would be paid by the corporate debtor within the time period shown therein.

Held that In view of the aforesaid development and taking into consideration the fact that the Committee of Creditors has not been constituted and the parties have already reached the settlement and being satisfied, allow the operational creditor to withdraw the application under section 9. In the result, the impugned order admitting the application under section 9 is to be set aside.

Case Review : *Swiss Ribbons (P.) Ltd. v. Union of India [2019] 101 taxmann.com 389/152 SCL 365 (SC), followed; Hubergroup India (P.) Ltd. v. Shreemataji Graphics (P.) Ltd. [2019] 111 taxmann.com 432 (NCLT - Mum.), set aside*

Insolvency Professional Agency of Institute of Cost Accountants of India

(Section 8 Company registered under the Companies Act, 2013)

The Insolvency Professional Agency of the Institute of Cost Accountants of India (IPA ICAI) , a Section 8 Company incorporated under Companies Act 2013 has been promoted by the Institute of Cost Accountants of India (Institute) and Registered with Insolvency and Bankruptcy Board of India (IBBI) to enroll and regulate Insolvency Professionals (IP) in accordance with the provisions of the Insolvency & Bankruptcy Code, 2016 (Code) and rules, regulations and guidelines issued there under

IPA ICAI invites applications for the Post of Managing Director (on Contractual basis)

Position	Managing Director
Age	Not above 55 years as on 31st July, 2020.
Qualification	Must be a Graduate along with a Fellow Member of the Institute of Cost Accountants of India / Institute of Company Secretaries of India/ Institute of Chartered Accountants of India / MBA / Law Graduate from reputed Institute /CAIIB
Experience	A minimum of 20 years work experience as practicing professional or in reputed corporate organization / banks / Financial Institutions / Regulatory Bodies.
Job Description	☐ Managing Director will be administrative head of IPA ICAI and responsible for all functions of the Insolvency Professional Agency of Institute and perform such tasks and functions as per the provision of Code and rules, regulations and guidelines issued thereunder and as determined and assigned by the Governing Board of the IPA from time to time. ☐ Liaison with the Insolvency and Bankruptcy Board of India on various matters. ☐ Coordinate with the other IPAs for policy making in various matters and providing end to end decision- making for pertinent aspects of development of Insolvency Profession. ☐ He/she should have strong leadership and administrative skills along with proven ability to build good working relationship.

	He/she should also have an impeccable track record, integrity and professional competence, with strong commitment to the cause of the profession. ☐ He/she should have the ability to drive the team of executives of the IPA to meet the expectations of all stakeholders. ☐ He/she shall be responsible for all compliance and statutory obligations as specified in the Code/ Companies Act, 2013 and various other Acts/Laws as applicable to IPA. ☐ He/she must possess good drafting skills as well as proven track record of handling pressing issues. ☐ He/she should have the ability of independently planning and organizing Seminars/Conferences, Workshops, Orientation programs and Training Programs for Insolvency Professionals (IPs) and also possess strong network with industry bodies and other corporate organizations. ☐ He / she should have the ability to carry out research work including release of newsletter, daily IBC update,e Journal, Guidance notes, legal case analysis on regular basis ☐ He/she is expected to be strong in planning and organizing, possess a problem solving approach and attention to details to achieve quality results. ☐ It is also expected that the Incumbent will stay abreast of all relevant changes in the environment so as to enhance the standards of performance of the IPA. ☐ He/she should have ability to identify opportunities and proposes new methods of improving existing operational procedure with a focus on building a sustainable organization ☐ He/she should have ability to develop and execute various strategic and development plans both short and long term to ensure sustainability of the IPA. ☐ He/she should develop appropriate role profiles for various personnel working in the company and evaluate their performance at regular intervals.
Duration	The tenure for the position is for 3 (three) years on contractual basis with an option with IPA ICAI for renewal up to a period of further 3 (three) years or superannuation whichever is earlier.
Remuneration	Consolidated Remuneration up to Rs. 200000 per month.(For deserving candidates, remuneration no bar)
Place of posting	New Delhi

General Information:

- ✓ The post is purely on contractual basis for a period of three years. This engagement is not a regular employment in the IPA-ICAI. During the period of engagement, the person should not hold a certificate of practice or engage in any other occupation. The appointment, renewal of appointment and termination of services of the Managing Director by the Governing Board shall be subject to prior approval of IBBI
- ✓ Mere submission of application and fulfilling the eligibility criteria does not give any right to any person to appear for interview etc.
- ✓ Original and attested copies of all documents in proof of Age, Qualifications, Experience, for the minimum period of experience as indicated for the post, etc. should be submitted by the candidates if called for Interview.
- ✓ Engagement will be subject to the Rules and Regulations of the IPA in force from time to time. Other benefits (if applicable) shall be as per the rules of the IPA as amended from time to time.
- ✓ In case it is found that information furnished by a candidate is false or defective in any manner, the candidature of such person(s) will be summarily rejected as and when it comes to the notice of the management. The candidates are advised to satisfy themselves fully about the correctness of the information furnished.
- ✓ The decision of management of the IPA in the selection process shall be final.
- ✓ The management of the IPA reserves the right to reject any application without assigning any reason whatsoever.
- ✓ Canvassing in any form shall disqualify a candidate
- ✓ Candidates are advised to submit the online Applications on e mail – **hr.md@ipaicmai.in**

- ✓ The last date for submitting online application is 25th August, 2020.

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

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