MARCH'21

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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CHAIRMAN MESSAGE

Introduction of Insolvency and Bankruptcy Code 2016 in India has been a very significant piece of Reform aiming largely at Resolution of Corporate Debt in a specified timeframe and optimising value to all the stake holders. The institutions like NCLT and NCLAT are continually evolving as the effective platform for resolution. It brings to the focus the Role Functions of an important catalyst known as Insolvency Resolution Professional who apart from domain knowledge and experience must possess potential to efficiently manage the business of Corporate Debtors wherever necessary for him to do so. The Quality, Efficiency, Good Governance and Result-orientation would be a true reflection of his capability and professional competence.

The money lending being a risky business is often fraught with the risk of a debt turning toxic during its life-cycle and thus giving rise to the need for its resolution/recovery. The large corporate debts turning toxic in last few years have adversely impacted the financial health of Financiers themselves, having very serious implication for future lending as the Financiers for the fear of accountability do turn risk-averse and shy away from taking lending decisions. Some of the important reasons for a debt turning toxic are as follows:

- Mismanagement of the Enterprise
- Illegal Diversion of Funds
- Fraudulent Transactions and Intentions
- Wilful Default
- Adverse Developments in the Given Ecosystem

Under such circumstances, the recovery of debt assumes a great concern and to compound the things for the Insolvency Resolution Professional is the primary objective of treating the Corporate Debtor as a going concern, which would essentially involve (1) Protecting/Maximising the value of Assets (2) Promoting Entrepreneurship (3) Ensuring Credit Availability (4) Managing Conflicting Interests of Different Stakeholders etc. It makes the job of a Resolution Profession quite onerous and unenviable rendering him vulnerable sometimes. To successfully guard against the vulnerability involved, he must essentially possess the following virtues:

- Highest Degree of Honesty and Integrity
- Unbiased and Objective Dealings
- Transparent Functioning
- Domain Knowledge & Competence
- Efficiency & Timeliness
- Ethical & Diligent Conduct

It can therefore be seen that the credibility of the entire edifice of the Insolvency and Bankruptcy Mechanism would revolve around a great superman called Insolvency Professional. His role can also be compared with an honest and efficient Critical Care Interventional Specialist. The Insolvency Professionals must, therefore, be proud of their onerous profession and also for being Virtually Virtuous.

Dr. Jai Deo Sharma
Chairman

MD MESSAGE

Dear Readers,

This March, we have completed a year-long battle to combat the effects of the COVID-19 pandemic on the economy that included, among other things, a myriad of corporate reliefs to seamlessly facilitate performance of day to day functions as much as possible. In the light of the complete forbearance from availing the right to exit as provided under the IBC, which forced the stakeholders to resort to alternate methods of restructuring and recovery, the practitioners acknowledged that the lack of pre-packaged insolvency regime in the prevailing insolvency framework is one area that is the need of the hour, especially for protecting of MSME industry from the effects of the COVID-19 pandemic.

The one optimistic outcome noticed during this year of suspension of the provisions of IBC would be the opportunity the judiciary had to settle various legal propositions pending before the Indian courts. One such issue involved application of the Limitation Act, 1963 over IBC. In a landmark judgment by the Hon'ble Supreme Court of India passed on 22 March, 2021 [*Sesh Nath Singh & Anr.* versus *Baidyabati Sheoraphuli Co-opeartive Bank Ltd. & Anr.*], the apex court has clarified that IBC does not exclude the application of Section 6, Section 14, Section 18 or any other provision of the Limitation Act, 1963 to the provisions of the IBC. It was further held that all the provisions of the Limitation Act, 1963 are applicable to the IBC to the extent feasible.

Now that the suspension on the admission of new cases, under the provisions of IBC is over, as per the ordinance passes by the legislature, a high surge in the number of cases under the provisions of IBC is expected. However, clarity on application of the Limitation Act, 1963 over IBC should result in withdrawal/settlement of various redundant appeals/ applications pertaining common subjects. Let us all brace ourselves with the fact that the surge in the cases would be a new normal for next few months and we should be ready to resolve the huge caseload in the best way possible with remedies for all stakeholders.

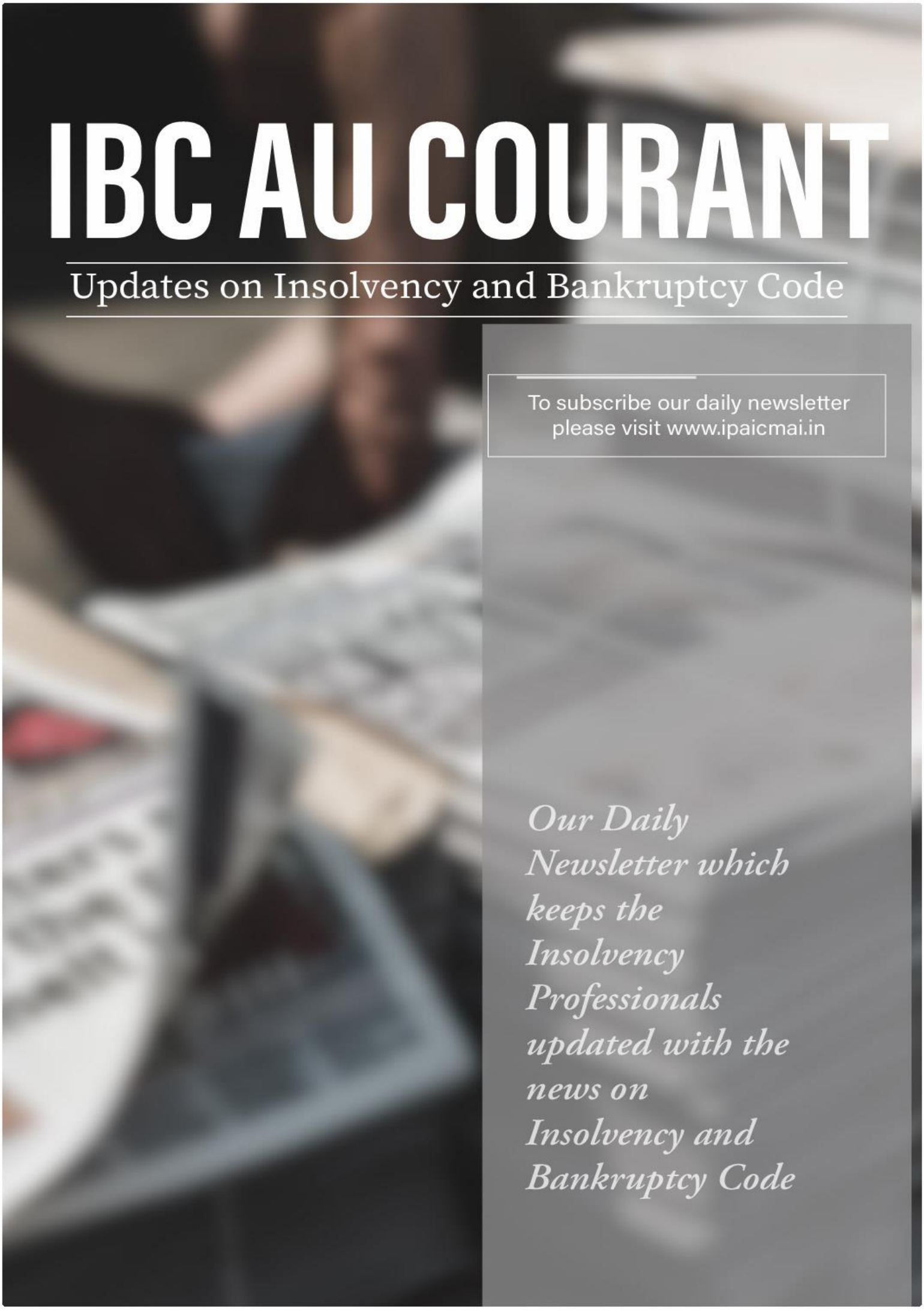
Susanta Kumar Sahu
Managing Director

Professional Development Intiatives

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

March'21	
Date	**Events**
02nd – 08th March 2021	41st Pre- Registration Educational Course jointly with 3 IPAs (IPAICAI, IIIPICAI & ICSIIP)
05th – 07th March 2021	Master Class on Cross Border Insolvency
15th March, 2021	Webinar on Information Utility jointly with NeSL
19th March, 2021	Seminar on Role of Insolvency Professional under IBC jointly with Institute of Cost Accountants of India.
20th- 21st March 2021	Certificate Course on Leadership and Management Skills.
23rd March, 21	Webinar on Information Utility jointly with NeSL.
30th March, 2021	Webinar on Information Utility jointly with NeSL.



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

GREY AREA IN IBC – WHETHER IP CAN INITIATE CRIMINAL PROCEEDINGS AGAINST ALLEGED OFFENDERS UNDER IBC?

Shyam Sundar Kasera

Chartered Accountant & Insolvency Professional

A great confusion prevails as to whether IP is permitted under IBC to directly lodge police FIR or file a criminal case before court against the alleged offenders under IBC. Even certain benches of honorable NCLT are directing IPs to lodge complaints against such offenders under the Criminal Law. Question arises as to whether IP is permitted under IBC to do so. The answer is NO. Then what are IP's duties and what should be his approach. What are powers and role of NCLT? Read the article for a detailed discussion, which takes into account relevant provisions of IBC; and clear set of guidelines contained in certain judgments of honorable NCALT on this issue.

This article deals with the aspect as to whether Insolvency Professional(s) can file a police FIR; or initiate criminal proceedings as per provisions of the Indian Penal Code, 1860 ("IPC"), read with the Code of Criminal Procedure, 1973 ("Cr.PC"), against those parties (including erstwhile promoters of the corporate debtor), who may have violated the provision(s) of the Insolvency & Bankruptcy Code, 2016 ("the Code").

Provisions of the Code

For the purpose of initiating Criminal Proceedings for offenses mentioned in the applicable Sections of the Code i.e. Sections 68, 69, 70, 71, 72, 73, 74, 75, 76 and /or 77 as contained in Chapter VII of Part II of the Code, having regard to various Irregular / Fraudulent Transactions reported to the Adjudicating Authority ("AA"); or having regard to various other offences mentioned in those Sections, the provisions of Section 236 (2) of the Code (*reproduced below*) need to be considered:

".... No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf....."

Further, as per Section 236 (1):

".... *Notwithstanding anything in the Code of Criminal Procedure, 1973(2 of 1974), offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013*".

Also, Section 238 of the Code clearly provides for the overriding effect of the Code over any other law.

Based on the above provisions (Sections 236 and 238), it is understood that:

A) Insolvency Professional can not on his own make a Criminal Complaint or lodge police FIR, for offenses mentioned under the Code, against any persons(s) including but not limited to erstwhile promoters of the Corporate Debtor, even under the Provisions of IPC or Cr.PC. The complaint needs to be made 1) by the Central Government or the Insolvency and Bankruptcy Board of India ("IBBI"); and 2) Such complaint can be made before the special court established under Chapter XXVIII of the Companies Act, 2013.

B) Even NCLT is not empowered to make criminal complaint with designated Special Court against such persons. It can do so only by referring the matter to Central Government or IBBI. (*Powers and Role of NCLT discussed later*)

In light of the above, the question arises as to how IP should proceed in such matter(s); and what are his duties and what is NCLT's role? To get an answer, please read two judgments delivered by NCLAT, Delhi in the succeeding paragraphs.

Honourable NCLAT Judgment dated Feb 04, 2020

The NCLAT, Delhi has, on Feb 04, 2020, pronounced a judgment in case of ***Vijay Pal Garg and Others vs. Pooja Bahry*** *(Liquidation in the matter of Gee Ispat Private Limited) in Company Appeal (AT) Insolvency No. 949 of 2019*. In the said judgment, NCLAT has, in para 44 on page 25-27, given its order as under, containing directions / guidelines as to how a criminal action can be initiated against the concerned persons for offences mentioned in Chapter VII of the Insolvency and Bankruptcy Code, 2016:

"....44. Be that as it may, this Tribunal on a careful consideration of respective contentions and also keeping in mind a prime fact that the Tribunal/Adjudicating Authority is guided by the Principles of Natural justice and is to follow the procedure prescribed u/s 213(b) of the Companies Act comes to an 'irresistible' and inescapable conclusion that the Adjudicating Authority (Tribunal) in Law is not empowered to order an investigation directly, to be carried out by the Central Government. An Adjudicating Authority (Tribunal) as a competent / Appropriate authority in terms of Section 213 of the Companies Act has an option to issue notice in regard to the charges/allegations levelled against the promoters and others (including the Appellants) of course after following the due procedure enshrined u/s 213 of the Companies Act, 2013. In case an ex facie/prima facie case is made out, then, the Tribunal is empowered

to refer the matter to the Central Government for an investigation by the Inspectors and upon such investigation, if any action is required to be taken and if the Central Government subjectively opines that the subject matter in issue needs an investigation, through the Serious Fraud Investigation Office, it may proceed in accordance with Law. Suffice it for this court to make a relevant mention that the Tribunal/Adjudicating Authority on receipt of an application/complaint of breach of the relevant provisions of the IBC, 2016 and the Companies Act and after satisfying itself that there are attendant circumstances pointing out fraudulent/wrongful trading etc. was / which has been committed then, it is well within jurisdiction to refer the matter to Central Government for an investigation by Inspector(s) to be appointed by the Central Government. If an investigating authority after completion of investigation comes to a conclusion that any offence punishable in terms of Section 213 read with 447 of Companies Act or under Section 68,69,70,71,72,73 of the IBC Code is/are made out then, the Central Government, may refer the matter to the 'Special Court' itself or may even require the 'Insolvency and Bankruptcy Board of India' to authorise any person as per Section 236(2) of the I&B Code to file a complaint. Viewed in that perspective this Tribunal varies the impugned order dated 19.07.2019 passed by the Adjudicating Authority and refer the matter to the Central Government for investigation through any inspector. Accordingly, this Tribunal refers the matter to the Secretary, Ministry of Corporate Affairs, Government of India in carrying out an investigation by the Inspector or Inspectors by following the due procedure as per Section 213 of the Companies Act, 2013 etc. If the matter needs to be examined by 'Serious Fraud Investigation Office', the Central Government may do so, if the case of fraud is made out and proceed further in accordance with law....."

Honourable NCLAT Judgment dated Aug 16, 2019

NCLAT had delivered one more Judgment, on the same subject, on Aug 16, 2019, in case of *Committee of Creditors of Amtek Auto Ltd. through Corporation Bank v. Mr. Dinkar T. Venkatasubramian and Others. in Company Appeal (AT) (Insolvency) No. 219 of 2019*, which judgment laid down a procedure to be followed in like cases for filing complaints by the Resolution Professional ("RP") before the AA for taking action against any officers or directors of the Corporate Debtor alleging commission of the offences falling under Chapter VII of Part II of the Code. The Hon'ble NCLAT set aside the liberty granted by the AA (NCLT Chandigarh) to the RP and the CoC to move before IBBI or Central Government, for offense falling under section 74 (3) of the Code (Page 38). NCLAT held that AA is though empowered to refer the matter to "IBBI" or "Central Government under Section 213 of the Companies Act, 2013" for investigation, AFTER providing reasonable opportunity of hearing to the parties concerned / alleged offenders of provisions of Chapter VII of Part II of the Code (Page 37-38)

Concluding Remarks

Criminal Complaint(s) for offenses mentioned under the Code should not be directly filed by the Insolvency Professional(s), before police or court, against the alleged offenders. Further, there is now available a clearer set of guidelines as contained in the above referred NCLAT judgments, as to how IPs can proceed towards filing a criminal complaint against the concerned persons (including Erstwhile Promoters of the Corporate Debtor). IPs should, therefore, refrain from directly initiating Criminal Proceedings under the IPC or Cr.PC, for any offense punishable under the Insolvency & Bankruptcy Code, 2016. Rather, he should move an application before AA, under Section 213 of the Companies Act, 2013 read with Section 236 of the Code, for referring the matter to Ministry of Corporate Affairs. Prayer to AA by IP to refer the matter to IBBI may not be advisable, in absence of a set of clear legal provisions w.r.t. procedure to be adopted by AA or IP, if the matter is referred by AA directly to IBBI, instead of leaving it to the discretion of Central Government.

For benefit of IPs, a draft of prayer which may be made before AA in applicable cases, is suggested below:

"*As per directions / guidelines contained in the honorable NCLAT judgment dated Feb 04, 2020 in case of Vijay Pal Garg and Others vs. Pooja Bahry (Liquidation in the matter of Gee Ispat Private Limited) in Company Appeal (AT) Insolvency No. 949 of 2019; and those contained in another NCLAT judgment dated Aug 16, 2019, in case of Committee of Creditors of Amtek Auto Ltd. through Corporation Bank v. Mr. Dinkar T. Venkatasubramian and Others. in Company Appeal (AT) (Insolvency) No. 219 of 2019; and also with reference to Section 236 of the Insolvency and Bankruptcy Code, 2016, which does not allow the Resolution Professional / Liquidator to directly file a criminal complaint on his own with any court against the concerned persons for offences mentioned in the Insolvency and Bankruptcy Code, 2016, the matter may please be referred by this honorable NCLT, if it is satisfied that the matter deserves to be so referred, to the Secretary, Ministry of Corporate Affairs, Central Government, under Section 213 of the Companies Act, 2013, read with Rule 11 of the NCLT Rules, 2016, for carrying out an investigation by any inspector or inspectors, with a direction that if the investigating authority after completion of investigation comes to a conclusion that any offence punishable in terms of Section 213 read with 447 of Companies Act or under Section 68,69,70,71,72,73 of the IBC Code is/are made out, then the Central Government, after or without getting the matter examined by 'Serious Fraud Investigation Office', may itself refer the matter to the 'Special Court established under Chapter XXVIII of the Companies Act, 2013'; or may even require the 'Insolvency and Bankruptcy Board of India' to authorize any person as per Section 236(2) of the I&B Code to file a complaint before the Special Court."*

WHETHER THE LIQUIDATOR IS REQUIRED TO FILE INCOME TAX RETURN?

Govindarajan M
Insolvency Professional

The Government dues, including income tax dues are not having priority in payment in liquidation proceedings. The liquidator is not expected to prepare the profit and loss account of the corporate debtor and file income tax return. TDS provisions are also not applicable to liquidation proceedings. Therefore, no TDS is to be deducted from the sale proceeds of the assets of the corporate debtor.

Duties of liquidator under Income Tax Act

Section 178 of the Income Tax Act requires a liquidator to give notice of his appointment as such to the Assessing Officer who is entitled to assess the income of the company. The Assessing Officer shall 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. The liquidator shall set aside an amount, equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hand. If the liquidator fails to give the notice or fails to set aside the amount or parts with any of the assets of the company or the properties in his hands, he shall be personally liable for the payment of the tax which the company would be liable to pay.

Distribution of assets

Section 53 of Insolvency and Bankruptcy Code, 2016 ('Code' for short) provides the procedure of distribution of assets by the liquidator to the eligible persons in the order of priority. The Government dues, including taxation departments, come under the fifth rank under section 53 at par with the security creditors.

Filing income tax return by liquidator

Chapter III of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 provides powers and functions of liquidator. Regulation 5 & 6 of the Regulations requires the liquidator to submit various reports, to complete the books of accounts, to maintain the

registers and books for a period of 8 years. The said regulation does not require the liquidator to prepare profit and loss accounts of the company and to file income tax return.

The Income Tax Department's view is according to the Income Tax Act the liquidator is liable to file income tax returns and to get refund if any TDS is recovered from the sale proceeds of the assets of the corporate debtor.

In the following case law the National Company Law Appellate Tribunal held that the liquidator is not required to file income tax return:

In **'Om Prakash Agrawal, Liquidator for S. Kumars Nationwide Limited v. Chief Commissioner of Income Tax (TDS) and others' – 2021 (2) TMI 364 – NCLAT**, (decided on 08.02.2021) the respondent No. 2 is the successful bidder in auction held for sale of assets of the Corporate Debtor. The liquidator filed an application before the Adjudicating Authority for direction against the respondent No.2 and Income Tax Authority not to deduct 1 % TDS from the sale consideration Rs. 43 Crores. The prayer is on the premise that Income Tax dues can be recovered by the department as per waterfall mechanism set out under Section 53 of Insolvency and Bankruptcy Code.

The Adjudicating Authority held that the deduction of Tax at source under Section 194-IA of the IT Act does not mean assessment and raising demand for collection of Tax by the Department. Collection of Tax will arise only after passing orders under the Income Tax Act subsequent to filing of Income Tax Return by the assessee. Thus, the deduction of TDS does not tantamount to payment of Government dues in priority to other creditors because it is not a Tax demand for realization of Tax dues. It is the duty of the purchaser to credit TDS to the Income Tax Department. The Adjudicating Authority, therefore, dismissed the application filed by the liquidator.

Aggrieved against the order of the Adjudicating Authority the liquidator filed an appeal before the National Company Law Appellate Tribunal ('Appellate Tribunal' for short)

The appellant submitted the following before the Appellate Tribunal-

- Section 53 of the Code, postulate the distribution of assets to the Creditors without deduction of the TDS.
- Disbursement of Government dues is covered under Section 53 (1) (e) of the Code.
- Deduction of TDS runs counter to the scheme and mandate of Section 53 of the Code.

- The Income Tax liability arising out of sale of assets by the Liquidator shall be distributed in accordance with the provisions of Section 53 of the Code and the capital gain tax shall not be treated as liquidation cost.
- A Liquidator is duty bound to maintain or update the Books of Account till the Liquidation commencement date and however, during the liquidation period there is no requirement of maintaining profit and loss account and balance sheet of the Corporate Debtor and to get the same audited.
- Filing income tax returns and getting refund for TDS is a tedious job and goes directly against the scheme and specific regulations provided under the Code.
- There is no such provision inbuilt either in the Code or the Regulation for filing of Income Tax Return and hence mode of distribution is provided based on existence of Liquidation Estate on liquidation commencement date.
- The Liquidation Process is required to be completed within a year as per Regulation 44 of the IBBI (Liquidation Process Regulation 2016).
- The provisions under Section 194 IA of the Income Tax Act are inconsistent with Section 53 of the Code.
- Section 238 of the Code, the provision of Section 53 of the Code shall have overriding effect.
- The impugned order is liable to be set aside and the Respondent No. 1 be directed to refund the amount of TDS which is deposited by the Respondent No. 2.

The respondent No.1 submitted the following before the Appellate Tribunal-

- The Appellant is drawing inference beyond what is mandated by the code.
- The Section 247 of the Code read with the Third Schedule of I&B Code 2016 duly describes the manner in which Income Tax Act was to be amended with regard to companies in liquidation. According to Third Schedule of the Code, only Section 178 of the Income Tax Act was to be amended, there is no amendment in Section 194-IA of the Income Tax Act.
- Nowhere it is mentioned in the code that company under liquidation outside the purview of Section 139 of the Income Tax Act.
- The liquidator is not exempted from filing return of the income.
- TDS is required to be deducted as per provisions of Section 194-IA of the Income Tax Act in respect of sale of immovable property under liquidation and exemption from the TDS would actually tantamount to amending the provisions of the Income Tax Act.
- The liquidator being a principal officer within the meaning of Section 2(35) of the Income Tax Act for the purpose of furnishing return can file and verify the return.
- There is no conflict between Section 194-IA of the Income Tax Act and Section 53 of the Code as the intent and purpose of both the sections are different.
- One is fiscal provision whereby TDS is required to be made in case of sale of immovable property for a consideration more than Rs.50 lakhs. The other determines priority amongst

different stake holder in case of distribution of sale proceeds of assets of Corporate Debtor under liquidation.

- The Adjudicating Authority has rightly held that the TDS under section 194-IA of the Income Tax Act does not mean assessment and raising demand for collection of Tax by the Department.
- The Appeal is liable to be dismissed.

The Appellate Tribunal heard the arguments put forth by both the parties and also the documents produced by them. The Question for consideration of the Appellate Tribunal is whether the provisions of u/s 194-IA of the Income Tax Act, 1961 are inconsistent with Section 53 (1) (e) of the Insolvency and Bankruptcy Code, 2016.

The Appellate Tribunal analyzed the various provisions of the Income Tax Act and the Code. The Appellate Tribunal observed that as per the Supreme Court judgment the Income Tax Department is to be treated as a secured creditor in the light of the words occurring in Sections 178 (3) and (4) of the Income Tax Act to the effect that the liquidator shall set aside the amount notified by the Income Tax Officer and if it is not so done, the liquidator is personally liable to pay the amount of Tax. With this proposition, the Income Tax Department is to be treated as a secured creditor and in liquidation proceedings such dues shall get priority. But section 53 (1) (e) of the Code assigned the 5th position in the order of priority to government dues (including Income Tax Dues).

The Appellate Tribunal further observed that Section 178 (6) of the Income Tax Act and Section 53 of the Code both Sections start with non-obstante clause, therefore, legislature in its wisdom to give effect to the scheme of the Code amended Section 178(6) of the Income Tax Act. By virtue of the amendment the whole of Section 178 has no application to the liquidation proceedings initiated under the Code. The Appellate Tribunal, therefore, considered for the amendment of section 178(6) of the Income Tax Act.

Then the Appellate Tribunal analyzed sections 45, 194-IA, 199 of Income Tax Act and section 53 of the Code. Section 194 IA of the IT Act provides that where the consideration for transfer of the immovable property is more than Rs. 50 lakhs, then the transferee is responsible to deduct the amount which is 1% of the consideration as Income Tax. Section 199 of the Income Tax Act, provides that any deduction made in accordance with the Section 194 IA of the Income Tax Act and paid to the Central Government shall be treated as payment of tax on behalf of the person from whose Income deduction was made, or the owner of the security or of the depositor or of the owner of the property. Section 45 of the Income Tax Act, provides that any profits are gains arising from the transfer of a capital asset effected in the previous year shall

save as otherwise provided in the Section be chargeable to Income Tax under the head of capital gain and shall be deemed to be the Income of the previous year, in which the transfer took place. Section 53(1)(e) of the Code in waterfall mechanism provides that the Government dues comes fifth in order of priority.

The Appellate Tribunal held that there is inconsistency between Section 194IA of the Income Tax Act and Section 53(1) (e) of the Code therefore, by virtue of Section 238 of the Code, Section 53 (1) (e) of the Code shall have overriding effect on the provisions of the Section 194 IA of the Income Tax Act.

The Appellate Tribunal further observed that there is no such provision in the Income Tax Act, Code or IBBI (Liquidation Process Regulation, 2016) that the Liquidator of the Company in Liquidation under the Code is required to file Income Tax Return. The Code/IBBI (Liquidation Process Regulation 2016) does not assign a duty on the Liquidator to prepare financial statements. The Appellate Tribunal was of the view that the Liquidator of a Company in liquidation under the Code is not required to file Income Tax Return, then there is no question of claiming refund of TDS deducted under Section 194 IA of the Income Tax Act.

The Appellate Tribunal held that the Adjudicating Authority has erroneously held that the deduction of Tax at source does not mean raising demand for collection of tax by the Department. Actually, TDS under Section 194 IA is an advance capital gain tax, recovered through transferee on priority with other creditors of the company. The impugned order is not sustainable in law. Therefore, the Appellate Tribunal set aside the order of Adjudicating Authority. The Appellate Tribunal further directed to refund the amount of TDS to the Appellant which is deposited by the Respondent No. 2 with the department.

OPERATIONAL CREDITOR OR FINANCIAL CREDITOR – IP'S DILEMMA GALORE

Rajeev Mawkin

Chartered Accountant & Insolvency Professional

Insolvency & Bankruptcy Code (IBC) has provided a mechanism for insolvency resolution of corporate entities and their guarantors, partnership firms and individuals including their guarantors in a transparent and fair manner. The mechanism of resolution is based on the claims submitted by financial and operational creditors of the entity which is undergoing resolution. The determination of status of a creditor as financial or operational remains a dilemma for insolvency professional (IP). Some practical situations that an IP may come across during determination of status of a creditor are discussed in this Article.

The Insolvency and Bankruptcy Code, 2016 (**IBC**), which came into existence as a new law in the year 2016, brought in a new ray of hope for the banks and financial institutions of India. The IBC law was made self-contained to a large extent, more direct and with less discretions. Each and every word, phrase and term used in IBC was defined within the IB Code itself and it was given a vast reach by over-riding nearly all other laws of the land.

The Corporate Insolvency Resolution Process (CIRP) was provided under IBC for corporate persons which envisaged that all financial creditors (FC) or operational creditors (OC) should submit their claims for amounts due to them from the corporate debtor (CD) undergoing resolution and a mechanism was provided for admission of such claims under CIRP by the Interim Resolution Professional (IRP) or the Resolution Professional (RP).

Here, we are going to discuss specifically about the OC and the process of determination of status of claimant by IRP or RP and the challenges faced in doing so by IRP or RP during the CIRP.

On initiation of CIRP, all creditors are required to submit their claims to the IRP within 14 days of the public announcement made by IRP. The IRP has to face an immediate challenge on submission of claim by such OC to ascertain whether the claimant should be considered as an FC or OC.

This can be interestingly elaborated with the help of certain practical situations an IRP or RP may be faced with. A few illustrations are given below –

1) **<u>Debts of OC payable by CD along with interest in case of delay in payment of dues:</u>**-

1.1 This is essentially a case where an OC had provided goods or services to a CD and issued an invoice for goods or services. There was a condition mentioned in the invoice issued by OC that interest shall be payable to the OC at a specified rate in case of delay in payment of dues beyond a particular date or time period.

1.2 In such cases, sometimes the OC try to project themselves as an FC and submit claims in relation to invoice amount along with interest calculated at the specified rate mentioned in their invoice along with an agreement to this effect as an FC.

1.3 As per provisions of section 5(20) and 5(21) which defines "Operational Debt" and "Operational Creditor", once a debt falls under the category of an "Operational Debt" at the first instance, then it cannot be considered as any other debt even if there is a pre-condition mentioned in the invoice of OC for charging interest in addition to invoice amount in case of delay in payment of dues.

1.4 The golden principle enumerated and interpreted by various courts is "Once a OC, always an OC". The charging of interest by OC for delay in making payment by CD will not convert an OC to FC. Therefore, the IRP or RP need to be mindful of such a misrepresentation and should verify the documentary evidence carefully to ascertain the correct status of claimant.

2) **Debts assigned by an OC in favor of an FC**:

2.1 In some cases, the operational debts due from a CD, may be assigned by OC to an FC by executing a deed of assignment and as a result, the FC steps into the shoes of the OC for submitting its claim during CIRP with the IRP or RP.

2.2 As per provisions of IBC, wherever such an assignment has been made by OC in favor of FC, a deed of assignment is required to be provided by OC to the CD as and when it is executed and the CD has to give its acceptance to the terms of assignment of such debt, thereby accepting FC as a creditor in place of OC.

2.3 If an FC claims to have received such an assignment of debt in its favor from an OC, then the FC should provide the deed of assignment along with acceptance of such assignment by the CD before admission of claim. If such documents are not provided, then effect of assignment cannot be considered by the IRP or RP while determining the status of the claimant.

2.4 Furthermore, even after assignment of operational debt by OC in favor of FC, the debt will remain an "Operational Debt" for all practical and legal purposes of IBC. The status of FC, in such a case, will remain as an OC to the extent of operational debt although it might otherwise be entitled to be treated as an FC for any other financial debts owed by CD.

3) **Security interest created by OC at a later date**:

3.1 The operational debt of an OC may be secured or unsecured depending on the terms of contract originally executed between the CD and the OC when the goods or services are provided by OC.

3.2 In case of unsecured debt of OC, it is observed sometimes that the OC provides documents with regard to security interest created at a later date by CD in favor of OC. In such cases, IRP should examine if the terms of the original contract executed between the CD and OC have also been amended while creating security interest and whether legally acceptable document is available with the OC for making such a claim. If the terms of original contract between the CD and OC remain unchanged, then the IRP or RP should obtain sufficient information from records available with CD in order to accept such security interest. The IBC provided and courts have held that a creditor can only assign a right which it was entitled to under the terms of original contract or agreement and it cannot assign a superior right than what was available to an OC at the time of entering into a business transaction with the CD.

4) Operational debts of OC reclassified as Unsecured Loans by CD:

4.1 In cases where the CD was a manufacturing entity and no business activity was undertaken by the CD, say for the last 5 years or more before the CIRP, it was observed that the books of accounts, which were statutorily required to be maintained by CD, were not available or were available in part. In most of these cases, audited annual accounts, MCA returns, VAT or GST returns and company minute books and statutory records were also not available and income tax returns were also not submitted. So there is distinct scarcity of required records and information about the affairs of the CD. The only solace is availability of statement of bank accounts of CD and the IRP or RP is required to determine the nature of all business transactions from such statement of bank accounts, which becomes a herculean task.

4.2 There is an effort by the CD to use this situation to their advantage. In some cases, a loan agreement is shown to have been executed between the CD and OC after the period for which last annual audited accounts of the CD is available. This loan agreement specifies terms and conditions of such unsecured loan given to CD including the rate of interest payable to the lender (OC) on such loan. After the date of execution of this loan agreement, the amount of operational debt is carried forward in the books of account of CD as an unsecured loan thereby giving the advantage to the OC to be treated as an FC on submission of claim.

4.3 In all cases of unsecured loans, the bank statement of CD should be verified by IRP to confirm whether any amount was actually received from lenders (OC) on the date or during the period which was mentioned in the loan agreement. If an amount payable to the OC has been simply converted as an unsecured loan, then the receipt of such an amount or amounts will not be reflected in the bank account of the CD. Similarly, certain definite actions by CD like payment of interest on such unsecured loans, deduction of tax at source on such interest and deposit of such tax deducted at source with the authorities and filing of TDS returns will go a long way in analysing such a transaction.

4.4 Another issue in this regard that seems to trouble the IRP or RP is that the narration or description given in relation to a credit entry appearing in the bank statement of the CD is often inadequate/incomplete which makes it difficult to ascertain the nature of the transaction undertaken between CD and any other party.

4.5 Prior to introduction of GST with effect from 01st July 2017, the information was not readily available regarding VAT submissions by OC as each state had a different VAT structure and it was difficult to obtain information about VAT registration and business transactions declared in VAT by OC. Where an IRP or RP considers it necessary, then he may approach the VAT authority of the concerned OC in order to determine the nature of transaction entered into between CD and OC. This will help the IRP or RP to determine if the transaction was of sale of goods or services or a loan.

5) OC being relatives/related party/connected persons of CD :

5.1 The relationship between a CD and OC assumes great importance as a CD and OC enjoy mutual convenience and can manage their business affairs in such a way that an operational debt of a related OC may be increased substantially so that it can breach the level of 10% of total debts when claims are submitted. This allows a related OC to become a member of COC and vote on the resolutions proposed by IRP or RP.

5.2 One such mechanism that can be adopted by CD is to provide a guarantee to a related OC for a reasonably large amount in any business transaction and then allow such guarantee to be invoked in favor of the related OC. As a result, the value of operational debt rises by a considerable extent and the chances of OC becoming a member of COC become quite likely. If the CD is able to push more related OCs as members of COC, then the CD can definitely impact the decision making of a COC while voting on resolutions proposed by IRP or RP.

5.3 Where the OCs are companies or LLPs, the information about their ownership and directors is available in public domains. However, where an OC is a partnership firm, association of persons, body of individuals, proprietorship firms, private trusts, etc., the information regarding their ownership is not readily available. A CD may be conducting

business with many of these OCs and large amounts may be shown to be due to them on account of goods or services. It will be a challenge to ascertain status of all such claimants by IRP or RP.

5.4 In relation to the relatives of an individual, a term, which has been defined by IBC to include some individual relationships specifically in case of CIRP, it is interesting to note that a CD may choose to determine certain relationships which are left out in the list prescribed by the IBC. One such example is that of father-in-law of a son or daughter which is not included in the list of relatives provided in the IBC. There could be many other relationships which are not mentioned in this definition. All such relatives of the CD could affect the decision making of the COC. Therefore, adequate care has to be taken by IRP or RP to determine and ring fence all such OCs so that decisions taken by COC remain impartial.

Therefore, IRP or RP are expected to exercise required diligence for determining the correct status of claimant which culminates in constitution of COC.

VALUERS UNDER IBC

Anil K Sharma
Insolvency professional

The Companies (Registered Valuers and Valuation) Rules, 2017 allows Valuation to be conducted by Individual valuers and Registered Valuer Entities, the award of work to Individual Valuers for related asset categories on one hand and on the other hand to Registered Valuer entities can lead to different Valuation results, the article tries to argue that the award of work to Registered Valuer Entities may lead to expected results as compared to placing the responsibility on individual valuers. It also raises an issue related to clarity on premises of values based on Going concern status of the Corporate Debtor while the scope of work is awarded.

Quality Valuations are linked to the clarity in scope and perhaps nature of entity to whom, the work is awarded, under IBC 2016

The Companies (Registered Valuers and Valuation) Rules, 2017 were notified by the Central Government of India on October 18, 2017, by the Ministry of Corporate Affairs in exercise of its powers under Section 247, read with sections 458, 459 and 469 of the Companies Act, 2013 (18 of 2013).

These Rules permitted Valuers to be registered under various Asset classes and allowed both individuals as well as Partnerships and Companies to be Registered as Valuers as per Rules 3, 4 and 5 based on the Eligibility, Qualification and Experience criteria. Partnerships and Companies have to meet some necessary conditions such as Objects, minimum number of partners/directors and a minimum number of asset class valuers in the category.

The Rules 7(c) and (h) laid down the following conditions in respect of conduct of Valuation amongst other rules:

- Rule 7(c): In his capacity as a registered valuer, not conduct valuation of the assets or class(es) of assets other than for which he/it has been registered by the authority
- Rule 7(h): In case a partnership entity or company is the registered valuer, allow only the partner or director who is a registered valuer for the asset class(es) that is being valued to sign and act on behalf of it.

Rule 8 (2) regarding, conduct of valuation, mandates that the registered valuer may obtain inputs for his valuation report or get a separate valuation for an asset class conducted by another registered valuer. In that case, he shall fully disclose details of the inputs and particulars etc of the other registered valuer in the report and the liabilities against the resultant

valuation, irrespective of the nature of inputs or valuation by the other registered valuer, shall remain of the first mentioned registered valuer.

Having read Rules 7(c) and 7(h) along with 8(2), one can infer that a partnership or an incorporated entity not registered for a class of assets cannot undertake valuation of assets of an excluded class from its registration. In case of assets class included in its registration only allows one each of those partners and directors to sign on behalf of the entity, who are registered for that particular class.

An individual valuer cannot Value assets unless he is registered in the category of those assets. However, he can take inputs and get a separate valuation for an asset class provided he assumes the liabilities against the resultant valuation, irrespective of the nature of inputs or valuation by another registered valuer. This means that the individual registered valuer can associate with other registered valuers of different asset classes and conduct valuations as long as, he is willing to take the responsibility of an assignment, including those of other classes.

In the context of these rules, let me raise some issues that concern us today around conduct of valuations by registered valuers of all 3 assets classes, namely Plant & Machinery (P&M); Land and Building; and Security and Financial Assets (SFA).

Let us assume that the target valuation is a Going concern valuation for a company under Corporate Insolvency Resolution Process (CIRP). Further, assume that the Valuation requires estimating the usual, the Fair Market value and Liquidation value. Assume that the Valuers began valuing assets individually under a Main valuer, the Land valuation is done by Sales comparisons method and Building assets on replacement cost basis. P &M valuation is done on replacement cost basis and SFA assets based on realizable values. Additionally, the Main Valuer has to ensure that all valuers have also assumed premises of value consistently.

The final values could be reported possibly by summing up the 3 asset classes values. Since the work has been awarded to the Main valuer, he will need to check if the sum of these values are supported against any earning potential for the enterprise, using Income method since valuation was based on a Going concern premise. Assume that the Main valuer has a reliable forecast and there are existing contracts or positive outcomes for sales of products of the Corporate Debtor enterprise, supporting the cash flow model. Let us say, that the Income valuation throws up a number notably lesser than the sum of all asset valuations, for legitimate reasons, the main valuer should use the results of Income method to report both the Fair Market Value and Liquidation value of the Company on a Going concern basis, discarding the value opinions reported by the other category valuers, even though he may choose to academically report the values arrived at, by other valuers using other methods, holding the income method value opinion..

However, when the same valuation of a Corporate Debtor has to be done by a Main valuer assuming a non-going concern, on an ex-situ-basis wherein Values are sought on piecemeal liquidation of assets, he perhaps has a choice to report the following values:

1. P & M assets on ex-situ-basis premise for its highest and best use employing most likely the Replacement cost method or Sales comparison method accounting for all disposal costs.

2. Land valued using Market method, the building or structures valued on salvage basis.

3. Realizable value to derive value of all current assets, investments and any intangible assets

Here the Main valuer reports the values and takes responsibility of valuations conducted by others not discarding the values this time. The Final values being the sum of all the preceding values.

In practice however, IBC valuations are being awarded by Resolution Professional or a Liquidator either to three individual valuers registered with IBBI in separate categories or to Registered Valuer Entities. Rarely do we come across cases where a Main valuer takes the responsibility for the other asset classes because of the inherent risks involved in assuming an overall responsibility. Thus, leaving the Resolution Professional to only sum up valuations of all asset categories.

Therefore, should the Valuation be awarded to Individual valuers without making one Main valuer responsible or awarding an Registered Valuer Entity to do the task, the results could easily lead to erroneous results and application of divergent premises of values for three asset categories, leading to grossly incorrect valuations

Now, the above process can be made fool proof in case work is awarded to a Registered Valuer Entity which allows the entity to substitute the main valuer, with a juristic entity and report the values on behalf of the entity even though individual partners/directors sign the valuation report for each class as Partners or Directors. This often results in convergence of premises of values by all asset category valuers and leads to consistency in assumptions and important factors being considered.

Individual valuers do not enjoy the limited liability benefit of incorporated entities. While awarding work to an RVE will not permit escape from any instance of inducement/fraud/falsification/misconduct even though the Valuers conducting valuations are part of an incorporated or a constituted entity.

Further when an RVE reports an opinion of Value, it could be assumed, that all Valuers involved have converged on a single opinion of Value separately for all bases of values, finally being reported to the Resolution Professional or Liquidator. In practice, a single valuer or two valuers out of three may lead and provide guidance on key assumptions and factors. This may only

lead to implicit agreement on opinions by the third asset class valuer. As there is no room for dissenting opinions or differing premise assumptions all generally converge on important factors and premises.

Another emerging issue is that of excessive broadening of scope by Resolution Professionals / Liquidators off late. It is based on the Regulation 32 in the IBBI (Liquidation Process) regulations 2016 related to the sale of assets, wherein scope of Valuation is expanded to encompass all Value premises based on Regulations 32(a) to 32 (f) leaving a lot of work on the Valuers table with usually a poor budget. This is mainly the result of lack of clarity in assessment of the Corporate Debtor as a Going concern by the Committee of Creditors under Regulation 39(C) of the IBBI (Insolvency process of Corporate Persons) Reg 2016. Note that Valuers are appointed by the 47th Day from commencement of proceedings and in many instances, Resolution Professional assumes responsibility only after an Interim Resolution Professional makes way after the first COC meeting. In case of Liquidation, the award of work is discretionary but if required, needs to be awarded by the 7th day from start of the Liquidation process. Both timelines offer insufficient duration to the Resolution Professional, the newly formed COC or the Liquidator to grasp the intensity of problems of the Corporate Debtors and arrive at a reliable conclusion for awarding a clear scope to the Valuers essential for a conclusion regarding premises of value.

Perhaps, the answers to all the issues raised above lie in streamlining some processes and timelines for award of Valuation work under IBC, more importantly assigning a clear scope around the premise of values along with assignment of clear responsibility to Valuers as RVE's or as Main valuers.

LEVERAGING 'SWISS CHALLENGE' IN IBC FOR MAXIMIZATION OF VALUE OF ASSETS

Dr. S K Gupta
MD- ICMAI RVO
Vaibhav Prateek
Student, Graduate Insolvency Program IICA

A CASE STUDY OF RUCHI SOYA INDUSTRIES LIMITED

Under the Swiss challenge method, the highest (H1) bid in the first round of bidding becomes the base price for bidders, including the H1 bidder, to place counter-bids in the second round of bidding. Also, this clears the eligibility norms for the second round of bidders. The "Swiss Challenge Method" helps to reduce the time involved in litigation and seeks to fulfil one of the key objectives of the code i.e. Time bound resolution of debt ridden companies. The Swiss Challenge Method has facilitated in fulfilment of the objectives of the code in Ruchi Soya Industries Limited case

The Company Profile

Featuring among the top five FMCG players in India, Ruchi Soya Industries Limited is a leading manufacturer and India's largest marketer of healthier edible oils, soya food, premium table spread, vanaspati and bakery fats. It is also the highest exporter of soya meal, lecithin and other food ingredients from India. Established in 1986, Ruchi Soya has emerged as an integrated player, from farm to fork with secured access to oil palm plantations in India and other key regions of the world. Ruchi Soya has access with exclusive oil procurement rights to over two lakh hectares of land in India with a potential of oil palm cultivation.

Today, Ruchi Soya owns 22 manufacturing units that cumulatively translate to a refining capacity of over 11000 tonnes per day, seed crushing capacity of 11000 tonnes per day and packaging capacity of 10000 tonnes per day. A Pan-India presence with strategically located manufacturing facilities striking the right balance between proximity to raw materials and markets coupled with an extensive distribution network and a large sales force in India has enabled the company to have progressively growing operations, higher production to meet the ever increasing domestic demand and has also enabled it to export by-products such as soya meal, lecithin and other food ingredients to other countries. Ruchi soya has access to exclusive procurement rights to over two lakh hectares of land in India with a potential of palm oil cultivation.

The Reasons for the Stress

Ruchi Soya was a part of the second list of 28 defaulters the Reserve Bank of India flagged for resolution. In December 2017, the NCLT had admitted Ruchi Soya for insolvency proceedings on the application of financial creditors Standard Chartered Bank and DBS Bank. Mr. Shailendra Ajmera was appointed as resolution professional (RP) to manage the affairs of the company and undertake the insolvency proceedings. Ruchi Soya had a total debt of about Rs 12,000 crore. Ruchi Soya Industries owed around ₹9,345 crore to financial creditors and another ₹2,750 crore to operational creditors. Among financial creditors, the State Bank of India (SBI) has the maximum exposure of around ₹1,800 crore, followed by Central Bank of India (₹816 crore), Punjab National Bank (₹743 crore) and Standard Chartered Bank India (₹608 crore). There were several reasons for the stress situation. The same are enumerated as follows:-

I) Unfavourable duty structure home and abroad

The business model of Ruchi soya is that it imports crude palm oil and sells the refined product that's used in everything from cooking oil to shampoos—a business that contributes more than 70 percent of its sales. Indonesia, the largest producer, in October 2011 made it cheaper to export the refined plam oil than the crude product. The South East Asian nation: Increased the export duty on crude palm oil by 150 basis points to 16.5 percent. Reduced the levy on refined bulk and consumer packed oil by 700 basis points to 8 percent and 800 basis to 2 percent, respectively. This led to increase in the landed cost of crude palm oil imported from Indonesia and thus, made refined oil cheaper which led to a severe financial strain amongst the domestic refiners in India.

II) The Pain in Soya Division

From 2012, the problems started for the company and the weather conditions added to the woes of the company as there was excess monsoon in the region in that season and the same was followed by two drought seasons. These factors contributed to drastic decrease in the area under cultivation for Soya and it was the second largest revenue contributor. Being a supplier to makers of refined oil to shampoos, the company had a long working capital cycle, leaving it short of cash. Short-term borrowings to tide over the crunch eventually left it under a pile of debt. Adding to its woes, the production of soybean remained healthy in overseas markets. International Prices of soybean declined due to robust production in US and Latin American countries. This coupled with drought severely restricted Ruchi Soya's exports.

III) Unhedged Transactions

In order to make up for the losses from Soya Division, Ruchi Soya in 2015 bet on castor seeds as prices rose as high as Rs 5,000 a quintal. But the mistake made by company was that it didn't hedge the exposure and a 40 percent crash after the new crop arrived and weak global

demand left it with cash losses in the quarter ended March 2016.. The management had bet on castor seed to revive them from dwindling soya production but fall in demand from China led to sharp fall in prices of castor seed. In May that year, markets regulator SEBI barred Ruchi Soya Industries from the securities market for alleged fraudulent and manipulative trading in castor seeds on the NCDEX. The financial impact from its exposure to the contract wasn't big. But Ruchi Soya failed to recover from the setback as it came on the back of its mounting debt.

IV) Inadequate Business Model

The kind of business model followed by Ruchi Soya compounded the troubles mentioned above. The company is a supplier to consumer goods makers and doesn't sell directly to consumers. That means payment period is relatively longer, elongating its working capital cycles. The company had to take on short-term debt to manage the shortfall. An increase in trade receivables days in 2015 brought down cash flow from operations. Ruchi Soya fell into a continuous spiral of borrowing to pay outstanding short-term debt. The margin of profit on revenue is very low which means the company is dependent on stable demand.

The CIRP Saga

The application was filed for initiation of CIRP of Ruchi Soya by….and the same was admitted and 15th Dec 2017 was the Insolvency Commencement Date of the company. CIRP concluded on 30th April 2019 with the approval of resolution plan of Patanjali but it is noteworthy that COC resorted to Swiss challenge approach in the process of evaluating and approving a Resolution plan.

The lenders of Ruchi Soya resorted to the Swiss challenge method to finalise a buyer for the edible oils company. This was the first time that banks used this method to find a resolution under the Insolvency and Bankruptcy Code (IBC). 'Swiss Challenge' (a form of open bidding) to pick the better resolution plan. Under the Swiss challenge system, which is now used by various government wings for tenders, lower bidders are given chance to match the highest bidder and if matched then the highest bidder is asked to improve its bid. Under this method, the details of one bid is published and others are asked to match or exceed it Adani Wilmar and Patanjali Limited were the only two players left in the fray.

Initially, Resolution Plans were submitted, inter-alia, by Adani Wilmar Limited ("Adani Wilmar") and Patanjali Group to acquire Ruchi Soya. The Resolution Plan submitted by Adani Wilmar was approved by the Committee of Creditors in August 2018. Patanjali Ayurved had approached NCLT challenging the decision of Ruchi Soya's lenders to approve Adani Wilmar's ₹6,000 crore takeover bid. Patanjali group came second with its bid of around ₹5,700 crore, including the infusion of about ₹1,700 crore into the edible oil company.

However, Patanjali Group challenged, inter-alia, eligibility of Adani Wilmar to submit the Resolution Plan under Section 29A of the Code and process for negotiation. While the application filed by Patanjali Group was being argued before the NCLT Mumbai, Adani Wilmar withdrew its Resolution Plan citing delays in the CIRP.

Subsequently, Patanjali Group negotiated its Resolution Plan with the Resolution Professional ("RP") and Committee of Creditors. Adani Wilmar, which emerged as the highest bidder, after a long drawn battle with Patanjali, had in December 2018 wrote to the RP regarding significant delays in resolution process that led to deterioration of Ruchi Soya's assets. Later, Adani Wilmar, which sells edible oil under the Fortune brand, withdrew from the race. Finally the bid was won by Baba Ramdev's patanjali . As per the plan proposed by Patanjali, Out of the ₹4,350 crore offered by Patanjali group, ₹4,235 crore would be utilised to pay creditors while ₹115 crore would be used for capital expenditure and working capital requirements of Ruchi Soya.As per the regulatory filing made by Ruchi Soya, ₹4,053.19 crore would be paid to secured financial creditors, ₹40 crore to unsecured financial creditors, ₹90 crore to operational creditors, ₹25 crore to clear statutory dues, ₹14.92 crore to workmen/employees and ₹11.89 crore to provide counter bank guarantee. The CoC had then approved the Resolution Plan submitted by Patanjali Group with approx. 96% vote in favour.

Relevance of Swiss Challenge method in IBC

As discussed above the Swiss challenge method has been affirmed by judiciary as well as government. Banks have followed the Swiss challenge mechanism in IBC matters In May 2018, to curb the crab mentality among litigious bidders to acquire stressed assets under the Insolvency and Bankruptcy Code (IBC), banks, in a proposal to the Ministry of Corporate Affairs, banks suggested that bidding under the 'Swiss Challenge Method' be incorporated into the Code. Insolvency and Bankruptcy code, 2016 was bought with an intent that it will be an agent for fixing the woes and the banks will be able to get the proceeds from sale of some of the stressed assets of the banks. However, this purpose of the code was being defeated by the bidders, as there was a dirty game of dragging each other in the court of law to prove the ineligibility of the rival bidder and their own eligibility or coming up with superior offers after bids have been opened.

Swiss Challenge method solves this problem as under the Swiss challenge method the highest (H1) bid in the first round of bidding becomes the base price for bidders, including the H1 bidder, to place counter-bids in the second round of bidding. Also, this clears the eligibility norms for the second round of bidders. Now after the bidding process of the second round, the stressed asset will be purchased by the highest bidder. But, if none of the bids were better than the H1 bid, than the top bidder I of the first round is declared as successful bidder. Thus, this process under "Swiss Challenge method" solves the aforementioned problem in two ways,

firstly, the base price is well known to the second round of bidders and secondly, it helps to avoid the litigation surrounding the eligibility criteria of the bidders.

As we are well aware that the essence of the Insolvency code i.e. the time bound resolution was getting defeated due to more and more time being spent under litigation. The "Swiss Challenge Method" comes to the rescue, as it helps to reduce the time involved in litigation and helps to fulfil one of the key objectives of the code i.e. Time bound resolution of debt ridden companies.

So from the above discussion it is quite evident that the Swiss Challenge Method has facilitated in fulfilment of the objectives of the code and with India moving towards Prepack Insolvency, Swiss challenge can prove to be more useful in maximising the value of assets of the Corporate Debtors.

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CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

❖ **First Global Finance (P.) Ltd. v. IVRCL Limited - [2020] 117 taxmann.com 83 /[2020] 162 SCL 13 (NCL-AT)**

Where appellant had strictly not complied with terms and conditions of EOI and also failed to submit EMD along with submission of resolution plan, same was rightly rejected by CoC.

The appellant filed a resolution plan for corporate debtor. The CoC, however, rejected same on ground that resolution applicant did not comply with conditions stipulated in Expression of Interest (EOI). The Adjudicating Authority also rejected plan of the applicant and approved liquidation application filed by the RP.

Held that since appellant had strictly not complied with terms and conditions of EOI and also failed to submit earnest money deposit (EMD) along with submission of resolution plan and, moreover, liquidation proceedings of corporate debtor was already on, no relief could be granted to the applicant.

Case Review : IVRCL Ltd. v. First Global Finance (P.) Ltd. [2020] 117 taxmann.com 82 (NCLT - Hyd.), affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

❖ **Vivek Jha v. Daimler Financial Services India (P.) Ltd. - [2020] 117 taxmann.com 98 /[2020] 162 SCL 159 (NCL-AT)**

Where last payment towards loan was made on 18-3-2015 whereas demand notice was issued on 17-8-2017, CIRP petition filed on 16-12-2017 was not barred by limitation.

The CIRP application filed by the financial creditor against the corporate debtor was admitted. The appellant, a director of the corporate debtor company stated that there was an agreement between the appellant and the financial creditor pertaining to securing loan in respect of car and EMI was to be paid in 36 instalments out of which the appellant had paid only 11 instalments. Grievance of the appellant was that copy of CIRP petition was not served on the appellant and NCLT passed ex parte order and further that CIRP petition was barred by limitation. It was noted that attempt of service was taken on address as available on MCA

website. It was also not in dispute that the corporate debtor and its director-appellant as co-applicant approached the respondent-financial creditor to avail financial assistance and entered into a loan cum hypothecation agreement dated 28-3-2013 with the financial creditor. On 18-3-2015 payment was made by the corporate debtor vide cheque and no payment was made thereafter. On 17-8-2017 a demand notice was issued to the corporate debtor.

Held that since CIRP application was filed on 16-12-2017 same was not barred by limitation.

Case Review : Daimler Financial Services India (P.) Ltd. v. Natconn Engineering (P.) Ltd. [2019] 103 taxmann.com 100 (NCLT - Mum.), affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Ashish Kumar v. Vinod Kumar Pukhraj Ambavat - [2020] 117 taxmann.com 154 /[2020] 162 SCL 130 (NCL-AT)**

Where corporate debtor issued various acknowledgement letters and one-time settlement proposals for full and final settlement, corporate debtor admitted jural relationship of debtor-creditor with financial creditor and since there was subsisting liability on corporate debtor on day of filling of CIRP application, same was not barred by limitation.

The corporate debtor was granted a loan by the financial creditor bank in year 2008 and same was extended till 2010. The account of the corporate debtor was declared NPA on 29-8-2012. CIRP application filed by the financial creditor was admitted. The corporate debtor in instant appeal contended that CIRP order was passed ex-parte which was illegal and same was also barred by limitation. It was noted that several opportunities were granted to the corporate debtor and notice to CIRP application was also served upon the corporate debtor, and when no response was received from the corporate debtor, the Adjudicating Authority proceeded ex-parte. It was further noted that the corporate debtor issued various letters and one-time settlement proposals between 2012 and 2019.

Held that since the corporate debtor offered varying amounts to the financial creditor for full and final settlement thereby admitted jural relationship of debtor-creditor with the financial creditor. Since afresh period of limitation started after acknowledgement of liability, there was subsisting liability on the corporate debtor on day of filling of CIRP application, therefore, same was not barred by limitation.

Case Review : ASREC (I) Ltd. v. R.K. Jain Construction (I) (P.) Ltd. [2020] 117 taxmann.com 153 (NCLT - Cuttack), affirmed.

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

- **Kundan Care Products Ltd. v. Surya Kanta Satapathy - [2020] 117 taxmann.com 156 /[2020] 162 SCL 450 (NCL-AT)**

Where evaluation criteria suggested that only top three resolution applicant should be negotiated, resolution applicant who ranked 6th could not have any right to participate for re-negotiating over decision of CoC; since no ground had been made out in terms of section 61(3), resolution plan of successful resolution applicant was not to be interfered with.

In CIRP of the corporate debtor, the Adjudicating Authority approved resolution plan submitted by the resolution applicant-FCPT. The appellant, another resolution applicant, stated that it submitted resolution plan and received an email from the resolution professional that it was ranked 6th and only top three resolution applicants were invited to present their plans before CoC. The appellant contacted the resolution professional telephonically and through email had sought an opportunity to negotiate and/or revise its bid/offer, however, the resolution professional by email reiterated denial of opportunity of discussion and negotiation to the appellant. Further, the appellant moved before NCLT, but in meantime, CoC approved resolution plan of the successful resolution applicant. The appellant further stated that when matter was placed before NCLT, the appellant stated its willingness to enhance its financial proposal, however, NCLT approved resolution plan of FCPT and rejected offer given by the appellant. The resolution professional stated that contents of email sent by the appellant could at best be construed as a willingness to negotiate with CoC but in no manner could be considered a revised proposal for consideration of CoC.

Held that if evaluation criteria suggested that only top three resolution applicant should be negotiated, appellant who ranked 6th could not have any right to participate for re-negotiating over decision of CoC. Since no ground had been made out in terms of section 61(3), resolution plan of FCPT was not to be interfered with and instant appeal was to be dismissed.

Case Review : Hemant Khaitan v. Alex Green Energy (P.) Ltd. [2020] 117 taxmann.com 155 (NCLT - Kol.), affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

❖ **Saurav Mukherjee v. Oriental Bank of Commerce - [2020] 117 taxmann.com 160 (NCL-AT)**

If there was subsisting liability on corporate debtor and its validity was extended from time to time due to acknowledgement of debt in writing, CIRP petition filed by financial creditor within three years from date of acknowledgement was not barred by limitation.

The financial creditor granted term loan to the corporate debtor. The corporate debtor created equitable mortgage on entire fixed assets and executed an agreement of term loan. From account details submitted by the financial creditor bank it was evident that account of the corporate debtor was declared as NPA on 15-12-2012. The corporate debtor contended that CIRP application filed by the financial creditor on 8-12-2018 was barred by limitation. It was noted that an agreement stipulating liquidation of claims of the financial creditor was entered into with the corporate debtor on 4-12-2015. Further the corporate debtor acknowledged and admitted correctness and debit balance due to bank on 30-6-2017.

Held that since there was subsisting liability on the corporate debtor and due to acknowledgement of debt in writing its validity got extended from time to time, a fresh period of limitation started after acknowledgement of debt, therefore, CIRP petition filed by the financial creditor within three years from date of acknowledgement was not barred by limitation.

Case Review : Oriental Bank of Commerce v. RDH Technologies (P.) Ltd. [2020] 117 taxmann.com 159 (NCLT - Kol.), affirmed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

❖ **Global Business Corporation v. Punjab National Bank - [2020] 117 taxmann.com 162 (NCL-AT)**

Where resolution plan had been duly considered by CoC in their commercial wisdom and same was rejected with 100 per cent voting share, process could not be kept pending endlessly and corporate debtor was to be liquidated.

Pursuant to initiation of CIRP against the corporate debtor, initial period of 180 days was extended by 90 days and further total period of 270 days also expired. The resolution professional filed an application seeking liquidation of the corporate debtor which was admitted by the Adjudicating Authority. The appellant-resolution applicant contended that he had submitted resolution plan to resolution professional and same was further revised from time-to-time vide e-mail. The appellant further stated that he was never allowed to attend CoC meting and was also not informed about any decision of CoC. It was noted that a suspended director of the corporate debtor was temporarily authorized to operate bank account including cheques of the appellant and meeting of CoC was also attended by said director. Further, resolution plan had been duly considered by CoC in their commercial wisdom and same was rejected with 100 per cent voting share.

Held that any question that the appellant was not informed about CoC meeting could not be raised. It could be said that process could not be kept pending endlessly so that revision of a plan after plan maybe considered by CoC without considering mandatory period, therefore order passed by the Adjudicating Authority was to be upheld.

Case Review : Kochar Overseas (P.) Ltd. v. Punjab National Bank [2020] 117 taxmann.com 161 (NCLT - Chd.), affirmed.

SECTION 238 - OVERRIDING EFFECT OF CODE

- **Action Barter (P.) Ltd. v. SREI Equipment Finance Ltd. - [2020] 117 taxmann.com 164 /[2020] 162 SCL 146 (NCL-AT)**

Where winding up petition had already been admitted against corporate debtor and liquidator appointed thereunder had already taken over assets of corporate debtor, CIRP petition filed thereafter by financial creditor against corporate debtor was maintainable.

Application under section 7 was filed by the financial creditor against the corporate debtor and same was admitted by the Adjudicating Authority. The shareholder of the corporate debtor contended that winding up petition against the corporate debtor had already been admitted by the High Court and liquidator had been appointed. The appellant further contended that upon notice to the financial creditor, liquidator appointed pursuant to admission of winding up petition had already taken over assets and properties of the corporate debtor. The appellant further informed that an application under section 7 filed by another creditor was already rejected, which was under challenge before Supreme Court, and same was still pending.

Held that CIRP application filed by the financial creditor was maintainable.

Case Review : SREI Equipment Finance Ltd. v. Shree Ram Urban Infrastructure Ltd. [2020] 117 taxmann.com 163 (NCLT - Mum.).

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

- **Sangeeta Goel v. Roidec India Chemicals (P.) Ltd. - [2020] 117 taxmann.com 177 /[2020] 161 SCL 426 (NCL-AT)**

Where one year before issuance of demand notice, corporate debtor complained about quality of services, there being pre-existing dispute, CIRP application filed under section 9 was to be rejected.

The appellant alleged default on part of the corporate debtor in clearing outstanding towards services rendered by the appellant. It was contended that the appellant and the corporate debtor were maintaining a mutual account in respect of invoices raised by the appellant. Demand notice was issued on the corporate debtor on 20-3-2019 and the corporate debtor sent a reply to same on 22-3-2019.

Held that since about one year before issuance of demand notice, corporate debtor complained about quality of services and communicated to the appellant that he had not provided services after 2015, CIRP application filed by the appellant under section 9 was to be rejected on ground of pre-existing dispute.

Case Review : Sangeeta Goel v. Roidee India Chemicals (P.) Ltd. [2020] 117 taxmann.com 176 (NCLT - New Delhi), affirmed.

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

- ***Suo Moto, In re - [2020] 117 taxmann.com 180 (NCL-AT)***

Period of lockdown ordered by Government would be excluded for purpose of counting period for resolution process under section 12 and any interim order passed by Appellate Tribunal would continue till next date of hearing.

Held that period of lockdown ordered by the Central Government and State Governments including period as may be extended either in whole or part of country, where registered office of the corporate debtor may be located, shall be excluded for purpose of counting of period for 'Resolution Process' under section 12 in all cases where the 'Corporate Insolvency Resolution Process' has been initiated and pending before any bench of National Company Law Tribunal or in appeal before the Appellate Tribunal. Further, any interim order/stay order passed by the Appellate Tribunal in anyone or other appeal under Insolvency and Bankruptcy Code, 2016 shall continue till next date of hearing.

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

- **Asset Reconstruction Company (India) Ltd. v. Corporation Ltd. - [2020] 117 taxmann.com 186 (NCL-AT)**

Adjudicating Authority has a right to call for further valuation to satisfy itself of plan approved by committee of creditors, to ascertain whether to approve plan under section 31 or not.

In corporate insolvency resolution process against 'Unimark Remedies Limited' (corporate debtor), resolution plan submitted by the appellant had been approved by the committee of creditors. However, matter was pending since long and the Adjudicating Authority had not passed any order under section 31, approving or rejecting resolution plan, as it had already called for fresh valuation. The appellant challenged decision for fresh valuation as made by the Adjudicating Authority on ground that it was not permissible. However, no party has a right to say whether the Adjudicating Authority should go for further valuation before approval of the plan or not and it is open to the Adjudicating Authority to satisfy itself of plan approved by the committee of creditors, to ascertain whether to approve plan under section 31 or not.

Held that impugned order calling for fresh valuation could not have been interefered with.

SECTION 238A - LIMITATION PERIOD

- **Digamber Bhondwe v. JM Financial Asset Reconstruction Company Ltd. - [2020] 117 taxmann.com 188 (NCL-AT)**

For purpose of application under section 7 or application under section 9, relevant date is date of default, hence, where account of corporate debtor was declared as NPA on 30-6-2013,

application under section 7 filed on 7-1-2019 based on order of DRT dated 22-10-2016, being barred by limitation was to be set aside.

Account of the corporate debtor was declared as NPA on 30-6-2013 as it had defaulted in repayment of loan to the financial creditor. An application was filed before the DRT which allowed claim of the financial creditor by order dated 22-10-2016 and held that the corporate debtor was liable to pay Rs. 85.95 crores with interest. Application filed by financial creditor under section 7 based on said final order dated 22-10-2016 was admitted by the Adjudicating Authority. On appeal, it was noted that since account of corporate debtor was declared as NPA on 30-6-2013 application under section 7 filed on 7-1-2019 in this matter was time barred. therefore, impugned order admitting application under section 7 was to be set aside.

Case Review : JM Financial Asset Reconstruction Company Ltd. v. Raipur Treasure Island (P.) Ltd. [2020] 117 taxmann.com 187 (NCLT-Mum.), Set aside.

SECTION 7 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY FINANCIAL CREDITOR

- **Laxmi Pat Surana v. Union Bank of India - [2020] 117 taxmann.com 192 /[2020] 160 SCL 664 (NCL-AT)**

Proceedings under section 7 can be triggered by a Financial Creditor against Guarantor for failure to repay money borrowed by Principal Borrower.

Held that proceedings under section 7 can be triggered by a Financial Creditor, against Guarantor for failure to repay money borrowed by Principal Borrower.

Case Review : Union Bank of India v. Suranan Metals Ltd. [2020] 117 taxmann.com 191 (NCLT-Kol.), affirmed.

I. SECTION 3(12) - DEFAULT
II. SECTION 75 - CORPORATE INSOLVENCY RESOLUTION PROCESS - OFFENCES AND PENALTIES - PUNISHMENT FOR FALSE INFORMATION FURNISHED IN APPLICATION

- **Allahabad Bank v. Poonam Resorts Ltd. - [2020] 117 taxmann.com 247 /[2020] 161 SCL 335 (NCL-AT)**

I. *Insolvency and Bankruptcy Code does not envisage a pre-admission enquiry in regard to proof of default by directing a forensic audit of accounts of financial creditor, corporate debtor or any financial institution.*

Held that satisfaction in regard to occurrence of default has to be drawn by the Adjudicating Authority either from records of information utility or other evidence provided by the financial creditor. Insolvency and Bankruptcy Code does not envisage a pre-admission enquiry in regard to proof of default by directing a forensic audit of accounts of the financial creditor, the corporate debtor or any financial institution.

II. *It is futile on part of corporate debtors to contend that applications under section 7 filed by financial creditor must pass muster of section 65 at pre-admission stage.*

Held that application under section 75 on behalf of the corporate debtors cannot be permitted to frustrate provisions of the Insolvency and Bankruptcy Code when matter is at stage of admission. The Adjudicating Authority cannot direct a forensic audit and engage in a long drawn pre-admission exercise which will have effect of defeating object of Code. Further, when the corporate debtors admit liability it is futile on part of the corporate debtors to contend that applications under section 7 filed by the financial creditor must pass muster of section 65 at pre-admission stage.

Case review : Allahabad Bank v. Poonam Resorts Ltd. [2020] 117 taxmann.com 246 (NCLT - Mum.), set aside.

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