JUNE 2024

THE INSOLVENCY PROFESSIONAL

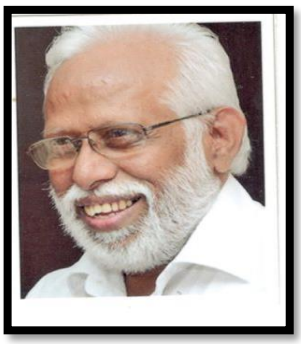
Your Insight Journal

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA-ICMAI) is a Section 8 Company incorporated under the Companies Act-2013 promoted by the Institute of Cost Accountants of India. We are thefrontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll 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 adhering to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavor to disseminate information in aspect of Insolvency and Bankruptcy Code to Insolvency Professionals by conducting round tables, webinars and sending daily newsletternamely “IBC Au courant” which keeps the insolvency professionals updated with the news relating to Insolvency and Bankruptcy domain.

BOARD OF DIRECTORS



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CASEBOOK

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MESSAGE FROM THE DESK OF MANAGING DIRECTOR

Dear Reader,

Greetings to you from TEAM IPA-ICMAI.

At IPA-ICMAI, our young team strives to be up to mark on both streams of our mandate – regulation and professional development.

The unprecedented heat wave conditions across most of the country, more so in northern plains is giving way to the Monsoon showers that are most welcome. Even with the misery monsoons bring, these showers mean welcome relief from the summer heat.

Professional development happens through continuous professional education including updates on changes in code and relevant laws and regulations as also new case laws. The equally important side of professional development is expression of a professional's knowledge and experience and competent sharing with fellow IPs.

In the IBC ecosystem which is still young and evolving, developments happen quite frequently and swiftly. All the more reason it is that practising professionals need to be keyed in always to be abreast of the latest developments. I invite more and more professionals to contribute articles and opinions to the E-Journal on all aspects that IBC ecosystem and related domains that will enrich the knowledge base of the readers.

At IPA-ICAI, we strive to make our publications relevant, informative, interesting and lucid. This issue of the 'Insolvency Professional – Your Insight Journal' has four interesting articles-

An interesting opinion on the emerging role of Asset Reconstruction Companies (ARC) by Shri M.L. Kabir, IP,

On related party transactions, a subject of much discussion and evolving jurisprudence, by CS Dr. M. Govindarajan, Another with recent developments in global insolvency laws by CA Gurbinder Singh, IP,

A detailed note on recovery of Income Tax dues from a CD where CIRP is approved, by Asit Kumar Mohapatra, IRS and Ventrapragada Naga Surya Rao, ITO.

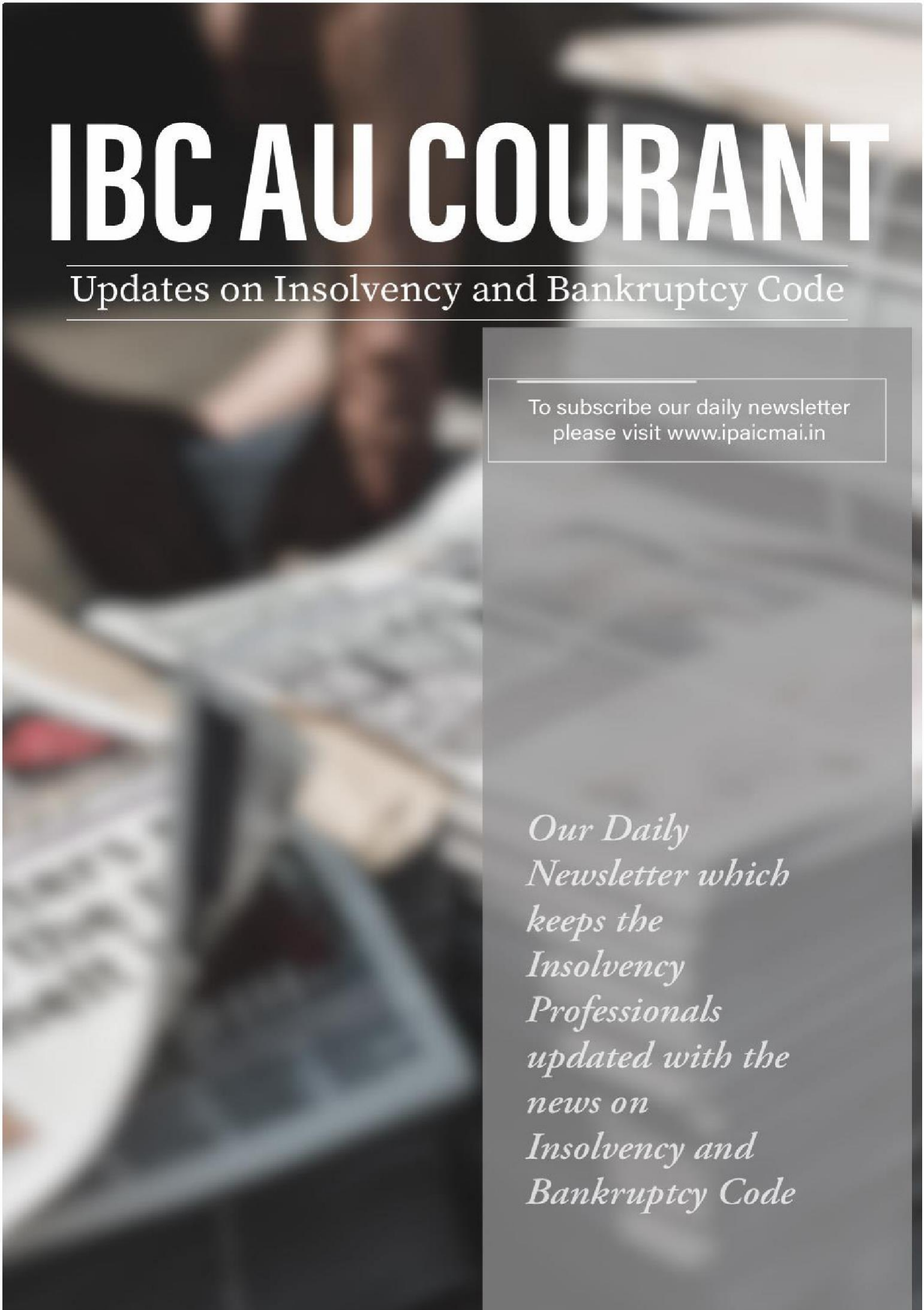
I am sure you will find all the articles interesting and useful. We welcome your responses to the published articles in this journal. You are welcome to write to publication@ipaicmai.in.

Wish you all happy reading.

Mr. G.S. Narasimha Prasad
Managing Director

PROFESSIONAL DEVELOPMENT INTIATIVES

June 2024	
Date	**Events**
2nd June, 2024	**Workshop on The Future of Insolvency and Valuation: Predictions, Prospects and Potential Disruptions** conducted on 2nd June, 2024, in Pune, was a successful and insightful event. We were pleased to have Representative of Insolvency Professionals, enriching the discussions with his expertise and perspectives
7th June, 2024	**Workshop on Transaction Audit & Forensic Audit** was held on 7th June, 2024 which included topics such as Conducting the Transaction Audit and Forensic Audit, Reporting and recommendations, Legal Framework, Post Audit Process and Dispute Resolution.
14th June, 2024	**Roundtable Discussion on Reducing Compliance by review of CIRP Forms Submitted by Insolvency Professionals to IBBI** was conducted on 14th June, 2024 where the Keynote Speakers Ms. Deepika Bhugra Prasad and Mr. Nilesh Sharma, along with other Insolvency professionals discussed the research paper proposing changes in the CIRP forms and filing compliances.
21st June, 2024	**Webinar on Reducing Compliance by Review of CIRP Forms** was conducted on 21st June, 2024, which received an overwhelming response from participants who benefitted from the knowledge sharing workshop. There were several insights that proved advantageous for the participants.
22nd June, 2024	**Workshop on Avoidance Transactions under IBC, 2016** was conducted on 22nd June 2024, with content like Analysis of Financial Statements, Identification of Red Alerts, Types of transactions under PUFE, Filing of application for Avoidance Transactions, Role and Responsibilities of IP and Auditors,
25th June, 2024	**Workshop on Compliance Issues of Insolvency Professionals** was scheduled on 25th June, 2024 which conducted sessions discussing various Compliance Requirements along with Discussion of IBBI Paper on Reducing Compliance by Review of CIRP Forms which included topics like Proposed changes in the approach of filling by Insolvency Professionals, Proposed changes in the Formats and Comparison with existing framework.
28th June, 2024	A **Webinar on Discussion Paper on Amendments in CIRP Regulations and Liquidation Progress Report Format** was held on 28th June, 2024 which involved discussion by Dr. Ashish Makhija regarding amendments in CIRP regulations and Liquidation Progress Report Format.
29th June, 2024	A **Workshop on Interface of different Laws with IBC, 2016** was conducted on 29th June, 2024 which discussed topics such as Interface of PMLA with IBC, 2016, Interface of Securities Laws with IBC, 2016, Interface of SARFAESI & Arbitration with IBC, Interface of Recovery of debts due to Banks & Financial Institutions Act (RDDBFI) with IBC and Interface of EPF Act 1952 with IBC, 2016.



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
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Asset Reconstruction Companies as Resolution Applicants under IBC: Revisiting the journey so far and way forward

Mohammad Lutful Kabir
Insolvency Professional & Social Auditor

SYNOPSIS

ARCs would continue to remain an effective player in the distressed asset management of ailing entities and also can become a meaningful value addition in the CIRP process as a successful Resolution Applicant. If one really looks at it ARCs propose a better understanding of the value of distressed assets and consequently offer a higher bid based on their ability and expertise to manage and turn around such assets. The need of the hour today is setting the right tone from the top in fostering a culture of integrity and ethical conduct. ARC needs to adopt a regulation-plus approach where there is compliance with both the letter of the regulation and spirit.'

INTRODUCTION:

On 11th May 2024, a news item in the financial daily The Economic Times flashed out a heading "RBI looks at ARCs Amid a Flood of Allegations". Under the above heading, the first para of the report says "India's Central Bank leadership is scheduled to meet the top management of asset reconstruction companies (ARC) next week to discuss corporate governance and effective stressed asset resolution amid concern of potential back-door entry by defaulting promoters, people with knowledge of the development told ET.

While the reported allegations and related matters would have got discussed and reviewed with 27 registered ARCs and corrective actions would have got initiated (we shall come to this later in this article) in the Apex Bank's meeting on the 17th May2024, we shall approach the subject here taking in due perspective the following while evaluating the ARCs in the new envisaged role that was permitted by RBI through a notification reference: RBI/2022-23/128 DoR.SIG.FIN.REC.75/26.03.001/2022-23 dt.11.10.2023. It would not be out of context to mention here that although under IBC Law Provision Sec – 29A sub-clause (d) of Explanation II with respect to Provisos to Explanation 1 under Sec 29A(it) does not prohibit participation of ARCs as Resolution Applicant, ARCs could not participate without prior approval of RBI (led to a number of litigation cases in this matter) which only came through the aforesaid notification of 2022-23.

In the next section we shall delve upon the following aspects of ARC functioning to assess and appreciate the expected role that the financial entity is expected to perform with respect to: -

a. As an asset reconstruction company under the SARFAESI Law
b. As Resolution Applicant under IBC within the Code's framework
c. The Legal perspective of ARC as Resolution Applicant
d. Explore and address any conflicting areas between the above two Laws

A) Advent of ARC and its functioning under SARFAESI Law:

It was in the year 2002 that the Government of India brought in the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest, 2002 Act (the SARFAESI Act, 2002), consequent to the 1998 Report by the Narasimham Committee II which recommended creation of such entities i.e., ARCs. Hence, Asset Reconstruction Companies started functioning from 2003 while carrying out activities like providing a framework for the banks and other lending institutions to transfer their NPAs to a third party as well as helping them in the resolution of NPAs by bringing in their expertise in managing, resolving and recovering the same. The more popular mode today is to buy the debt from the original lender at deep discount with a nominal down payment and the rest of the considerations through issuance of security receipts. All the modus operandi requires adhering to the detailed compliance guidelines laid down in this regard by various regulatory bodies like RBI, SEBI and last but not the least complying with the law itself. In the following paras we shall deal with the provisions under the Mother Law of ARCs i.e., the SARFAESI Act, 2002 which would help us understand the role and compliance by which the entity is guided under Law.

When we look into the various provisions of the Law, we find that securitization and reconstruction remain the primary areas of business that the ARCs are allowed to conduct as Sec 10(1) of the Act clearly spells out as such ***'Any [asset reconstruction company] registered under section 3 may (a) act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the parties; while Sec 10(2) says 'Save as otherwise provided in sub-section (1), no [asset reconstruction company] which has been granted a certificate of registration under sub-section (4) of section 3, shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitization or asset reconstruction: Provided that a [asset reconstruction company] which is carrying on, on or before the commencement of this Act, any business other than the business of securitization or asset reconstruction or business referred to in sub-section (1), shall cease to carry on any such business within one year from the date of commencement of this Act.'*** Hence, we see that Sec 10 provisions clearly limit the role of ARCs within the restrictive areas as spelt out in the Law governing such entities. However, we see a catch in Sec 12 where the RBI is empowered to issue directions to ARCs under the provisions of Section 12 of SARFAESI. Probably based on this Section RBI had issued its circular RBI/2022-23/128 DoR.SIG.FIN.REC.75/26.03.001/2022-23 dt.11.10.2023 in the absence of any other provision under the Law that permits any ARCs to be the Resolution Applicant as is envisaged under IBC or to be in any other business for that matter other than the securitization and reconstruction of assets. On the operational side, provisions like Section 9 of the Act prescribes the measures that can be adopted by an ARC for the purpose of asset reconstruction under the directions and regulation of RBI. Likewise, Section 12(2) empowers RBI to issue directions with respect to the kinds of financial assets that may be acquired by an ARC whereas Section 12(1) empowers RBI to give directions to ARCs concerning income recognition, accounting standards, bad and doubtful debts, capital adequacy, and deployment of funds.

B) As Resolution Applicant under IBC within the Code's framework:

Any discussion or evaluation on IBC must start with the BLRC Report since the Code had its primary foundation based on the recommendations under the BLRC

Report. Truly speaking the BLRC Report 2015 does not envisage any significant role of ARCs in the Insolvency Resolution process of an entity. It sees the RBI norms on ARCs as an interfacing element that could influence the Insolvency Resolution process. Also, the IBC Code 2016 did not have any provision for considering ARCs as Resolution Applicant and it was only in the 2018 Amendment that this provision was brought in so that ARC could also be considered as a Resolution Applicant. Section 29A of the Insolvency and Bankruptcy Code, 2016 (IBC) is a provision that lays down eligibility criteria for resolution applicants. Objectively speaking, Section 29A got introduced through an amendment in 2018 to strengthen the resolution process and to prevent certain categories of persons from taking over distressed companies. Under the IBC, sub-clause (d) of Explanation Il with respect to the Provisos to Explanation 1, under Section 29A(j), in effect, does not prohibit an Asset Reconstruction Company from submitting a resolution plan and an ARC hence becomes eligible to be a Resolution Applicant for a CD under CIRP.

Although the above provision under IBC after the 2018 amendment gives a blank cheque to the ARCs to bid as Resolution Applicant in a CIRP, it was still not a smooth sailing till some landmark legal cases that came on the way for implementing the same. In the next paras we shall deliberate on a couple of such cases for better understanding of the crux of the issue.

C) The Legal Perspective of ARC As Resolution Applicant:

In the CIRP case of Aircel Ltd and its subsidiaries in CP (1B) No.298/MBII/2018, UV Asset Reconstruction Company Limited ("UVARCL") became the successful Resolution applicant after it got approved by the Adjudicating Authority subsequent to the CoC approval. While UVARCL had applied for RBI nod for acquiring the Aircel shares as part of the resolution plan it had landed up hitting a road block as RBI denied such approval and rather issued a show cause notice to the ARC seeking an explanation to the reported violation of Sec 10 norms failing which action would be taken. UVARCL challenged the show cause notice before the Delhi High Court in UV Asset Reconstruction Company Ltd. Vs. Union of India & Ors. to which a stay order was granted by Delhi High Court. It is here that the Delhi High court emphasized the need to reconcile the apparent disengagement between IBC 2016, SARFAESI Act 2002 and RBI as Regulator to make ARC's inclusion effective and purposeful in the near future. There have been other instances where ARCs have served as the resolution applicants. However due to the stand taken by RBI before the Delhi High Court that the prior approval of the Reserve Bank of India would be required before submitting a Resolution Plan, and since the said approval was not obtained by the ARCs, the Resolution Plan submitted by them is invalid in law.

Similarly in the case of *Superna Dhawan v. Bharti Defense and Infrastructure Ltd*, other apprehensions like the provisions as per RBI Circular sighted above also crept in like that of (i) ARCs having significant influence or control on the insolvent entity only for a period of five years may finally have an adverse impact on the ultimate resolution of the entity under an insolvency resolution process. (ii) The high likelihood of an ARC investing in a distressed entity only for the purpose of selling it at a higher price and profit margin also do not go down with the ultimate objectives laid out under the Code.

D) Explore and address conflicting areas under the Laws and Regulatory Norms:

The above two cases clearly indicates that there are inconsistent provisions between the two laws as well as in the laid-out norms and guidelines of RBI. There have been efforts to close these

gaps or at least narrow it down to a level where the implementation of the intended processes does not suffer or get delayed leading to further decay in the asset value of the already distressed entity. A couple of such initiatives that are taken by authorities are listed as under -

The Reserve Bank of India (RBI) committee led by Executive Director Sudarshan Sen spelt out several recommendations in their report submitted in April 2021 which addressed many such conflicts and incongruencies in the matter of optimizing asset acquisition, securitization and reconstruction measures, enhancing liquidity and trading of security receipts, and improving operational efficiency of ARCs. The Committee also had proposed that ARCs to be permitted to participate in the Insolvency and Bankruptcy Code (IBC) process as a Resolution Applicant, either through a SR trust or through an Alternative Investment Fund (AIF) sponsored by them. Since then, RBI has taken several steps in line with the recommendations of the Committee and the meeting outcome on the 17th May 2024 point out several such action points to be carried out by the ARCs and RBI.

CONCLUSION

From the points deliberated above it will be clear now that ARCs would continue to remain a very effective player in the distressed asset management of ailing entities and also can become a meaningful value addition in the CIRP process as a successful Resolution Applicant. If one really looks at it ARCs propose a better understanding of the value of distressed assets and consequently offer a higher bid based on their ability and expertise to manage and turn around such assets. On the 17th May 2024 meeting with 27 nos registered ARCs, the RBI Deputy Governor Mr. J Swaminathan emphasized that ***'setting the right tone from the top is crucial in fostering a culture of integrity and ethical conduct. He urged the ARC to adopt a regulation plus approach where there is compliance with both the letter of the regulation and spirit.'***

Reference & Resources: -

- **a.** BLRC Report dt. 4th November 2015
- **b.** UVARCL in Aircel CIR in CP (1B) No.298/MBII/2018
- **c.** Superna Dhawan v. Bharti Defense and Infrastructure Ltd CP(IB)195 of 2019
- **d.** RBI/2022-23/128 DoR.SIG.FIN.REC.75/26.03.001/2022-23 dt.11.10.2023
- **e.** RBI Master Direction for Asset Reconstruction Companies(ARC) effective April, 24 , 2024

A Related Party Unsecured Creditor Cannot Be Treated On Par With The Secured Creditors

CS. Dr. M. Govindarajan
PCS & Insolvency Professional

RELATED PARTY TRANSACTIONS

The term 'related-party transaction' refers to a deal or arrangement made between two parties who are joined by a pre-existing business relationship or common interest. Companies often seek business deals with parties with whom they are familiar or have a common interest. Although related-party transactions are themselves legal, they may create conflicts of interest or lead to other illegal situations. Public companies must disclose these transactions. Unchecked, the misuse of related-party transactions could result in fraud and financial ruin for all parties involved.
Related parties include parent companies, subsidiaries, associate firms, joint ventures, or a company or entity that is controlled or significantly influenced or managed by a person who is a related party.

Related party transactions in IBC

The concept of related party transactions is also applicable to the Insolvency and Bankruptcy Code, 2016 ('Code' for short). Section 5(24) of the Code defines the expression 'related party' in relation to a corporate debtor as-a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

- a key managerial personnel of the corporate debtor or a relative of key managerial personnel of the corporate debtor;
- a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
- a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent of its share capital;
- a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent of its paid-up share capital;
- anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
- a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;
- any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement;
- any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement;

- any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;
- any person who is associated with the corporate debtor on account of-

1. participation in policy making processes of the corporate debtor; or
2. having more than two directors in common between the corporate debtor and such person; or
3. interchange of managerial personnel between the corporate debtor and such person; or
4. provision of essential technical information to, or from, the corporate debtor

Section 21(2) of the Code provides that a related party who is also a financial creditor of the corporate debtor does not have the right to representation, participation, or voting in the Committee of Creditors meetings. Section 29A of the Code prohibits the participation of related parties in the resolution process to ensure that companies or individuals with potential negative impacts on the insolvency resolution process are excluded. The disclosure of related parties is required under Section 29 of the Code to safeguard the interests of creditors. Related parties are not granted voting rights in the resolution process to maintain an objective environment and protect the interests of the Committee of Creditors and other creditors. The eligibility of related parties as resolution applicants is contingent upon clearing all their dues, as seen in the case of Committee of Creditors.

In 'Arcom Medical Devices Private Limited v. B & A Health Care Private Limited'- CP (IB) No. 243/7/HDB/2021, the NCLT, Hyderabad Behcn – I, held that the 2nd Respondent is a related party to the corporate debtor and the 2nd respondent as operational creditor of the corporate debtor, Consequently, it is further ordered that 1st Respondent shall reconstitute the Committee of Creditors by treating the 2nd Respondent as operational creditor to the corporate debtor.

Related party transactions have significant implications for the insolvency resolution process, including conflicts of interest, potential abuse of the framework, and equitable distribution of assets among creditors. Judicial precedents and case studies provide insights into the consequences of related party transactions under the Code, highlighting the need for robust regulation.

ISSUE

The issue to be discussed in this article is as to whether a related party unsecured creditor can be treated on par with the secured creditors with reference to decided case law.

The equity shareholders of the company are treated as related parties of that company. Even if they provide loan to the said companies, they are related parties. Therefore, in the case of resolution plan they may be treated as separate categories of unsecured creditors and they will not be treated on par with the secured creditors of the corporate debtor.

CASE LAW

In 'West Coast Paper Mills Limited v. Bijay Murmuria, RP and others' – Company Appeal (AT) (Ins.) 1272 of 2019 – NCLAT, Principal Bench, New Delhi, decided on 13.05.2024, one ex-employee of Fort Glost Industries Limited filed an application under Section 9 of the Code for initiation of corporate insolvency resolution process against Fort Glost Industries Limited ('Corporate Debtor' for reference) on account of default by the corporate debtor a sum of Rs.1,13,946/- towards his gratuity. The said application was admitted by the Adjudicating Authority on 09.08.2018. A Committee of Creditor was constituted by the Resolution Professional ('RP' for short) on 04.12.2018.

The RP invited applications from the eligible resolution applicants for submission of resolution plans for the revival of the corporate debtor. Two resolution plans were received one from Gloster Limited and the other from Hooghly Infrastructure Private Limited. The RP, through the Forensic Audit reports ascertained that there were no preferential transactions, undervalued transactions, transactions defrauding creditors, extortionate credit transactions, fraudulent transactions or wrongful trading.

The RP placed the two resolution plans before the Committee of Creditors ('CoC' for short). The CoC analyzed the two resolution plans and selected the plan submitted by Gloster Limited. 73.21% of CoC approved the resolution plan. The RP submitted an application before the Adjudicating Authority for the approval of resolution plan. The Adjudicating Authority approved the same on 27.09.2019. The Adjudicating Authority rejected the claim of West Coast Paper Mills Limited holding that the claim of the said company is to be treated on par with the Financial Creditors and to make the appellant eligible for distribution of claims as per resolution plan.

The Adjudicating Authority held that non allocation of fund by the resolution applicant, in the case in hand to the related party of the Corporate Debtor do not contravene the water fall mechanism as provided in Section 53(1)(h) of the Code, 2016. The Adjudicating Authority did not find any contravention by the resolution applicant.

West Coast Paper Mills Limited filed an appeal before the National Company Law Appellate Tribunal challenging the order of Adjudicating Authority. The appellant submitted the following before the NCLAT-

- A sum of Rs.7.15 crore was paid by them on behalf of the corporate debtor to KDCC Bank Limited due to default by corporate debtor and corporate guarantee bond executed by the appellant.
- The said amount was paid on 25.08.2014 which was transferred into a short term inter-corporate debtor.
- The Corporate debtor every year issued balance confirmation to the appellant.
- The appellant claimed a sum of Rs.89.2 crore during CIRP to RP.
- The appellant claimed that he should be treated as par with the other Financial Creditors and should be eligible for equal pro-rata distribution as per resolution plan.
- No amount has been paid to him.
- The resolution plan is contrary to the provisions of the Code and liable to be quashed.
- The impugned judgment is ex facie illegal and in teeth of the judgment passed by Supreme Court in 'M.K. Rajagopalan v. Dr. Periyasamy Palani Gounder and another' – Civil Appeal Nos. 1682-1683 of 2022, inasmuch as the Supreme Court has categorically rejected the reasoning attributed by the Adjudicating authority in the present case to dismiss the application.
- Despite being a financial creditor, although related party to the Corporate Debtor, was never provided with minutes of any meeting of the CoC.
- The impugned judgment has been premised upon erroneous and wrong reasoning which is in teeth of the observations passed by the Supreme court in M.K. Rajagopalan (supra).
- As a consequence of equating the appellant at par with equity shareholders, the appellant has been illegally and wrongly discriminated in as much as the claims of Central Government and the State Government secured creditors who have exercised their enforcement rights; remaining debts and dues and preference shareholders have been illegally and wrongly given preference over the claim of the Appellant.

Therefore, the appellant contended that the present appeal deserves to be allowed and resolution plan deserves to be set aside and/or remanded back to the CoC for ensuring that the resolution plan is not discriminatory against the Appellant.

The RP, the first respondent in the present appeal, submitted the following before the High Court-

- The prayers sought by the appellant are impermissible under the provisions of the Code.
- The appellant is a related party of Corporate Debtor, and is also an unsecured Financial Creditor.
- The whole class of unsecured financial creditors (consisting of the appellant and another related party viz. Gloster Cables Ltd.) are not being paid anything under the said resolution plan.
- It's a settled position of law that a resolution plan can provide for differential payment to different classes of creditors.
- There is no provision in the Code which mandates that a related party should be paid in parity with unrelated parties.
- No fault can be attributed to a resolution plan merely for not making provisions for related parties.
- The appellant cannot seek payment under the resolution plan in parity with secured financial creditors, who form a different class of creditors and further a resolution plan is not mandated to make provisions for related parties.
- The present appeal is completely misconceived in both fact and law and is liable to dismissed.
- The RP is not empowered to interfere in the commercial wisdom of CoC.
- The role of the RP is limited to ensuring that the resolution plan received by him is compliant with Section 30 (2) of the Code before placing the same before the Committee of Creditors for their consideration.

The respondent No.3, the SRA submitted the following before the High Court-

- The annual report and accounts of the Corporate Debtor for the year 2017-18 shows that the appellant is a promoter entity holding 33% shares in the Corporate Debtor.
- The said annual report of the Corporate Debtor shows that the West Coast at the material time was a related party.
- Clause 32 of the Resolution plan provides that all contracts between the Corporate Debtor and its Related Parties shall stand terminated with immediate effect without any further act, deed or instrument and all Liabilities and obligations of the Corporate Debtor to such Related Parties shall be discharged and be permanently extinguished.
- Thus, under the resolution plan all claims of the related parties against the corporate Debtor stood extinguished.
- Since no payment is proposed to any unsecured financial creditor, there can be no question of discrimination of unsecured financial creditor i.e., all the unsecured financial creditors of the Corporate Debtor have received the same treatment viz. 'Nil payment' and there has been no discrimination what so ever amongst the same class of creditors.
- The appellant has been equated with equity shareholders was made by the appellant and not by SRA or Resolution Applicant.
- The NCLAT heard the submissions of the appellant, RP and SRA. The NCLAT considered the following issues to be considered in this case-
- Whether the appellant has been treated as equity shareholder by the Adjudicating Authority while approving the resolution plan? and

- Whether the appellant has been discriminated vis-à-vis other Financial Creditors?

The NCLAT observed that the Appellant was admitted as Unsecured financial creditor and the same plan were approved by the Adjudicating Authority. Both the CoC and Adjudicating Authority has treated the appellant as unsecured financial creditor. Initially the claim of the appellant and another creditor has been admitted and proposed to pay the full amount as claimed by them. Later on, the RP found that they are related parties to the corporate debtor. The RP informed them that they could not attend the CoC meetings. The SRA has proposed NIL amount to the claimants under this head on account of them being related parties. The Appellant in its submission has also accepted that he is a related party unsecured creditor. The resolution plan has been approved by the CoC and the Adjudicating Authority. The NCLAT was of the view that the appellant has not been treated as equivalent to equity shareholder and such contention of Appellant is devoid of any merit.

The NCLAT observed that it is seen from the records that the Appellant was aware of the fact, that it was being treated as a related party and was accordingly removed from the Committee of Creditors. The Appellant never challenged its treatment as a related party at any stage of the insolvency resolution proceedings, despite have complete knowledge of its status as that of a related party.

In the instant case, among the financial creditors, only secured financial creditors (not related to Corporate Debtor) are being paid Rs. 64.20 crores against their admitted claims of Rs. 619.24 crores. The appellant who is an unsecured financial creditor and related party to Corporate Debtor does not fall in that category as per IBC. there was no provision of the code, which mandates that the related party should be paid in parity with unrelated party. Any prohibition of differential payment to different class of creditors in the resolution plan is ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making provisions for a related party, so long as provision of the IBC and CIRP regulations are met.

The NCLAT found no merit in the present appeal and dismissed the appeal.

Reference:

1. https://www.investopedia.com/terms/r/related-partytransaction.asp.
2. https://www.lawyersclubindia.com.

SUMMARY

It isn't uncommon for companies to do business with people and organizations with whom they already have relationships which is called as related party transactions. These types of transactions are not necessarily illegal. But they can cloud the business environment by leading to conflicts of interest as they show favorable treatment for close associates of the hiring business. The Companies Act, 2013 provides for the disclosures of related party transactions. These transactions are also applicable income tax, Insolvency and Bankruptcy Code, 2016, etc. The aims of the Insolvency and Bankruptcy Code is for the revival of the business of the company which come for insolvency. The resolution plan paves the way for the revival. No related party transaction shall be there in the process of corporate insolvency resolution process etc. This article highlights as to whether the related party unsecured financial creditor is allowed payment in the resolution plan and placed on par with the secured financial creditors.

Recent Developments in Global Insolvency Laws

CA. Gurbinder Singh,
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INTRODUCTION

Insolvency laws have experienced significant changes globally in recent years, driven by the need to address the complexities of modern economies, facilitate business restructurings, and protect creditors' and debtors' rights. These changes are essential for maintaining economic stability, fostering entrepreneurship, and ensuring efficient resolution of financial distress. This article delves into the recent developments in global insolvency laws, examining trends, reforms, and the impact of these changes on different jurisdictions.

Part 1: Overview of Global Trends in Insolvency Law

1.1 Increasing Harmonization of Insolvency Laws

One of the most prominent trends in recent years has been the increasing harmonization of insolvency laws across jurisdictions. This trend is driven by globalization and the interconnectedness of economies, which necessitate a coherent framework for dealing with cross-border insolvencies.

The UNCITRAL Model Law on Cross Border Insolvency, adopted in 1997, has gained wider acceptance, with more countries incorporating its provisions into their national legislation. The Model Law provides a framework for recognizing and enforcing foreign insolvency proceedings, promoting cooperation among jurisdictions, and ensuring fair treatment of creditors and debtors.

1.2 Emphasis on Restructuring and Rehabilitation

There has been a notable shift towards restructuring and rehabilitation of financially distressed businesses rather than liquidation. This approach aims to preserve viable businesses, save jobs, and maximize the value of assets for the benefit of creditors and stakeholders.

Countries like the United States, with its Chapter 11 bankruptcy process, have long emphasized reorganization. Recently, other jurisdictions, including the European Union, the United Kingdom, and India, have reformed their insolvency laws to facilitate business rescue and restructuring.

1.3 Focus on Speed and Efficiency

The efficiency of insolvency proceedings is crucial to minimize the negative impact on businesses and the economy. Recent reforms have focused on streamlining procedures, reducing delays, and improving the speed of resolution.

Technological advancements, such as electronic filing systems and digital platforms, have been integrated into insolvency processes to enhance efficiency. Additionally, specialized insolvency courts and trained judges are being established to handle complex cases more effectively.

PART 2: REGIONAL DEV

ELOPMENTS IN INSOLVENCY LAW

2.1 Europe

2.1.1 The European Union

The European Union has been at the forefront of insolvency law reform, driven by the need to create a cohesive framework for its member states. The most significant development in recent years is the adoption of the EU Restructuring Directive (2019/1023), which aims to harmonize restructuring and insolvency laws across the EU.

The Directive introduces preventive restructuring frameworks, allowing businesses to restructure their debts before becoming insolvent. It also provides for the stay of individual enforcement actions, ensuring that businesses have the breathing space needed to negotiate with creditors. The Directive emphasizes the importance of early intervention and includes provisions to support the restructuring of small and medium-sized enterprises (SMEs).

2.1.2 United Kingdom

Following Brexit, the United Kingdom has introduced significant reforms to its insolvency framework to maintain competitiveness and adapt to changing economic conditions. The Corporate Insolvency and Governance Act 2020 introduced new tools for business rescue, including:

- Moratorium: A temporary period during which no legal action can be taken against a company, allowing it to restructure.
- Restructuring Plan: A new procedure similar to the US Chapter 11, enabling companies to propose a restructuring plan that can bind dissenting creditors if approved by the court.
- Termination Clauses: Provisions preventing suppliers from terminating contracts solely because of the company's insolvency.

These reforms aim to provide businesses with more options to restructure and survive financial difficulties.

2.2 North America

2.2.1 United States

The United States has a well-established insolvency framework, with Chapter 11 bankruptcy proceedings being a cornerstone of business restructuring. Recent developments include the Small Business Reorganization Act (SBRA) of 2019, which created a new subchapter V within Chapter 11 specifically for small businesses.

Subchapter V simplifies the restructuring process for small businesses, making it more cost-effective and accessible. It eliminates the need for a creditors' committee, reduces administrative burdens, and allows for the appointment of a trustee to oversee the process.

2.2.2 Canada

Canada has also seen significant reforms aimed at modernizing its insolvency laws. The most notable development is the introduction of amendments to the Companies' Creditors Arrangement Act (CCAA) and

the Bankruptcy and Insolvency Act (BIA) in 2019.

These amendments include provisions to:

- Enhance the protection of workers' pensions and benefits.
- Introduce a duty of good faith for all parties involved in insolvency proceedings.
- Allow for the recognition of foreign insolvency proceedings, in line with the UNCITRAL Model Law.

The reforms aim to balance the interests of creditors, debtors, and other stakeholders while ensuring a fair and transparent process

2.3 Asia

2.3.1 India

India's Insolvency and Bankruptcy Code (IBC), enacted in 2016, has been a transformative reform for the country's insolvency framework. The IBC consolidates and amends existing insolvency laws, providing a comprehensive and time-bound process for the resolution of insolvency.

Recent amendments to the IBC have focused on strengthening the framework and addressing practical challenges. Key developments include:

- Pre-Packaged Insolvency Resolution Process (PPIRP): Introduced in 2021 for MSMEs, the PPIRP allows for a debtor-initiated, out-of-court restructuring process with minimal disruption to the business.
- Threshold for Initiation: Raising the threshold for initiating insolvency proceedings to prevent frivolous cases and reduce the burden on the insolvency courts.
- Group Insolvency: Developing a framework for the insolvency resolution of corporate groups, ensuring a coordinated approach to dealing with group companies' financial distress.

2.3.2 China

China has made significant strides in reforming its insolvency laws to support its rapidly growing economy. The Enterprise Bankruptcy Law (EBL), enacted in 2007, marked a major step towards modernizing the country's insolvency framework.

Recent developments in China include:

- Pilot Programs: Implementing pilot programs in selected regions to test new insolvency procedures and mechanisms.
- Cross-Border Insolvency: Developing guidelines for recognizing and cooperating with foreign insolvency proceedings, in line with international best practices.
- Individual Insolvency: Introducing pilot programs for personal bankruptcy in selected cities, aiming to provide a fresh start for honest but unfortunate debtors.

PART 3: THE IMPACT OF COVID-19 ON INSOLVENCY LAW

3.1 Temporary Measures and Moratoriums

The COVID-19 pandemic has had a profound impact on economies worldwide, leading to a surge in financial distress for businesses and individuals. In response, many countries

implemented temporary measures and moratoriums to provide relief and prevent a wave of insolvencies.

These measures included:

- Moratoriums on Debt Enforcement: Temporarily suspending enforcement actions and debt collection to give businesses and individuals' time to recover.
- Financial Support: Providing financial support through loans, grants, and subsidies to help businesses weather the crisis.
- Flexibility in Insolvency Proceedings: Introducing flexibility in insolvency proceedings, such as extending deadlines and allowing virtual meetings.

3.2 Long-Term Reforms

The pandemic also highlighted the need for long-term reforms to enhance the resilience of insolvency frameworks. Countries have undertaken reviews and introduced changes to address vulnerabilities exposed by the crisis.

Key areas of focus include:

- Early Intervention: Encouraging early intervention and the use of preventive restructuring tools to address financial distress before it leads to insolvency.
- Digitalization: Accelerating the digitalization of insolvency processes to improve efficiency and accessibility.
- Stakeholder Protection: Enhancing the protection of workers, suppliers, and other stakeholders in insolvency proceedings.

PART 4: CASE STUDIES OF RECENT INSOLVENCY LAW REFORMS

1.1. The European Union's Restructuring Directive

The EU Restructuring Directive (2019/1023) represents a landmark reform aimed at harmonizing insolvency laws across member states. The Directive introduces several key features:

- Preventive Restructuring Frameworks: Allowing businesses to restructure their debts at an early stage, before becoming insolvent.
- Stay of Individual Enforcement Actions: Providing a temporary stay on individual enforcement actions to give businesses time to negotiate with creditors.
- Cross-Class Cram-Down: Enabling courts to approve restructuring plans that bind dissenting creditors if certain conditions are met.
- Director Duties: Clarifying directors' duties to take timely action in the face of financial distress.

Member states were required to transpose the Directive into national law by July 2021. The implementation of the Directive is expected to enhance the effectiveness of insolvency proceedings and promote business rescue across the EU.

1.2. India's Insolvency and Bankruptcy Code (IBC)

India's IBC has been a game-changer for the country's insolvency framework. Key features and recent developments include:

- Time-Bound Resolution: The IBC mandates a time-bound resolution process, typically within 180 to 270 days, to ensure swift resolution of insolvency cases.
- Committee of Creditors: The decision-making power rests with the

Committee of Creditors (CoC) comprising financial creditors, which approves the resolution plan.

- Pre-Packaged Insolvency Resolution Process (PPIRP): Introduced in 2021 for MSMEs, the PPIRP allows for a debtor-initiated, out-of-court restructuring process with minimal disruption to the business operations.

1.3. United States' Small Business Reorganization Act (SBRA)

The United States has long been known for its robust insolvency framework, particularly the Chapter 11 reorganization process. The introduction of the Small Business Reorganization Act (SBRA) of 2019, which took effect in February 2020, marks a significant development aimed specifically at small businesses.

Key features of SBRA include:

- Subchapter V of Chapter 11: This new subchapter provides a streamlined process tailored for small businesses, making reorganization more accessible and cost-effective.
- Elimination of the Absolute Priority Rule: Under Subchapter V, owners of small businesses can retain their ownership interests, even if not all creditors are paid in full, provided the plan is fair and equitable.
- Trustee Role: A trustee is appointed to facilitate the development of a consensual reorganization plan, but the debtor retains control of the business operations.
- Simplified Process: The process eliminates the need for a creditors' committee, reduces administrative burdens, and allows for a quicker confirmation of the reorganization plan.

1.4. Australia's Insolvency Law Reforms

Australia has undertaken significant reforms to its insolvency laws in recent years to enhance business rescue and creditor rights. The reforms, which took effect in 2021, include:

- Small Business Restructuring Process: A new process tailored for small businesses with liabilities under AUD 1 million. It allows directors to remain in control while a restructuring practitioner helps develop a plan to repay creditors.
- Simplified Liquidation Process: A streamlined liquidation process for small businesses, reducing complexity and costs.
- Safe Harbour Provisions: Enhancements to existing safe harbour provisions to encourage directors to take proactive steps to restructure their businesses without the immediate threat of personal liability for insolvent trading.

These reforms aim to provide small businesses with more options for restructuring and survival, reflecting the need to support the backbone of the economy during financial distress.

1.5. China's Enterprise Bankruptcy Law and Recent Reforms

China's Enterprise Bankruptcy Law (EBL), enacted in 2007, laid the foundation for modern insolvency practices in the country. Recent reforms and initiatives reflect China's efforts to further strengthen its insolvency framework:

- Pilot Programs: Implementing pilot programs in regions like Shanghai and

Shenzhen to test new insolvency procedures, including simplified processes for SMEs.

- Cross-Border Insolvency: Developing guidelines and mechanisms for recognizing and cooperating with foreign insolvency proceedings, aligning with international standards.
- Personal Bankruptcy: Introducing pilot programs for personal bankruptcy in cities like Shenzhen, providing a fresh start for honest but unfortunate debtors and aligning with global practices.

China's reforms are part of broader efforts to create a more business-friendly environment and improve the overall efficiency of the insolvency process.

PART 5: CHALLENGES AND FUTURE DIRECTIONS

5.1 Challenges in Implementing Insolvency Reforms

While recent developments in global insolvency laws are promising, several challenges remain:

- **Legal and Institutional Capacity:** Many countries face challenges in building the legal and institutional capacity required to implement and enforce new insolvency laws effectively. This includes training judges, insolvency practitioners, and other stakeholders.
- **Cultural Attitudes:** Cultural attitudes towards insolvency can hinder the adoption of reorganization and rescue mechanisms. In some jurisdictions, insolvency is still seen as a stigma, deterring businesses from seeking timely assistance.
- **Cross-Border Coordination:** Cross-border insolvency cases remain complex due to differences in national laws and the need for effective cooperation among jurisdictions. While the UNCITRAL Model Law provides a framework, its adoption and implementation vary widely.
- **Economic Uncertainty:** Ongoing economic uncertainties, such as those caused by the COVID-19 pandemic, pose challenges to the effectiveness of insolvency reforms. Governments must balance immediate relief measures with long-term structural changes.

5.2 Future Directions in Insolvency Law

Looking ahead, several key areas are likely to shape the future of global insolvency laws:

- **Enhanced Digitalization:** The digitalization of insolvency processes will continue to be a priority, improving efficiency, accessibility, and transparency. This includes electronic filing systems, virtual court hearings, and digital platforms for creditor meetings.
- **Focus on SMEs:** Given the crucial role of SMEs in the global economy, future reforms are expected to further address the unique needs of small businesses, providing tailored restructuring and liquidation processes.
- **Sustainability and ESG Considerations:** Environmental, Social, and Governance (ESG) considerations are increasingly influencing insolvency laws. Future reforms may incorporate ESG criteria into insolvency proceedings, promoting sustainable business practices.
- **Global Harmonization:** Efforts to harmonize insolvency laws globally will continue, driven by organizations like UNCITRAL and the World Bank. This will facilitate cross-border insolvency

resolutions and enhance international cooperation.

CONCLUSION

Recent developments in global insolvency laws reflect a dynamic and evolving landscape, driven by the need to address modern economic challenges, support business restructuring, and protect the interests of creditors and debtors. From the harmonization efforts in the European Union to the innovative reforms in India, the United States, and China, jurisdictions around the world are making significant strides in improving their insolvency frameworks.

These reforms are essential for fostering economic stability, promoting entrepreneurship, and ensuring fair and efficient resolution of financial distress. As the global economy continues to evolve, further advancements in digitalization, SME support, sustainability, and international cooperation will shape the future of insolvency laws, creating a more resilient and inclusive financial system.

Understanding these developments provides valuable insights into the challenges and opportunities facing insolvency law in the 21st century and beyond. By learning from the experiences of different jurisdictions and adopting best practices, countries can enhance their insolvency frameworks and contribute to a more robust global economy.

Recovery of Income Tax Dues In A Case Where CIRP Is Approved Under IBC

Sri Asit Kumar Mohapatra,
Chief Commissioner of Income Tax

I. Recovery mechanism under Income Tax Act:

1. An Income Tax assessee will become statutorily obliged for payment of amount of any tax, interest, penalty or fee in terms with the notice issued under section 156 of the Income Tax Act, 1961(Act).

2. The Income Tax statute contains provisions for recovery of the tax dues, which includes even creating a charge on all the assets of a defaulter. Chapter XVII of the Income Tax Act provides for various manner for collection and recovery of tax. Section 220 to 232 of the Act provides mechanism for collection of tax due from the assessees. The Assessing Officer is responsible for collection/recovery of tax in accordance with the procedure laid down in section 220 of the Act.

3. Where the assessee is in default in making the payment of tax,the proceedings for recovery are carried out by the Tax Recovery Officer(TRO), once the recovery certificate is drawn by the Assessing Officer.T.R.O. can recover the arrears of taxes by any or all of the following 4 modes in accordance with the rules laid down in the Second Schedule to the Income-tax Act-

- Attachment and sale of the defaulter's movable property (Schedule II, Part II).
- Attachment and sale of the defaulter's immovable property (Schedule II, Part III).
- Appointment of a Receiver for the management of the defaulter's movable and immovable property (Schedule II, Part IV).
- Arrest of the defaulter and his detention in a Civil Prison (Schedule II, Part V).

1.1. The immovable property will include property transferred by the defaulter after 1.6.1973, if such transfer has been made without adequate consideration.

1.2. Besides the above, the normal procedure and Powers for recovery of tax available to the assessing officer are also available to the T.R.O.

Provisional attachment of properties:

Further, with a view to protect the interest of revenue, during the pendency of any proceeding for the assessment or reassessment, the Assessing Officer is empowered to make a provisional attachment of any property of the assessee (even though there is no demand outstanding against the assessee). In order to invoke this provision, the Assessing Officer should be of the opinion that it is necessary to do so. The order of the provisional attachment will be made under Section 281B. It is to be made only after obtaining the approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director.

Primacy of income tax dues granted by Income Tax Act:

Priority of recovery of outstanding Income Tax dues over all other debts, by virtue of creation of first charge over the assets of the defaulter, was the stand enjoyed by Income Tax Department.

II. Change of position post introduction of IBC-2016:

1. A question now arises whether the recovery income tax dues stand any chance post introduction of Insolvency and Bankruptcy Code, 2016 (IBC) w.e.f. 28-05-2016, which is the nation's first comprehensive law to address the insolvency of corporate persons and individuals.

Objective of IBC

IBC was intended to tackle the bad loan problems that were affecting the banking system. It provides for a time bound process to resolve insolvency. When a default in repayment occurs, insolvency professional gains control over debtor's assets and must take decisions to resolve insolvency under the guidance of Committee of Creditors consisting of financial creditors. If debt resolution does not happen, the company goes for liquidation.

Important provisions in IBC:

Now let us examine the provisions contained in IBC w.r.t. treatment of Income tax dues (for that matter any amounts due to Central or State Government) while approving a Resolution Process. But, understanding the following key terms as defined in the IBC is important before going further on the issue:

Section 3(10): "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, an unsecured creditor and a decree holder;

Section 3(11) : "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operation debt.

Section 3(12) : "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

Section 5(7) "financial creditor" means a person to whom financial debt is owned (including a person to whom debt has been legally assigned);

Section 5(8) "financial debt" means a debt along with interest disbursed against consideration for time value of money and includes specified borrowings.

Section 5(13) of IBC defines "insolvency resolution process costs" as costs of interim finance, fees of RP, costs incurred by RP in running day-to-day business, and costs incurred to facilitate resolution process.

Section 5(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Section 5(21) "Operational debt" -- claim in respect of goods or services, including employment, or debt in respect of payment of dues under any law and payable to Central Government/State Government/Local Authority

Section 5(26) "resolution plan" – means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.

Explanation – For removal of doubts, it is hereby clarified that a resolution plan my include provisions for the restructuring of the corporate debtor, including by way of merger/amalgamation and demerger.

Section 31 – if the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors(COC) under sub-section (4) of

section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan, which has a binding nature.

1.1. Approval of the Committee of Creditors (CoC) thus becomes key, basing on which the Adjudicating Authority passes an order approving the resolution plan. Hence, it can safely be concluded that Corporate Insolvency Resolution Process (CIRP) is a financial creditor driven process.

2. **Waterfall mechanism:** The proceeds are distributed in a specific sequence (popularly known as waterfall mechanism), starting with secured creditors, followed by preferential creditors, and then unsecured creditors. The Supreme Court has consistently held the waterfall mechanism and the priority of claims, as prescribed under section 53 of the IBC, which cannot be over-rided by other laws.

   Section 53: Proceeds from the sale of liquidation assets shall be distributed as provided in this section, as under:

   a. the first priority is given to Corporate Insolvency Resolution Process ("CIRP") Costs, which are paid in full.

   b. next priority is given to debts owed to secured creditors (in the event such secured creditor has relinquished security) along with workmen for 24 months preceding the commencement of the liquidation which are paid paripassu amongst them.

   c. third in line are the wages and any unpaid dues owed to the employees (other than workmen) upto 12 months preceding the commencement of the liquidation and debts.

   d. thereafter come the dues of unsecured creditors, which are low at priority, followed by dues of Central Government & State Government upto 2 years preceding Liquidation Commencement date.

   e. least priority is given to any remaining debts or dues; preference shareholders followed by equity shareholders

3. **Whether the resolution plan will be binding on the tax authorities?**

   Yes. As per Section 31 of the IBC, the approved resolution plan shall be binding on the corporate debtor and its employees, members, creditors, including Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed], guarantors and other stake holders involved in the resolution plan.

3.1. Further, IBC has overriding effect over provisions of Income Tax, by virtue of non obstante clause contained in Section 238 of the Code. Thus, where there is a conflict between provisions of the Code and those of the Income Tax Act, the Code will prevail over the Act.

3.2. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect of a claim, which is not part of the resolution plan.

4. **Imposition of moratorium:**
   As per section 14 of the Code, which reads as under, the Adjudicating Authority shall declare moratorium prohibiting any action against the corporate debtor.

   14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency

commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

- the institutionJ2 of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

- transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

- any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

- the recovery of any property by an owner or lessor where such property is occupied by or in the possession ofJ3 the corporate debtor.

III. This overriding nature of IBC over any other law necessitated amendments to the below mentioned Income Tax provisions:

1. **Change in overriding nature of Income Tax provisions in the case of company in liquidation:**
   As per Section 178(6) of the Income Tax Act, as amended w.e.f. 01.11.2016, the Code (IBC) shall have the overriding effect.
2. **Modification in demand notice:** A new section 156A was inserted in the Income Tax Act w.e.f. 01-04-2022 to reduce Income tax demands, which gets modified by virtue of an approved resolution plan, from the outstanding demand register.
3. **Profits and gains of business or profession under section 28(iv):**
   (Taxability of loans waived in restructuring plan – monetary benefits were not covered prior to amendment)

   The following words were inserted w.e.f. 01-04-2023 in the amended provisions of section 28(iv) of Income Tax Act, 1961 w.r.t. benefit or perquisite arisen from business or profession.
   "in cash or in kind or partly in cash or in kind"

IV. Judicial pronouncements:

The declaration of moratorium and overriding nature of the IBC resulted in following pronouncements decisions/orders by Apex Court, various High Courts/Tribunals making the Income Tax provisions inoperative in the case of a corporate debtor in whose case resolution plan is approved.

1. **Pr.CIT v. Monnet IspatAnd Energy Ltd. 107 taxmann.com 481 (SC)[2019]**
   Moratorium under section 14 of the IBC will also apply to appeals being made by the Income Tax Departments against the orders of Income Tax Appellate Tribunal, in respect of tax liability of a debtor under CIRP;

   The Hon'ble Supreme Court upheld the ruling of Hon'ble High Court of Delhi in this judgement**.**

2. **Kitply Industries Ltd. V. Asst. Commissioner of Income Tax-- 102 taxmann.com 116 (NCLT-Guwhati) [2019]**
   Proceeding before the Income Tax Department, which has resulted in freezing of bank accounts is a proceeding of quasi-judicial nature and continuation of such a proceeding during the period of moratorium period is illegal, in view of the prohibitions under section 14(1)(a) of the Code.

3. **PCIT v. Monnet Ispat& Energy Ltd., [SLP (C) No. 6487 of 2018, dated 10-08-2018] (SC)**
   The overriding nature and supremacy of the provisions of the IBC over any other enactment in case of conflicting provisions, was upheld in this case by the Apex Court.

4. **Alchemist Asset Reconstruction Co. Ltd. V. Hotel Gaudavn (P) Ltd. 88 taxmann.com 202[2017] / 145 SCL 428 [2018](SC)**
   It was held in this case that even arbitration proceedings cannot be initiated after imposition of the moratorium u/s. 14(1)(a);

5. **Leo Edibles and Fats Ltd. Vs. Tax Recovery Officer (Central), Hyderabad[WP No.8560 of 2018, dated 26-07-2018)** –
   The Hon'ble Telangana High Court held that the Income Tax Department cannot claim any priority over other creditors only because of its order of attachment prior to the initiation of liquidation proceedings under the IBC.

6. **Murli Industries Limited vs. Asst. CIT 441 ITR 8 [2022] (Bom)**
   IT Department is not entitled to issue notice against the corporate debtor for unpaid tax claims after the approval of the resolution plan by the Adjudicating Authority.

7. **In Sirpur Paper Mills Ltd. Vs. Union of India[WP No.25827 of 2019, dated 18-01-2022],**
   The Hon'ble Telangana High Court held that IBC law overrides Income Tax law and quashed the assessment notices issued by the Income Tax Department during the pendency of IBC resolution proceedings.

8. **Sundaresh Bhatt v. Central Board of Indirect Taxes and Customs[Civil Appeal No.7667 of 2021] (SC) –**
   The decision of Hon'ble Supreme Court in this case established the supremacy of the IBC over the Customs Act, even though the Customs Act grants customs officials a statutory first charge over a corporate debtor's assets.

V. **There are no specific provisions under IT Act** dealing particularly with tax implications in the case of corporate structuring pursuant to IBC provisions. Consequently, the waiver of loans under resolution plan approved under IBC by NCLT will lead to potential tax implication as the following sections may not be applicable to the case of a corporate debtor, in whose case the resolution plan is approved.

a) **Cessation of liability under section 41(1):**
   (Taxability of Loans Waived or written off)
b) **Carry forward and set off of losses under section 79:**
   (Inspite of change in shareholding pattern in the case of corporate debtor in whose case resolution plan is approved by IBC, losses can be carried forward and set off against future profits)
c) **TDS under section 194R**
   (Taxability of benefit or perquisite in respect of business or profession)
d) **Capital gains under section 47(vi)**
   (in the case of amalgamation/merger, as depreciation shifts to the amalgamated company)
e) **Penalty u/s.271E**
   (applicability of section 269T for non-payment of loan by accounting payee cheque or electronic clearing system/mode)
f) **Deeming provisions of Section 50CA and 56(2)(x)**
   (Valuation of equity shares in the case of IBC company much lower than fair market value – violation of Rule 11UA)
g) **Issuance of notice u/s.148**
   (to assess or reassess the income which has escaped assessment for any

assessment year

VI. Other losses to Revenue on account of debt resolution under IBC: Apart from making the above provisions of Income Tax Statute non-applicable to the case of a Corporate Debtor in whose case resolution plan is approved under IBC, it is pertinent to note that there are some other pecuniary losses to Revenue, which are discussed hereunder:

i. Recovery of unpaid TDS: Any person is statutorily obliged to deduct tax on payments made to various categories of persons under different heads of expenditure, under the relevant TDS provisions of Income Tax Act.

However, often the amounts deducted towards TDS/TCS are not remitted into Central Government account within the prescribed due dates and such monies are used for business purposes by the deductor companies/entities (especially which are in not financially sound position).

In the case of a corporate debtor covered under IBC resolution plan, apart from non-availability of credit to the deductees (due to TDS mismatch for non-remittance), recovery of such unpaid TDS becomes impossible due to waterfall mechanism.

ii. Loss of revenue on account of corporate debts, which could not be recovered in full as per the resolution plan approved under IBC and written off by the creditors will ultimately result in lower tax payments.

iii. Loss of revenue on account of tax losses available for set off,in the hands of a corporate debtor, against future incomes of a resolution applicant if the same benefit is extended to a resolution applicant taking over the CD under CIRP.

VII. Government dues is a secured creditor or unsecured creditor :Now, let us examine some of the recent judgements delivered by Hon'ble Supreme Court with respect to treatment of 'government dues' as secured creditor or otherwise.

1. Honourable Supreme Court in State Tax Officer vs. Rainbow Papers Limited in civil appeal no. 1661 of 2020 decided on 06th September, 2022 held that – "because of the provisions of Gujarat Vat Act, the tax dues to the Government of Gujarat are secured creditors covered by the definition of secured creditors given in section 3(30) of the IBC, as security interest is created by operation of law as per the definition of security interest given in section 3(31) of the IBC".

1.1. Thus, the Hon'ble Supreme Court interpreted the definition of 'secured creditor' to hold that any government or governmental authority shall be a secured creditor as the charge created by a statutory law can be considered as a 'security interest'.

1.2. The expressions 'security interest' and 'secured creditors' have to be read in accordance with the definitions assigned under section 3(31) and section 3(30), respectively. Therefore, in order to be a secured creditor, one has to have a 'security interest'. The definition of 'security interest' reads as to mean a right, title, etc., created by a 'transaction' which secures payment or performance of an obligation. 'Transaction', as defined in section 3(33) of IBC, includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor.

1.3. Now the question to be answered is - whether, the concept of 'security interest' can be stretched to include forced or non-consensual acts like attachment of property by Income tax authorities, which will create a statutory charge in favour of the tax authority, such that the status of a 'secured creditor' can be imparted to the tax authority.

1.4. The decision of the Honourable Supreme Court in this case (Rainbow Papers Private Ltd.,) was subject to review petition which was decided by the Honourable Court on 31.10.2023 wherein the Honourable Court has

refused to Review its earlier order dated 06.09.2022.

2. The above decision in Rainbow Papers limited was, however, dissented with by another bench of the Honourable Supreme Court in PaschimanchalVidyutVitaran Limited vs. Raman Ispat Private Limited in civil appeal No. 7976 of 2019 vide order dated 17.07.2023. The Hon'ble Supreme Court observed that –

i. Rainbow Papers (supra) did not notice the 'waterfall mechanism' under Section 53 – the provision had not been adverted to or extracted in the judgment. Furthermore, Rainbow Papers (supra) was in the context of a resolution process and not during liquidation.

ii. The judgment in the case of Rainbow Papers (supra) has not taken note of the provisions of the IBC which treat the dues payable to secured creditors at a higher footing than dues payable to Central or State Government.

iii. The dues payable or requiring to be credited to the Treasury, such as tax, tariffs, etc. which broadly fall within the ambit of Article 265 of the Constitution are 'government dues' and therefore covered by Section 53(1)(e) of the IBC

iv. The Gujarat Value Added Tax Act, 2003 no doubt creates a charge in respect of amounts due and payable or arrears. It would be possible to hold [in the absence of a specific enumeration of government dues as in the present case, in Section 53(1)(e)] that the State is to be treated as a 'secured creditor'. However, the separate and distinct treatment of amounts payable to secured creditor on the one hand, and dues payable to the government on the other clearly signifies Parliament's intention to treat the latter differently - and in the present case, having lower priority.

v. The Rainbow Papers judgment has to be confined to the facts of that case alone.

vi. It is possible to hold the State as a secured creditor but only if there is no separate enumeration of "state dues" as in section 53(1)(e) of the IBC.

3. The above view that the State Dues do not rank paripassu with Secured Creditors is fortified by the decision of three member bench of the Supreme Court in Ghanashyam Mishra and Sons Pvt. Ltd.,v. Edelweiss Asset Reconstruction Co. Ltd.[SC] [2021] 126 taxmann.com 132/166 SCL 237 (SC).

3.1. The Honourable Court held that the Government cannot recover tax dues that are not forming part of the resolution plan under IBC and that the resolution plan is binding on all stakeholders, including the Government.

3.2. The Honourable Court after considering the Statement of Objects and Reasons for the amendment to the code in 2019, the Finance Minister's speech in Parliament at the time of introduction of the bill for amendment went on to hold at paragraph 87of the order that the amendment of 2019 to section 31 is retrospective. It was held to be clarificatory because even otherwise the words "other stake holders" in the pre amended section 31 covers both Central and State Governments or any other local authority.

3.3. The Honourable Court has concluded that once the Resolution Process is approved by the Adjudicating Authority as per law, then no further claims can be made against the successful bidder. It was held that the state dues whether service tax, vat, income-tax or any other dues to the Governments (State or Central) or any local authority will stand extinguished if the same are not included in the Approved Resolution Plan. It may be noted that in this case also dues to the Government are treated on a footing different from the dues to other secured/financial creditors.

3.4. The Hon'ble Apex Court observed that –

"…….Harmonious construction of subsection (10) of Section 3 of the I&B Code read with subsections (20) and (21) of Section 5 thereof would reveal, that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of 'operational debt'.

The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of 'operational creditor' as defined under subsection (20) of Section 5 of the I&B Code. Consequently, a person to whom a debt is owed would be covered by the definition of 'creditor' as defined under subsection (10) of Section 3 of the I&B Code.

As such, even without the 2019 amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term 'creditor' and in any case, by the term 'other stakeholders' as provided in subsection (1) of Section 31 of the I&B Code."

VIII. Amendments made to IBC-2016 : The chronological order of the amendments made to IBC-2016 till date are as under:

1. In December 2019, provisions for insolvency resolution and liquidation for individual insolvency were brought into force concerning personal guarantors ("PG") to corporate persons.

In addition, a separate customised framework was also notified under the Code for the financial service providers in November 2019.

2. Further, in April 2021, a separate framework for pre-packaged insolvency resolution for micro small and medium enterprises ("MSMEs") was introduced.

3. In November-December, 2021, the Ministry of Corporate Affairs invited public comments on issues related to the corporate insolvency resolution and liquidation frameworks, and the introduction of a cross-border insolvency framework. Since receipt of public comments in response to such invitation, further changes are being considered to bolster the frameworks under the Code.

4. In this process, the Ministry of Corporate Affairs released a notice seeking comments on the proposed amendments, in File No. 30/38/2021-Insolvency Date: 18.01.2023, to strengthen the functioning of the IBC, in relation to the admission of corporate insolvency resolution process ("CIRP") applications, streamlining the insolvency resolution process, recasting the liquidation process, and the role of service providers under the Code.

4.1. One of the proposed amendment as per para 14.1 of the said notice suggests that--

"all debts owed to Central Government and the State Government, irrespective of whether they are secured creditors pursuant to a security interest created by a mere operation of statute, shall be treated equally with other unsecured creditors."

Further, it is also to be clarified that- "only where the security interest is created pursuant to a transaction of the Central Government or a State Government with CD, the Government in question will continue to be treated as a secured creditor in the order of priority.

4.2. In addition to the above proposed amendment, attention of the reader of this article is drawn towards para 17.1 of the said discussion paper, which reads as under:

"it is being considered that the Code may be amended to clarify that post approval of the resolution plan, no proceedings may be commenced or be continued by any government or authority regarding the claims arising before the

commencement of the CIRP, unless otherwise provided for in the resolution plan, and such claims shall stand extinguished."

IX. Clearance certificate from IT Department before creating charge :

1. As per the provisions of section 281 of the Income Tax Act, which reads as under certain transfers of assets or charges created over assets by an Income Tax assesse during the pendency of any proceeding or after completion of such proceeding "shall be treated as void".
   Section 281. (1) Where, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise.

1.1. However, it is provided that such charge or transfer shall not be void if it is made –
   i. for adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee ; or
   ii. with the previous permission of the Assessing Officer.

1.2. Further, the provisions of section 281B are applicable to cases where the amount of tax or other sum payable or likely to be payable exceeds five thousand rupees and the assets charged or transferred exceed ten thousand rupees in value.

1.3. In this section, "assets" means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the assessee.

2. Thus, it is evident from the above provision that previous permission of the Assessing Officer, before transferring any asset or creating charge on any asset is, mandatory. In other words, a clearance certificate is required to be obtained by the assesse and produced before the lending banks/other financial institutions.
3. The litigation with respect to supremacy or first charge of the Income Tax dues could be avoided if the above procedure is followed scrupulously either by the assesses or by the lending institutions. In very few cases the certificates were obtained prior to 2016.
4. However, due to overriding nature of IBC, the above provision is no longer applicable to the case of a Corporate Debtor in whose case resolution process has been initiated.

X. It transpires from the above discussion that –

i. the recovery of government dues (crown debts) in the case of a Corporate Debtor have lost primacy (claim for a priority in the resolution plan) as they cannot be treated on par with security creditors, as was held in catena of judicial pronouncements;

ii. deviation from waterfall mechanism is not allowed as adjudicated by various courts;

iii. the sums due to Central or State Government which go to the consolidated fund of India or State shall be ranked only after the dues payable to creditors listed earlier in section 53(1)(e) of IBC;

iv. recovery of Income Tax dues even in cases where properties were already attached by the Tax Recovery Officer prior to initiation of CRIP also is ruled out as the same is not treated as a security interest;

v. the overriding nature of IBC prohibits initiation of proceedings under Income Tax Act after the approval of resolution plan by the Adjudicating Authority;

vi. the only way to reduce the Income Tax dues from the books is to write-off the uncollected demands in the case of a Corporate Debtor, if recovery of the same was not a part of the approved resolution plan.

vii. neither Income tax assesses nor the lending institutions are not obtaining clearance certificates before creating charge over assets/release of sanctioned loan amounts.

3. It is pertinent to mention that as per the latest data given by the Central Government in the budget for fiscal year 2024-25, the unrealised taxes (both direct and indirect) of the Union reported at 21.3 trillion rupees is very close to the Government's full year's share of revenue under all heads reported at 23.24 trillion rupees as per the revised estimates for 2023-24. The dues to various State Governments would also be of significant amount.

3.1. The attention of the readers is also drawn to the fact that such figure is steadily increasing year after year due to apparent impediments in recovery of tax dues by Central and State governments.

In view of the above, the authors are of the view that the amendments as proposed in the discussion paper released by Government of India will put an end to the litigation relating to the contentious issues like-

1. priority for recovery of Income Tax dues over other items in the resolution process under IBC;

2. treatment of the government dues as secured creditors where security interest was already created by way of attachment of assets; and

3. requirement of clearance certificate from Income Tax Department under section 281B.

CASE LAWS

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INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 238A - LIMITATION PERIOD

Maneesh Pharmaceuticals Ltd. v. Export-Import Bank of India [2024] 161 taxmann.com 14 (SC)

Where financial creditor invoked corporate guarantee given by appellant on 21-2-2012, however, reference was filed by appellant with BIFR on 6-11-2012 and SICA was repealed w.e.f. 1-12-2016, limitation would start running from 1-12-2016 and, therefore, application filed by financial creditor against corporate debtor under section 7 on 30-8-2019 was within limitation period.

The respondent banks had extended term loan facilities to tune of USD 45 million to a borrower, in which appellant gave its unconditional and irrevocable corporate guarantee to respondents for punctual performance of borrower's obligation. However, borrower failed to make timely repayments, consequently its account was classified as Non-Performing Asset (NPA). Pursuant to default, the respondent invoked corporate guarantee given by the appellant vide guarantee invocation notice dated 21-2-2012, calling upon the appellant to pay entire outstanding amount due but despite that repayment was not made. Meanwhile, facility agent filed a foreign suit against borrower and during pendency of that suit appellant filed a reference with BIFR under section 15(1) of Sick Industrial Companies Act, 1985 (SICA) on 6-11-2012. Thereafter, the respondent filed an application under section 7 against the appellant-corporate guarantor. However, NCLT dismissed said application holding that said application was barred by limitation. The respondent challenged NCLT's order on ground that reference was filed with BIFR on 6-11-2012 and SICA was repealed w.e.f. 1-12-2016 and, therefore, application filed by the respondent was within limitation period. NCLAT vide impugned order held that date of invocation of guarantee was 21-2-2012 and SICA was repealed w.e.f. 1-12-2016 and, therefore, limitation would start running from 1-12-2016 and would extend up to 1-12-2019.

Held that application filed under section 7 on 30-8-2019 was prior to expiry of limitation and same was to be allowed, thus, there was no error in impugned order passed by NCLAT and instant appeal filed by appellant was to be dismissed.

Case Review: Export-Import Bank of India v. Maneesh Pharmaceuticals Ltd. [2024] 161 taxmann.com 13 (NCLAT - New Delhi), affirmed.

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

- **Mars Art Studio v. Shirdi Industries Ltd. [2024] 161 taxmann.com 51 (Bombay)**

Where a resolution plan submitted by Resolution Professional (RP) was approved granting respondent-operational creditor 15 per cent of their claim amount but respondent filed an execution application before Court for recovery of Rs. 8.73 lakhs and warrant of attachment of current account of applicant-corporate debtor was issued, since applicant had discharged its liability as per approved resolution plan,

warrant of attachment on bank account of applicant was to be set aside.

Corporate Insolvency Resolution Process (CIRP) was initiated against the applicant-corporate debtor and a resolution plan submitted by Resolution Professional (RP) entitling the respondent-operational creditor to 15 per cent of claim amount was approved. Meanwhile, the respondent filed an execution application before High Court for recovery of Rs. 8.73 lakhs on ground that applicant had failed to pay amount and a warrant of attachment in respect of current account of the applicant corporate debtor was issued. The applicant filed instant application to set aside warrant of attachments in respect of current account. It was noted that the applicant had discharged its liability in accordance with approved resolution plan and paid an amount of Rs. 62.53 thousand as full and final payment.

Held that order of approval of resolution plan had attained finality and accordingly, claim of creditors or statutory authorities had to be dealt with in accordance with approved resolution plan and in view of facts, warrant of attachment on current account of the applicant was to be set aside.

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

- **EBIX Singapore Pte. Ltd. v. Mahendra Singh Khandelwal Resolution Profession of Educomp Solutions Ltd. [2024] 161 taxmann.com 188 (NCLAT- New Delhi)**

Where appellant, SRA filed an application before NCLT seeking withdrawal of resolution plan on ground that corporate debtor was not a going concern, however, corporate debtor was carrying on business and generating revenue, in view of fact that corporate debtor was a going concern and resolution plan was feasible and viable which had been approved by CoC, NCLT did not commit any error in admitting RP's application and approving resolution plan.

In pursuance of commencement of Corporate Insolvency Resolution Process (CIRP) of corporate debtor, a resolution plan submitted by appellant Successful Resolution Applicant (SRA) was approved by CoC. An application for approval of resolution plan was filed by RP. During pendency of approval of resolution plan, appellant filed an application seeking withdrawal of resolution plan. However, NCLT vide impugned order allowed application filed by RP and approved resolution plan submitted by the appellant. Aggrieved by NCLT's order, the appellant filed instant appeal on ground that the corporate debtor was not a going concern. It was noted from record that an affidavit was filed on 22-9-2023 before NCLT by RP stating that the corporate debtor was a going concern. It was further noted from financial records of the corporate debtor for years 2020-21 and 2021-22 that the corporate debtor was carrying on business and in Financial Year 2020-21 revenue of Rs. 13.8 million was generated.

Held that there was no substance in submission of the appellant that the corporate debtor was not a going concern and since resolution plan was feasible and viable and approved by CoC, the appellant could not ask NCLT to enter into feasibility and viability of resolution plan. There were no valid grounds raised by the appellant before NCLT to reject application filed by RP for approval of resolution plan and, therefore, no error

had been committed by NCLT in admitting RP's application in approving resolution plan.

Case Review: Educomp Solutions Ltd. v. Mahendar Singh Khandelwal [2024] 160 taxmann.com 796 (NCLT - New Delhi) (SB), affirmed.

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

- **Deepak Dahyalal (Ex-Director of Pritdip Impex (India)(P.) Ltd. v. Steel Resources [2024] 161 taxmann.com 193 (NCLAT- New Delhi)**

Where impugned order was passed on 22-11-2023 and 30 days period for filing an appeal ended on 22-12-2023 and period of 15 days ended on 7-1-2024, appeal filed on 1-2-2024 with a delay of more than 15 days from date of expiry of limitation could not be entertained as jurisdiction to condone delay was limited to only 15 days as per section 61(2) and, hence, application to condone delay was not to be entertained.

Petition under section 9 filed against the corporate debtor was admitted and NCLT vide impugned order had passed ex parte order against the corporate debtor. Aggrieved by impugned order, the appellant, ex-director of the corporate debtor filed a delay condonation application seeking condonation of delay of 41 days in filing instant appeal on ground that the appellant had no knowledge of proceedings and only became aware of said proceedings when interim resolution professional (IRP) informed appellant on 6-12-2023 about impugned order through e-mail. It was noted that the impugned order dated 22-11-2023 had been served upon the appellant on 29-11-2023 by Registry of NCLT, which clearly showed that the appellant was well aware that NCLT had passed impugned order.

Held that limitation for filing appeal started from 22-11-2023 when impugned order was pronounced and did not depend upon when the appellant became aware of said order and 30 days period came to an end on 22-12-2023 and further period of 15 days ended on 7-1-2024, thus, appeal having been filed on 1-2-2024 was clearly been filed with a delay of more than 15 days from date of expiry of limitation and jurisdiction to condone delay was limited to only 15 days as per section 61(2), hence, application to condone delay could not be entertained.

Case Review: Steel Resources v. Pritdip Impex (India) (P.) Ltd. [2024] 161 taxmann.com 192 (NCLT - Mum.) affirmed.

SECTION 3(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - CLAIM

- **Regional Provident Fund Commissioner, EPFO Regional Office, Jamshedpur v. Ms. Mamta Binani, Resolution Professional - [2024] 161 taxmann.com 250 (NCLAT- New Delhi)**

Where appellant-Regional P.F. Commissioner submitted claims under sections 7A, 7Q, and 14B of Employees Provident Funds and Miscellaneous Provisions Act, 1952 and claim under section 7A was fully paid but no payment had been made under sections 7Q and 14B, however, all amounts

claimed by appellant under sections 7A, 7Q and 14B were part of provident fund dues, which were admitted by RP, appellant's entire claim required consideration and payments in resolution plan.

Corporate Insolvency Resolution Process (CIRP) against corporate debtor was commenced and public announcement was made by Resolution Professional (RP). The appellant, Regional P.F. Commissioner submitted its claim under sections 7A, 7Q and 14B of 1952 Act. RP admitted entire claimed amount and filed an application before NCLT seeking approval of resolution plan. RP proposed that amount claimed under section 7A was to be paid in full but no payment was proposed towards amount claimed under sections 7Q and 14B. NCLT approved resolution plan.

Held that claim of appellant submitted under sections 7A, 7Q and 14B were part of provident fund dues and had been admitted by RP, appellant's entire claim required consideration and payments in resolution plan. Central Board is empowered to waive damages under section 14B as per scheme under 1952 Act and, therefore, SRA was directed to make an application to Central Board for waiver of amount of damages under section 14B. In view of facts, claim which was admitted in CIRP i.e. amount under section 7Q was required to be paid by SRA to the appellant and, therefore, impugned order passed by NCLT was partly affirmed.

Case Review: Indian Overseas Bank v. R.D. Rubber Reclaim Ltd. [2024] 161 taxmann.com 249 (NCLT - Kol.), partly affirmed.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

- **Anjani Kumar Prashar v. Manab Datta [2024] 161 taxmann.com 252 (NCLAT- New Delhi)**

Where successful auction purchaser took over a developing real estate project of a company under SARFAESI Act, it was obliged to honour allotments of said project, however no steps were taken to start construction which indicated inaction of purchaser or default committed by it, financial debt owed by said company to allottees was now debt owed by purchaser as per section 5(8), there was no error in order passed by NCLT initiating CIRP against purchaser.

Company 'A' purchased a land from company 'S', along with license to develop same. 'A' executed a flat buyer's agreement with prospective allottees / homebuyers in project developed by it. 'A' obtained loan from a bank but due to default committed by 'A', said bank initiated proceedings under SARFAESI Act, 2002. Auction sale notice was issued and bid of the appellant-corporate debtor was accepted and a sale confirmation advice/certificate was issued to the appellant. The respondents / allottees of said project filed an application under section 7 for initiation of CIRP against the appellant and NCLT vide impugned order admitted same. On appeal, the appellant submitted that due to various orders passed by Supreme Court and High Courts, the appellant had no opportunity to carry out construction, and there was no transaction i.e. agreement between the

appellant and respondents, which could be termed as financial debt as it was not party to said agreement. It was noted that sale confirmation advice indicated that the appellant i.e. successful auction purchaser was obliged to honour and acknowledge all lawful allotments, however no steps were taken by the appellant to start construction or to seek any clarification / direction which indicated inaction of the appellant or default committed by it.

Held that financial debt owed by 'A' to allottees was now debt owed by the appellant who was fully covered by definition of section 5(7) and the appellant had taken over project under SARFAESI Act, could not escape rigours of Code and defeat rights of homebuyers. Since, there was a financial debt and default was clearly proved on part of the appellant, there was no error in impugned order and, thus, instant appeal was to be dismissed.

Case Review: Manab Datta v. Grandstar Realty (P.) Ltd. [2024] 161 taxmann.com 251 (NCLT -New Delhi), affirmed.

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

- **G. Sreevidhya v. Karismaa Foundations (P.) Ltd. - [2024] 161 taxmann.com 276 (Madras)**

Where corporate debtor (D1) defaulted in making payment owed to plaintiff under a Memorandum of Compromise and cheques issued by D1 to plaintiff were also dishonoured, since D1 failed to honour compromise and breached settlement, D1 was directed to deposit a sum of Rs.70 lakhs due under compromise.

Plaintiff, land owner, had paid a sum of Rs. 1.5 crores as an advance to the defendant no. 1 (D1)/corporate debtor, for construction of a building. However, D1 had not commenced construction work even upon receipt of advance amount. Consequently, the plaintiff sought a refund of advance. Thereafter, the plaintiff filed a CIRP petition against D1 and same was admitted. However, during pendency of petition, D1 proposed to settle entire dues of Rs. 1.25 crores and accordingly, a memorandum of compromise was entered between parties and, on basis of said settlement, petition stood dismissed as withdrawn. However, post-dated cheque given by D1 was returned dishonoured. Consequently, plaintiff filed an application before NCLT seeking to revive insolvency proceedings, which was dismissed as withdrawn earlier on account of Memorandum of Compromise. NCLT dismissed said application on ground of maintainability. It was noted that D1 defaulted in making payment of Rs. 70 lakhs payable to the plaintiff under Memorandum of Compromise and cheque issued by D1 for said amount was dishonoured.

Held that the plaintiff had filed petition seeking summary judgment against D1 for recovery of advance amount paid by it for construction of a building, but the defendant had raised a plea of limitation, which being a mixed question of fact and law could not be adjudicated in summary judgment. Since D1 defaulted in making payment was admitted fact, instant Court directed D1 to deposit a sum of Rs. 70 lakhs within a period of two weeks.

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

- **Punjab National Bank (International Ltd.) v. Perfect Day Inc [2024] 161 taxmann.com 279 (SC)**

Where appellant, stake holder of corporate debtor challenged NCLAT's order, however, there was delay in filling instant appeal, which was beyond maximum period and could not be condoned, instant appeal was to be dismissed.

An application under section 7 filed against the corporate debtor was admitted and the corporate debtor had been ordered for liquidation by NCL. Liquidator took over the corporate debtor and published public notice and bids were invited from parties as a whole on a going concern basis. In e-auction process of the corporate debtor, respondent No. 1 was declared as a successful bidder. The respondent no. 1 filed an application before NCLT seeking permission to execute and conclude purchase/acquisition of the corporate debtor and reliefs and concessions, which were necessary to acquire the corporate debtor as a going concern. NCLT admitted said application. The appellant, who was a stake holder, in the corporate debtor challenged NCLT's order. NCLAT vide impugned order dismissed said appeal on ground that the appellant was part of CoC and participated in liquidation process by filing its claim, which was accepted and at no point of time, prior to holding of auction, any kind of objection was raised by the appellant to reserve price or against valuation obtained in liquidation process by Liquidator. Appellant challenged NCLAT's before the Supreme Court.

Held that there was delay in filling instant appeal which was beyond maximum period and could not be condoned, thus, instant appeal was to be dismissed.

Case Review: Punjab National Bank (International Ltd.) v. Perfect Day Inc. [2023] 157 taxmann.com 169 (NCLAT-New Delhi), affirmed.

SECTION 62 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - SUPREME COURT, APPEAL TO

- **Bank of Baroda (Erswhile Vijaya Bank) v. Suchi Paper Mills Ltd. [2024] 161 taxmann.com 343 (SC)**

Where on appeal against order passed by NCLT approving resolution plan, matter was remanded back by NCLAT on ground that order passed by a Single Member Bench of NCLT without recording its own satisfaction was in violation of provisions of section 419(3) of Companies Act, 2013, appeal filed against said order of NCLAT before Supreme Court was not to be entertained as these matters were to be considered by NCLT when proceedings would appear before it on remand.

CIRP was initiated against the corporate debtor by NCLT and RP was appointed. CoC of the corporate debtor approved a resolution plan with 77 percent vote shares. RP filed an application before NCLT seeking approval of said plan under section 31 and said application was allowed. The respondent/unsuccessful resolution applicant filed an appeal against order of NCLT and NCLAT observed that said order was passed by a single member of NCLT in violation of

provisions of section 419(3) of the Companies Act, 2013 and NCLT approved resolution plan only on basis of approval given by CoC without recording its own satisfaction and, thus, matter was remanded back to NCLT. The appellant/financial creditor of the corporate debtor filed instant appeal against order of NCLAT, and submitted that substantial steps were taken in pursuance of order of NCLT and dues of financial creditors were also settled. It was stated that instant matter was to be considered by NCLT when proceedings would appear before it on remand.

Held that since impugned order was by way of an order of remand, instant appeal was not be entertained, keeping open all rights and contentions of parties to be urged before NCLT.

Case Review: Suchi Paper Mills Ltd. v. Ashish Gupta [2024] 161 taxmann.com 342 (NCLAT - New Delhi), affirmed.

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

- **Srinivas Reddy Yadiki v. Ardee Hi-Tech (P.) Ltd. [2024] 161 taxmann.com 345 (NCLAT - Chennai)**

Where there was nothing on record to show that corporate debtor had any intention to pay due amount prior to demand notice was issued and that there was existence of any dispute since, despite demand notice amount therein was not paid by corporate debtor in all to operational creditor indicated an admission of debt and, thus, impugned order passed by NCLT admitting Application under section 9 was justified..

The corporate debtor, operational creditor and a company called as 'GTL' had entered into consortium agreement. Thereafter, GTL Ltd. had opted to withdraw itself from consortium and GVK ltd had given entire contract to the corporate debtor being lead member for an amount of Rs.26.46 crores. As per consortium agreement, the corporate debtor had issued a purchase order to respondent no.1-operational creditor. The operational creditor issued invoices against the corporate debtor and due to default committed by the corporate debtor, the appellant filed an application under section 9 and same was admitted by NCLT's order.

The appellant, suspended director of the corporate debtor filed instant appeal on ground that the corporate debtor had raised invoices for work done on GVK ltd. but, owing to cancellation of contract of coal block, full amount was not remitted and that accordingly, the corporate debtor had passed on to the operational creditor only that amount which was received from GVK ltd. based on condition of back-to-back payment arrangement of purchase order and therefore there was delay in remittance of dues to operational creditor.

Held that where two documents which were relied on i.e. purchase order and contract agreement did not anywhere stipulate as a condition precedent of back-to-back payment as a condition to make payments of amount due only after receipt of amount from GTL and, thus defense taken by the corporate debtor of remittance of balance amount only on basis of back-to-back arrangement ran contrary from contents of two documents itself. Where there was nothing on record to show that the corporate debtor had any intention to pay amount due prior to date demand notice was issued by the operational creditor and that there was existence of any dispute with the

operational creditor by the corporate

debtor prior to receipt of demand notice served as a mandatory notice in terms of section 7, since despite demand notice amount therein was not paid by the corporate debtor in all to the operational creditor, existence of amount due to be paid became an admitted fact. Thus, admission of proceedings by NCLT under section 9 did not suffer from any apparent error of fact and law, thus, instant appeal lacked of merits and same was to be dismissed.

Case Review: Ardee Hi-Tech (P.) Ltd. v. Bevcon Wayors (P.) Ltd. [2024] 161 taxmann.com 344

CIRCULAR

No. IBBI/LIQ/73/2024

During the liquidation process, the liquidator invites claims from stakeholders, forms a liquidation estate, endeavours to sell assets in consultation with the Stakeholders' Consultation Committee (SCC) and distributes the realized proceeds to stakeholders as per the waterfall mechanism provided under section 53 of the Code.

1. The Insolvency Professional (IP), functioning as a liquidator, is also required to ensure compliance with legal requirements and reporting to the Adjudicating Authority (AA) and IBBI. Presently, the IPs submit the details regarding the liquidation process to the Board through emails, which is time-consuming and inefficient.

2. To ease the compliance burden for Insolvency Professionals (IPs), a set of electronic formshas been developed by the Board to capture the details of the liquidation process. These formsare crucial for the liquidation process under the Insolvency and Bankruptcy Code (IBC), as they facilitate systematic and transparent record-keeping and seamless reporting. The key benefits of these forms include:

- Enhancing the efficiency and effectiveness of the liquidation process.
- Allowing liquidators to easily access and submit forms online, reducing delays and improving efficiency.
- Minimizing the likelihood of errors and omissions, ensuring more accurate and reliableinformation.

3. An overview of these Forms is as per the Table below:

Form No.	Period Covered and Scope	Timeline
LIQ 1	From Commencement of Liquidation till Public Announcement: This includes details of the Liquidator, Corporate Debtor (CD), and the liquidator's fee.	On or before the 10th day of the subsequent month, after a public announcement has been made.
LIQ 2	From Public Announcement till Progress Report: This includes details of valuation, sale, litigations, PUFE, SCC meetings, Receipts and Payments.	On or before the 10th day of the subsequent month, after 2 submission of the Progress report to the AA.
LIQ 3	From last Progress Report to Application for Dissolution: This includes details of unclaimed proceeds, sale, litigations, PUFE, Realisation, distribution of proceeds, Receipts and Payments. (The details required in these forms are carried forward from the last Progress Report and hence need not be filled again).	On or before the 10th day of the subsequent month, after submission of the Dissolution /closure application to the AA.
LIQ 4	From Application for Dissolution to Order for Dissolution: This includes details of, the distribution of proceeds, Receipts and Payments, etc. (The details required in these forms are carried forward from the last Progress Report and hence need not be filled again).	On or before the 14 days of passing of the order for dissolution of corporate debtor or closure of the liquidation process by the AA.

4. It is directed that an IP shall file Forms through the electronic platform:

   a. within the prescribed timeline for all cases where a liquidation order is passed on or after issuance of this circular.

   b. for ongoing cases: Cases in which no application for dissolution of the corporate debtor/closure of the liquidation process has been filed, shall file form LIQ 1 and LIQ 2 (for the March 24 quarter) latest by 30th September 2024.

   c. for cases where an application for dissolution of the corporate debtor/closure of theliquidation process has been filed with AA, shall file forms LIQ 1 and LIQ 2 (for the last quarter of the process), and LIQ 3 by 30th September 2024.

   d. for cases where an order for closure of the liquidation process or dissolution of the corporation debtor has been ordered by AA, shall file forms LIQ 1 and LIQ 2 (for the last quarter of the process), LIQ 3, and LIQ 4 by 30th September 2024.

5. It is clarified that an IP who do not comply with applicable provisions of the Code and the Regulations made thereunder, shall be liable for:

   (i) failure to file a Form along with relevant information and records,

   (ii) inaccurate and incomplete information and/or records filed in or along with a Form.

6. This is issued in exercise of the powers under sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016.

GUIDELINES FOR ARTICLES

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

✓ The article should be original, i.e., not published/broadcasted/hosted elsewhere including any website. A declaration in this regard should be submitted to IPA ICAI in writing at the time of submission of article.

✓ The article should be topical and should discuss a matter of current interest to the professionals/readers.

✓ It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of.

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

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

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

✓ The authors must provide the list of references if any at the end of article.

✓ A brief profile of the author, e-mail ID, postal address and contact numbers and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.

✓ In case the article is found not suitable for publication, the same shall not be published.

✓ The articles should be mailed to "publication@ipaicmai.in".