



Presented by:

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FOUNDER & CHAIRMAN

AAA INSOLVENCY PROFESSIONALS LLP

India's largest Insolvency Professional Entity (IPE)
under IBC

AAA CAPITAL SERVICES PVT. LTD.

India's largest resolution and enforcement agents
under SARFAESI act

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Why IBC was required in India?



- To provide a comprehensive law and single platform to deal with or resolve financial stress of business entities or otherwise
- To assure early detection of financial stress or default, any creditor can report the default now
- To provide for time bound resolution for viable businesses. Helps reorganisation and /or restructuring of business



Why IBC was required in India?....cont.




- Creates a collective platform of the stakeholders to enable them to take decisions about the future of the distressed entity
- Sends the unviable businesses to liquidation at the earliest to arrest any substantial loss in value
- To consolidate all statutes, schemes, orders into single debt resolution process. BIFR, CDR, SDR, S4A and other debt resolution schemes were withdrawn/ repealed with the notification of IBC





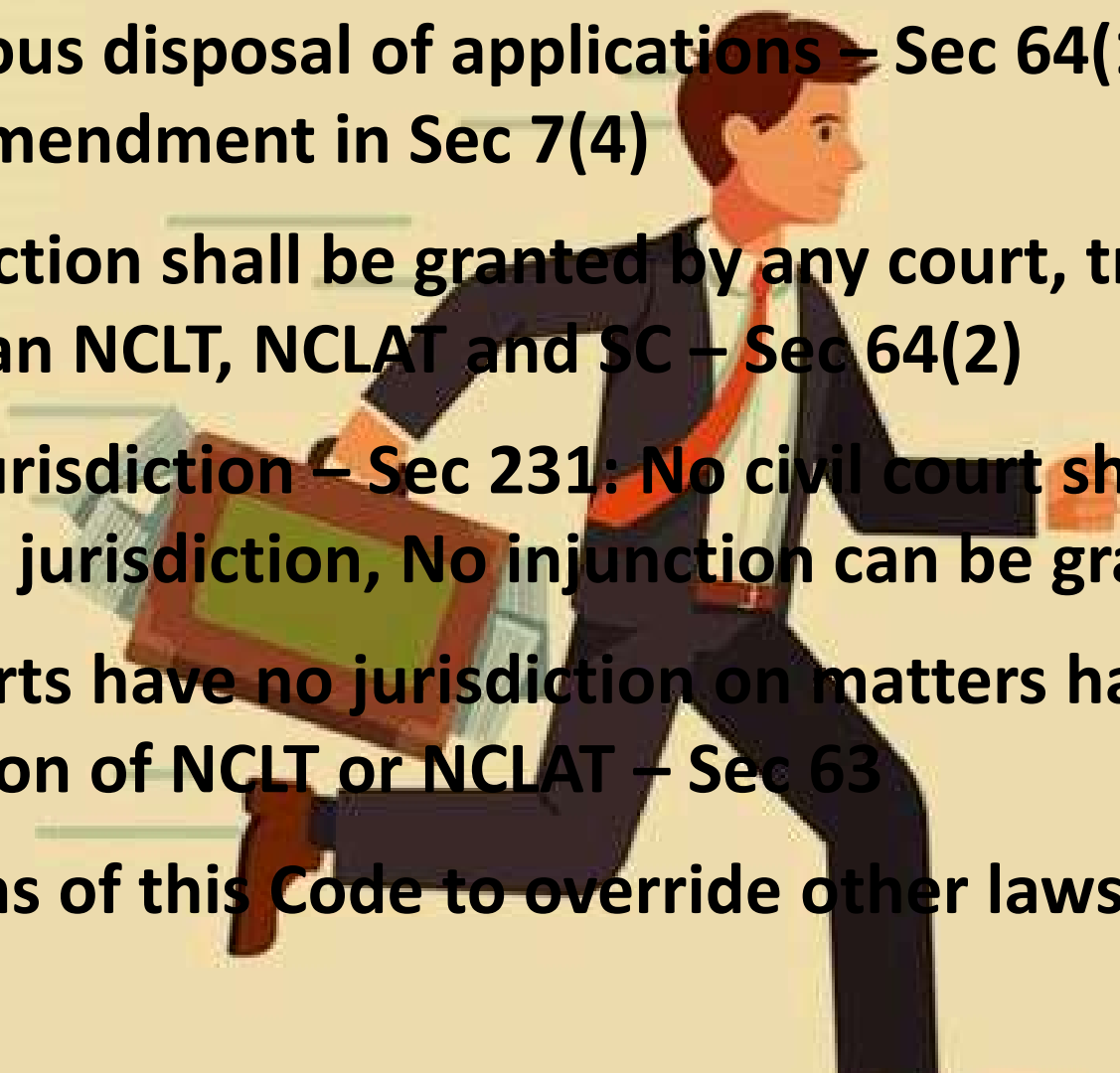
HOW IBC PROVIDE FAST TRACK RESOLUTION

- Lender inertia during CIRP would lead to liquidation – invariably an economically inferior outcome as compared to resolution
 - Clarity on the insolvency framework will attract investors to invest into stressed/ distressed situations
 - Moratorium clause to ensure smooth insolvency-resolution process and protection from creditors
 - An “open floor” for submission of resolution plans should facilitate the approval of the best plan and exploration of best value for the business or assets
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HOW IBC PROVIDE FAST TRACK RESOLUTION

Contd.

- The framework defines the role of the judiciary and leaves limited scope for legal delay/ deferral of the problem
- Expeditious disposal of applications – Sec 64(1) recent amendment in Sec 7(4)
- No injunction shall be granted by any court, tribunal other than NCLT, NCLAT and SC – Sec 64(2)
- Bar on Jurisdiction – Sec 231: No civil court shall have any jurisdiction, No injunction can be granted.
- Civil Courts have no jurisdiction on matters having jurisdiction of NCLT or NCLAT – Sec 63
- Provisions of this Code to override other laws – Sec 238





Implementation
of IBC
with
Lightening speed



Implementation of IBC with Lightning speed

- **Previous Government sworn in on 26th May, 2014**
- **Budget was presented by Finance Minister on 10th July, 2014 and formation of BLRC was announced**
- **Composition of the Bankruptcy Law Reforms Committee (BLRC) was decided on 22nd August, 2014**
- **BLRC was set up on 10/11/2014 under the Chairmanship of Dr. T K Vishwanathan, who was Secretary General of 15th Lok Sabha up to May, 2014**
- **Final BLRC report was required to be submitted within 12 months i.e. by November, 2015**



Implementation of IBC with Lightning speed

- **Final BLRC Report was submitted on 4th November, 2015**
- **The Insolvency and Bankruptcy Code, 2016 was introduced to Lok Sabha on 21st Dec, 2015**
- **The bill was referred to Joint Committee of both houses of Parliament on 23rd Dec, 2015, the report was supposed to be submitted by Feb, 2016, but it was extended for few months**
- **The report was presented to Lok Sabha on 28th April, 2016**
- **The insolvency and bankruptcy code, 2016 was notified on 28th May 2016**
- **Corporate insolvency resolution process started with effect from 1st Dec 2016**





INSTITUTIONAL FRAMEWORK AND ADJUDICATORY MECHANISMS

IBC FOR CORPORATE DEBTORS: TWO-STAGE PROCESS



Corporate insolvency regulation process

For insolvency process for corporate debtors, default should be at least INR 100,000/- (which limit may be increased up to INR 10,000,000/- by the Government).

During CIRP financial creditors assess whether the debtor's business is viable for continuation and the options for its rescue and revival

Liquidation

if the insolvency resolution process fails or financial creditors decide to wind down and distribute the assets of the debtor

Corporate Insolvency Regulation Process



WHO CAN INITIATE CIRP



- Banks, NBFCs, other private financiers who have given loans, may be secured or unsecured, credit card or personal loans (Financial creditors)
- Persons who have supplied the material (vendors) or any given any service and have not been paid (Operational creditors)
- Employees or workers (also called 'operational creditors')
- Central or state govt. or any local authority who have to recover any tax (also called 'Operational creditors')
- Company or person itself, who thinks that it cannot repay its debts. (Corporate Debtors)

FILING OF APPLICATION BEFORE NCLT



By a Financial Creditors – default of Rs. 1 Lakh and above



- **Existence of Debt**
- **Disbursement of Debt**
- **Occurrence of default**
- **No need to give prior notice to Corporate Debtor**
- **Name of the Interim Resolution Professional to be proposed**
- **The application can be accepted even if a dispute is pending**

FILING OF APPLICATION BEFORE NCLT



By a Operational Creditors – supplier of goods or services, workman or employee, govt authorities for tax dues - default of Rs. 1 Lakh and above

- **Existence of Debt**
- **Disbursement of Debt**
- **Occurrence of default**
- **Existence of No dispute**
- **10 days Demand Notice to be given prior notice to Corporate Debtor**
- **Name of the Interim Resolution Professional may be proposed, if not proposed NCLT will appoint one from the List**

FILING OF APPLICATION BEFORE NCLT

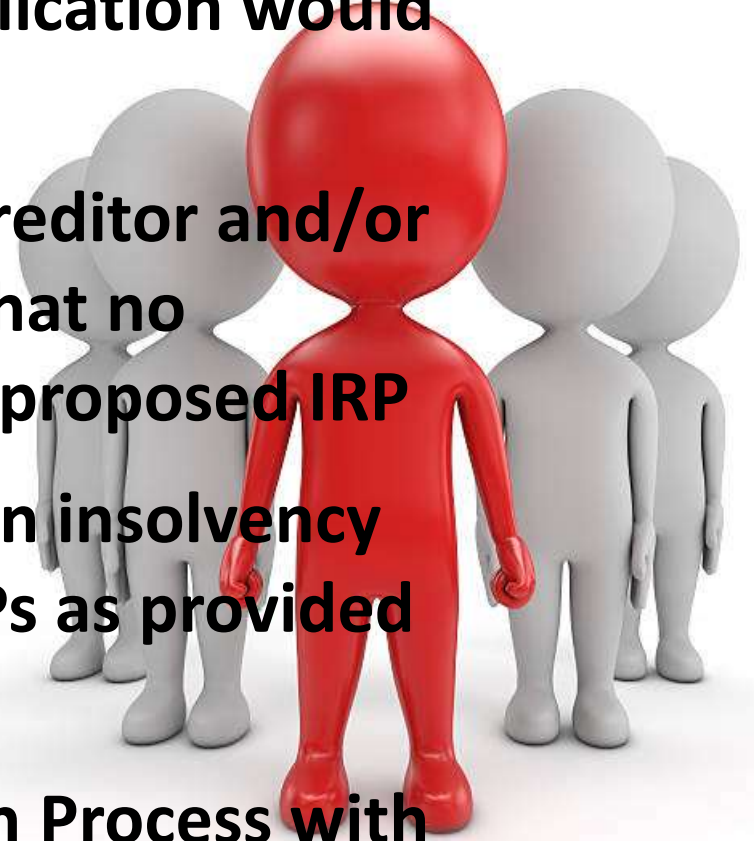


By the Corporate Debtor - default of Rs. 1 Lakh and above

- Committed a default
- Application can be filed by Corporate Debtor, any authorised member or partner , CFO, MD or any person who is in charge of operations, resources or control and supervision of financial affairs of the Corporate Debtor
- Name of the Interim Resolution Professional must be proposed

Appointment of Interim Resolution Professional

- NCLT will assure notice to Corporate Debtor
- After hearing objections and arguments, the application would be either admitted or dismissed by NCLT
- IRP proposed by Financial creditor, operational creditor and/or corporate applicant shall be appointed if found that no disciplinary proceedings are pending against the proposed IRP
- If IRP is not proposed by OC, the NCLT appoints an insolvency professional as IRP from the list of empanelled IPs as provided by IBBI
- IRP will start the Corporate Insolvency Regulation Process with public announcement and invite claims from the creditors



Resolution Professional & Team

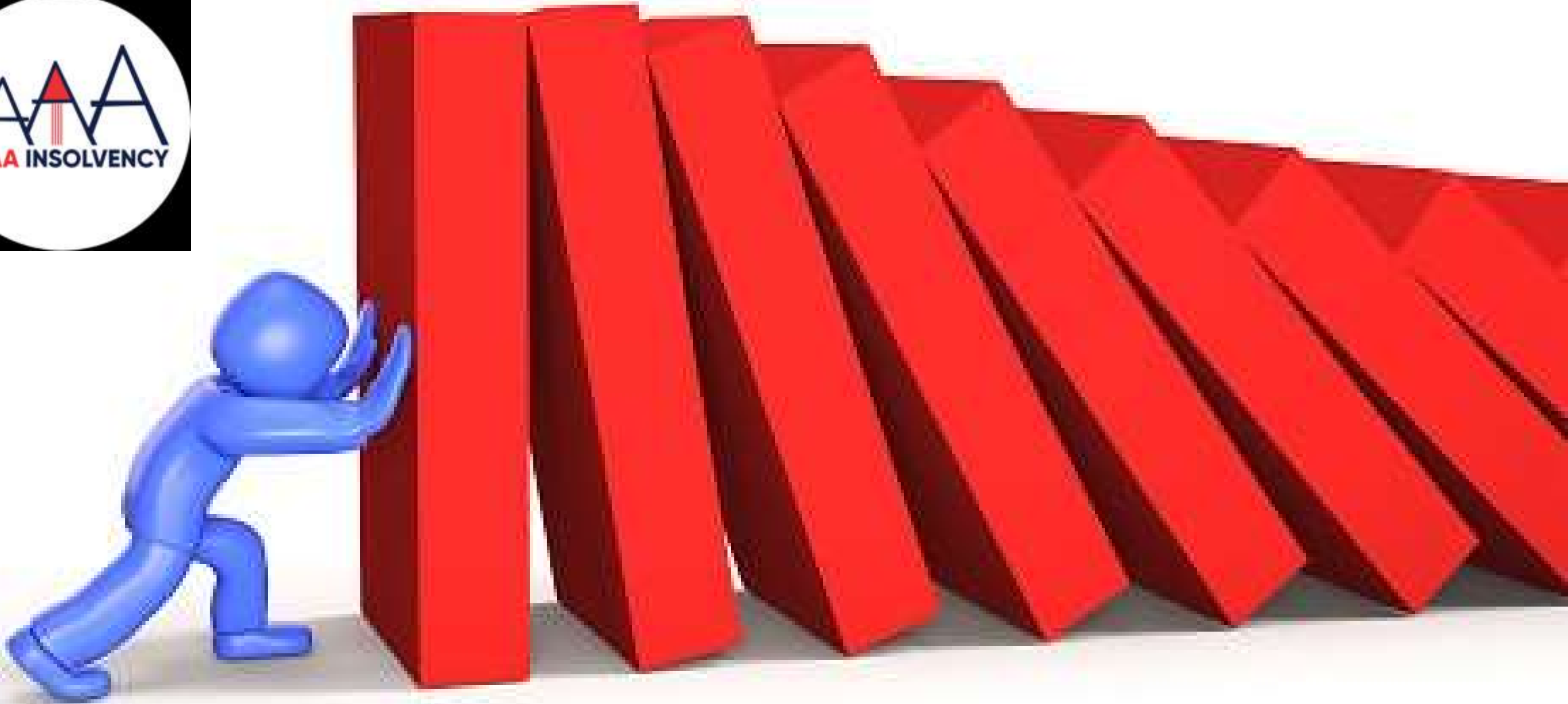
Appointment of Interim Resolution Professional

- IRP will take over management of Corporate Debtor, take over the operations of bank accounts, take control and custody of assets over which CD has ownership rights in India or abroad including assets not in possession of CD
- Power of BOD of the CD shall be suspended, however the duties and responsibilities of directors would continue
- Officers and management of the CD will report to IRP
- To operate its business as a going concern under the broad directions of a committee of creditors.
- Collect all information relating to assets, finances and operations of CD, Receive and collect all the claims submitted by creditors
- Constitute a committee of creditors
- Monitor the assets and manage operations until RP is appointed by CoC



Resolution Professional & Team

MORATORIUM – TO BE DECLARED BY NCLT –



Prohibiting all to do following:

- 1) All would be prohibited to do the following:**
 - (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;**
 - (b) Transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;**
 - (c) 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 SARFAESI Act;**
 - (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.**

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

Reg 32: The essential goods and services referred to in section 14(2) shall mean-

(a) electricity; (b) water; (c) telecommunication services; and (d) information technology services,

To the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Punishment for contravention of Moratorium - Sec 74



- **Officer of the Corporate Debtor or CD – imprisonment 3-5 years and/or Fine 1-3 Lakhs**
- **Any person of Financial Creditor or Operational Creditor – imprisonment 1-5 years and/or fine 1 lakh – 1 Crore**
- **Officer of the Corporate Debtor or CD, creditor or any other person – imprisonment 1-5 years and/or fine 1 lakh – 1 Crore on contravention of implementation of resolution plan u/s 31**

Committee of Creditors and its First Meeting



- The IRP identifies the financial creditors and constitutes a creditors committee excluding related parties
- Operational creditors (if their aggregate debt is 10% of total debt) are allowed to attend meetings of the committee but do not have voting power
- In case there are no financial creditors, then the committee of creditors will be formed out of operational creditors
- Each decision of the creditors committee requires a 51% majority vote unless otherwise provided in the code. Most important decisions require 66%
- Decisions of the creditors committee are binding on the corporate debtor and all its creditors
- CoC in first meeting by majority vote of not less than 66% may decide to appoint IRP as RP or to replace him with their proposed RP



Voting Share required for different decisions of Committee of Creditors (effective 06/06/2018)



90% - For withdrawal of application admitted u/s 7, 9 or 10 – approval of COC -Sec 12A



- For Extension of CIRP Period by up to 90 days -Sec 12(2)
- For appointment of Resolution Professional - Sec 22(2)
- For Replacement of Resolution Professional -sec 27(2)
- For Approval of COC for various actions u/s 28
- For approval of Resolution Plan u/s 30(4) and allocating resources under the Plan to CIRP Cost, LV due to dissenting creditors and LV due to operational creditors
- For approval of resolution to liquidate the Corporate Debtor u/s 33(2)



66%

- Approval of Eligibility Criteria and Bid Evaluation Matrix
- Authorising any person to attend the meeting;
- Ratification of Public Announcement expenses;
- Reduction in notice period for meeting of COC,
- Modification of voting share required for quorum,
- Sale of unencumbered assets under reg. 29,
- Ratification of expenses incurred by IRP for IRP Fee, IPE Fee, Professional charges, etc.;
- Approval of Resolution Professional fee and expenses incurred by Resolution Professional and amount payable to professionals appointed by Resolution Professional
- Modification of Expression of Interest and/or Bid Evaluation Matrix and eligibility criteria.



POWERS AND DUTIES OF PERSONAL



**RP will take over
management of
Corporate Debtor**

**Power of BOD of the
CD shall be suspended**

**Officers and
management of the
CD will report to RP**

**Can access information from third parties to
the extent relevant for CIRP e.g. depositories
of securities, professional advisors of CD, IUs,
other registries keeping ownership records,
members, promoters, partners, directors, JV
Partners, contractual counter parties of CD,**

Banks, FIs maintaining accounts of CD will act as per instruction of RP – Bank account operations will be under the control of RP

Collect all information relating to assets, finances and operations of CD

Receive, collate and verify all the claims submitted by creditors and determine any contingent claims to his best estimate

Monitor the assets and manage operations until RP is appointed by CoC

Take control and custody of assets over which CD has ownership rights in India or abroad including assets not in possession of CD including business records

Powers and Duties of Resolution Professional



Manage operations of CD as a going concern

Preserve and protect the assets of the CD, including the continued business operation of the CD

Represent and act on behalf of CD with third parties

Raise interim Finance

Appoint accountant, legal or other professionals e.g. Valuers, Transactional Auditors, Auditors, etc.

Maintain updated list of all claims

Convene and Chair all meetings of CoC and circulate minutes

Prepare Information Memorandum and provide information to Prospective Resolution Applicants

Invite Lenders/Investors and other persons to put forward their resolution plan

Put resolution plans for consideration/approval of CC and submit the Resolution Plan before NCLT for approval.

Observe, find and determine avoidable transactions u/s 43, 45, 50 & 66 of the Code e.g. Preferential, undervalued, extortionate and fraudulent transactions and file appropriate application to NCLT for remedy

RESOLUTION PLAN



WHO CAN PREPARE AND SUBMIT A RESOLUTION PLAN?

- **Financial creditor(s)**
- **Operational creditor(s) including any employee of the Company**
- **Corporate debtor**
- **Committee of creditors**
- **Any one or more shareholders of the CD**
- **Any one or more employees of the CD**
- **Any person who is interested in buying one or more assets of the CD**
- **Any other person who is having any strategic interest in the corporate debtor**
- **Any other person who is having interest in taking over the CD as going concern**
- **Any other person as the RP may permit**

HOW MANY RESOLUTION PLANS CAN BE PREPARED AND SUBMITTED?

- **No limit on number of Resolution Plans, which can be prepared and submitted**
- **No limit on number of modifications to Resolution Plans**
- **Resolution Professional is under obligation to examine each resolution plan received by him**
- **Resolution Professional may decline acceptance of any further Resolution plan, in case not submitted 30 days before expiry of period permitted under section 12 for completion of CIRP**

WHO ALL ARE NOT ELIGIBLE TO SUBMIT A RESOLUTION PLAN



(B) Liquidation



- Under the Code, a corporate debtor may be put into liquidation in the following scenarios:
- A 66% majority of the creditor's committee resolves to liquidate the corporate debtor at any time during the insolvency resolution process;
- The creditor's committee does not approve a resolution plan within 180 days (or within the extended period of 90 days) & within a period of 330 days if time is consumed in litigation;
- The NCLT rejects the resolution plan submitted to it on technical grounds; or
- The debtor contravenes the agreed resolution plan and an affected person makes an application to the NCLT to liquidate the corporate debtor
- Once the NCLT passes an order of liquidation, a moratorium is imposed on the pending legal proceedings against the corporate debtor, and the assets of the debtor (including the proceeds of liquidation) vest in the liquidation estate

IMPLICATION OF LIQUIDATION ORDER

- **RP under CIRP to act as liquidator**
- **No suit or other legal proceedings will be instituted by or against the CD, provided that liquidator can, with prior permission of NCLT, institute a suit or legal proceeding**
- **Liquidation order is deemed to be a notice of discharge to officers, employees and workers of the CD except when business of CD is continued during the liquidation process**
- **Board of directors suspended and all the powers to vest in the liquidator**
- **NCLT can replace the resolution professional in case resolution plan submitted by RP was not as prescribed by the law/rules or if the Board recommends replacement of RP**

LIQUIDATION STEPS

Appointment of Liquidator

- The NCLT shall pass an order for liquidation and the RP appointed for the CIRP shall act as a liquidator for the purpose of liquidation unless replaced by AA

Formation of Liquidation Estate

- The liquidator shall form an estate of the assets which will be called the liquidation estate in relation to the CD
- The Liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors

No Legal proceeding by or against the CD

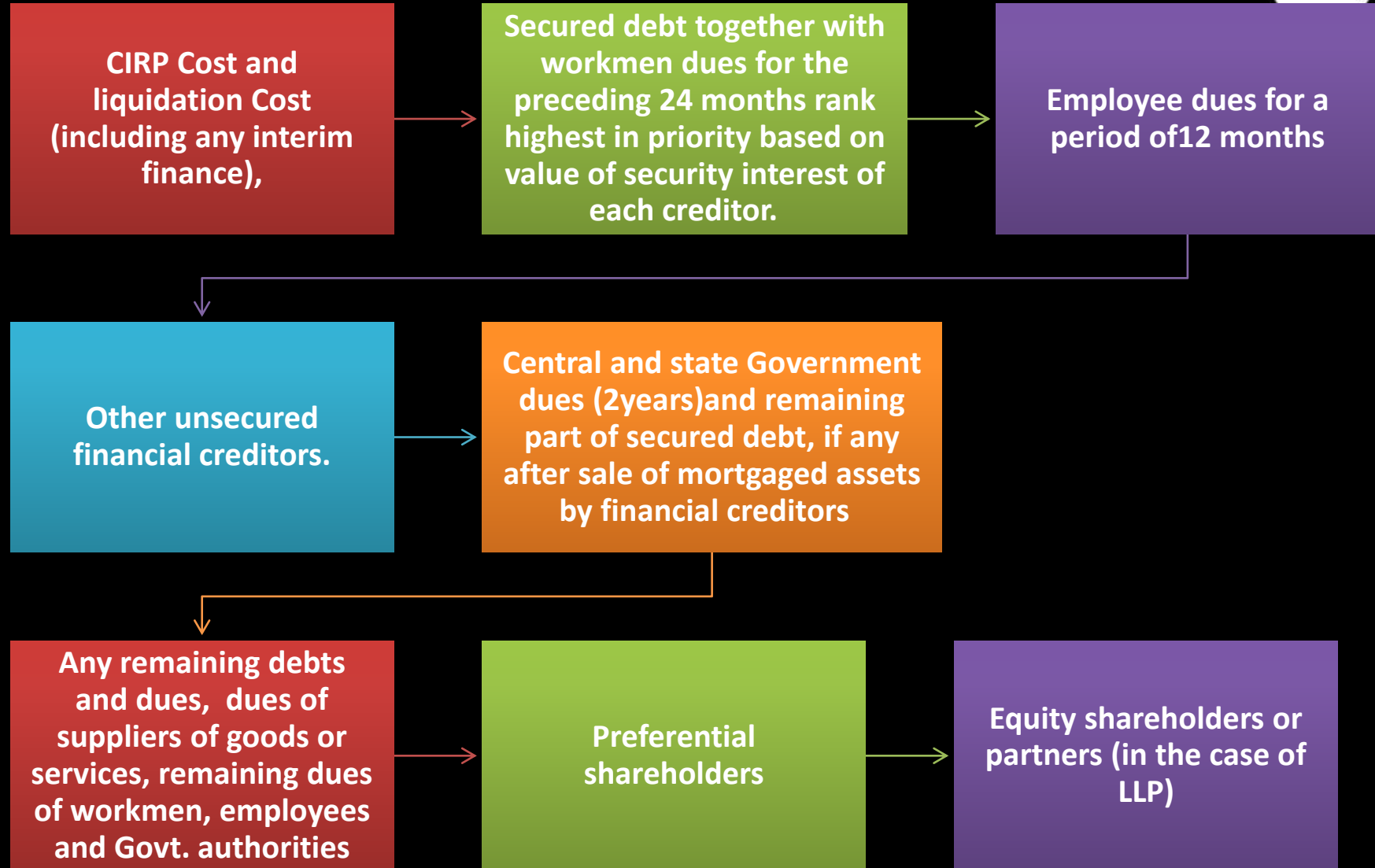
- No suit or other legal proceedings will be instituted by or against the CD, provided that liquidator can, with prior permission of NCLT, institute a suit or legal proceeding

Consolidation of claims

- The liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of commencement of liquidation process
- Financial creditor, operational creditor may submit a claim to the liquidator in prescribed form and may withdraw or vary his claim within fourteen days of its submission

Distribution of assets (WATERFALL MECHANISM)

Amount available under a Resolution Plan or proceeds of sale of assets of the liquidation estate will be distributed in the manner and in the priority based on the value of security Interest of each creditor:



DISTRIBUTION OF ASSETS OR DISTRIBUTION OF LIQUIDATION ESTATE

Section 53 of IBC

Sub section (1)

- Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force;
- The proceeds from the sale of the liquidation assets shall be distributed in the following order of priority; and
- within such period as may be specified, namely

(a) The insolvency resolution process costs and the liquidation costs paid in full;

(b) The following debts which shall rank equally between and among the following; -

i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

i) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52

DISTRIBUTION OF ASSETS OR DISTRIBUTION OF LIQUIDATION ESTATE... Contd.

- c) Wages and any unpaid dues owed to employees other than workmen for the **period of twelve months** preceding the liquidation commencement date;
- d) Financial debts owed to unsecured creditor
- e) The following dues shall rank equally between and among the following: -
 - i) Any amount due to the **Central Government**; and
 - Any amount due to the **State Government**; including
 - The amount to be received on account of the **Consolidated Fund of India** and the **Consolidated Fund of a State**, if any,
 - In respect of the **whole or any part of the period of two years** preceding the liquidation commencement date
 - i) Debts owed to a secured creditor for any amount unpaid following the enforcement of security interest

DISTRIBUTION OF ASSETS OR DISTRIBUTION OF LIQUIDATION ESTATE... Contd.

f) Any remaining debts and dues

For Example:

- workmen dues beyond 24 months
- wages and any amount due to employees beyond 12 months
- amount due to govt authorities for period beyond two years
- dues of parties against supply of goods or services

g) Preference shareholders, if any; and

h) Equity shareholders or partners, as the case may be

Dissolution of Debtor

- Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of debtor
- The AA shall on application, order that the corporate debtor shall be dissolved from the date of the order
- A copy of order shall within seven days from the date of order, be forwarded to the authority with which corporate debtor is registered

Dissolution of Debtor...Contd.



Secured Creditor in Liquidation

A secured creditor may choose to enforce and realise his security and receive proceeds from the sale of the secured assets in first priority. If the secured creditor enforces his claims outside the liquidation, he must contribute any excess proceeds to the liquidation trust. Further, in case of any shortfall in recovery, the secured creditors to approach liquidator for recovery of balance dues in terms of waterfall mechanism as set out in section 53



INSOLVENCY AND BANKRUPTCY LAW

VIZ-A-VIZ

TAX AUTHORITIES

IMPLICATION OF MORATORIUM UNDER SECTION 14 OF IBC ON TAX AUTHORITIES



During Corporate Insolvency Regulation Process

- Start of fresh proceedings is prohibited against the Corporate Debtor – Sec 14(1)(a)
- Continuation of pending proceedings is prohibited against the Corporate Debtor – Sec 14(1)(a)
- Execution of any judgement or order is prohibited during CIRP – Sec 14(1)(a)
- Any action to recover any dues is prohibited– Sec 14(1)(c)

During Liquidation Process

- Start of fresh proceedings is prohibited against the Corporate Debtor – Sec 33(5)
- Continuation of pending proceedings is not prohibited against the Corporate Debtor – Sec 33(5)
- Liquidator will take into control and custody of all assets of Corporate Debtor– Sec 35(1)(b)

Any action to recover any dues is prohibited as claims would be filed by all the creditors

- **IRP/RP shall have the authority to access the books of accounts, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified – Sec 17(2)(d)**
- **Take control and custody of any asset over which the corporate debtor has ownership rights including the assets that may or may not be in possession of the corporate debtor – Sec 18(f)(ii) & 25(2)(a)**
- **To file an application to NCLT and seek directions against any such person who is not co-operating with the IRP/RP – sec 19(2)**

- **Similar powers are given to liquidator during Liquidation Process**
- **All the assets of Corporate Debtor, if attached by Govt. Authorities against tax dues would be released in favour of Resolution Professional or liquidator e.g. Bank accounts, movable or immovable properties, etc.**
- **However, if the assets are realised and adjusted against the tax dues, the same is not required to be reversed as the ownership of those assets have changed from Corporate Debtor to either Govt. Department or third parties**

- **Shall be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor – Sec 17(2)(e)**
- **To comply with all the provisions during CIRP e.g. TDS, TCS, payment of income-tax, filing of returns, etc.**

FILING OF CLAIM BY TAX AUTHORITIES & THEIR RIGHTS IN COC DURING CIRP



Sec 5(20) defines “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

Sec 5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment 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

Reg 7: Claim would be filed by operational Creditors in Form B of CIRP Regulations along with proofs, documents and clarifications, if any. Copies of the relevant orders would be required.

Claim can only be filed for amount due from the Corporate Debtor, irrespective of any appeal pending with any authority.

FILING OF CLAIM BY TAX AUTHORITIES & THEIR RIGHTS IN COC DURING CIRP...contd.



Right of Operational Creditors to get notice of Committee of Creditors meeting and to attend the meeting: Sec 24(3)(c) – only in case the amount of their aggregate dues are not less than 10% of total debt/claims

Operational Creditors will not have any right to vote in Committee of Creditors

Reg 16: in case there are no financial creditors, the operational creditors will form Committee of Creditors. Eighteen large Operational Creditors will form Committee of Creditors. All the decisions then be taken by the Operational Creditors and all will have voting rights based on the debt outstanding.

Govt Authorities would also file their claims during Liquidation Process in Form C as provided in Liquidation regulations along with all the documents and evidences.

RIGHTS OF TAX AUTHORITIES DURING LIQUIDATION PROCESS

Govt. Authorities have been given one seat on the Stakeholders' Consultation Committee

Maximum seats in the SCC are 11 and one seat is given to Govt. Authorities, if there are claims filed by Govt. Authorities

The SCC members are not having any power except to observe the process of sale of assets and understand Liquidation Value

SCC can direct Liquidator to do some act or not to do some act, however, the liquidator would still have powers to do as he deems fit after recording reasons

TAX AUTHORITIES CAN INITIATE CIRP TO RECOVER DUES

- **Operational Creditors can initiate Corporate Insolvency Regulation Process – Sec 6**
- **CIRP can be initiated only on occurrence of default – Sec 8**
- **First step is to deliver a demand notice to Corporate Debtor along with evidences of payment due and default**
- **To make sure that no dispute is pending before any authority before the delivery of such demand notice and no payment has been made by the Corporate Debtor**
- **After the expiry of 10 days from the date of delivery of demand notice, an application can be made u/s 9 to initiate Corporate Insolvency Regulation Process**

TAX AUTHORITIES CAN INITIATE CIRP TO RECOVER DUES

- **Operational Creditors may propose an Interim Resolution Professional or NCLT will select one from the panel**
- **Corporate Debtor will have the option to make payment to escape from CIRP**
- **Provisions can be used for final determination of outstanding demands and pushing those Companies to liquidation which are not paying their tax dues**
- **The dues would be recovered only if Liquidation Value is enough to provide for all other creditors who are to be paid in priority to Govt Dues.**

TREATMENT OF TAX DUES IN RESOLUTION PLAN

Each Resolution Plan must provide for payment of debt of Operational Creditors, which will not be less than:

The amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

The amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53

Higher of the above two amounts would be provided for Operational Creditors in the Resolution Plan

In case the Liquidation Value of the Corporate Debtor is high and other creditors which are higher on priority u/s 53 are being paid, then dues of Govt Authorities would also be paid in the Resolution Plan

TREATMENT OF TAX DUES IN RESOLUTION PLAN...Contd.

Each Resolution Plan must provide for payment of debt of Operational Creditors, which will not be less than:



In case the Liquidation Value is low and other operational creditors are not being paid, then the dues of the Govt authorities would not be paid

Claims admitted by Resolution Professional in order of priority and the Liquidation Value of Corporate Debtor are very important information for Govt Authorities to understand if their dues would be paid or not.

Liquidation Value is the value of the assets of the Corporate Debtor as assessed by the two registered valuers appointed by Resolution Professional who would give fair value and the Liquidation Value

Operational Creditors have a right to get copies of Resolution Plan and also to get the Liquidation Value as per the provisions of the Code to understand their rights under Resolution Plan

**PENDING
ASSESSMENTS
DURING CIRP &
IN RESOLUTION
PLANS**

**During
Corporate
Insolvency
Regulation
Process**

The assessment proceedings during CIRP will be kept in abeyance as the information may not be available with Resolution Professional

Sec 60(6) provides that any period of limitation would exclude the period during which moratorium under IBC was in force

The assessment proceedings can be resumed after the Resolution Plan is approved or liquidation order is passed for the Corporate Debtor

Any demand raised by Govt authorities for the period up to the commencement of CIRP would be dealt with as provided in approved Resolution Plan or would be dealt with as per Liquidation Process

Generally, all the Resolution Applicants are asking waiver of dues to Govt Authorities in case no Liquidation Value is due as per section 53 priority

Even if such specific waiver is not asked for by the Resolution Applicant, the amount of such dues to Govt Authorities would not be recoverable if no Liquidation Value is due

RESOLUTION PLAN

Implementation of Resolution Plan through a SPV by assignment of entire debt to SPV. This can also lead to absolving the promoters from personal guarantee

Tax planning via part assignment and part write off in a resolution plan if the entire waiver is leading to tax payment

Banks are not comfortable in absolving the promoters from personal guarantee. COC insist for their right in the Resolution Plan to proceed against promoters.

Supreme Court has held in the case of Essar Steel that the clause in Resolution Plan that right of subrogation of suspended directors is extinguished can be accepted

Any recovery from avoidable transactions would be paid to creditors over and above the amount offered under Resolution Plan. Normal clause in Resolution Plan

Any judicial delay in approval of Resolution Plan would no give a right to Resolution Applicant to withdraw the Resolution Plan

PRACTICAL EXPERIENCE ABOUT RESOLUTION PLAN

**PENDING
ASSESSMENTS DURING
CIRP &
IN RESOLUTION PLANS**

During Liquidation Process

The pending assessment or any other proceedings would be revived and assessments would be completed based on the information available.

No enforcement can be done to recover dues and no assets can be attached as liquidator has been appointed and he has the power to take control and custody of all the assets of Corporate Debtor

Claim would be filed by Govt Authorities before the liquidator after completion of the proceedings.

The due of Govt Authorities would be paid as per the priority of section 53 of the Code.



INCOME TAX PROVISIONS APPLICABLE TO COMPANIES UNDER CIRP OR LIQUIDATION

INCOME TAX PROVISIONS APPLICABLE TO COMPANIES UNDER CIRP OR LIQUIDATION



Section 178, which provides for

- Liquidator to notify to Assessing Officer about commencement of liquidation
- Assessing Officer to notify amount due from the Company to Liquidator
- Liquidator to take prior approval from IT Department before sale of assets

THESE PROVISIONS ARE NOT APPLICABLE TO COMPANIES UNDER IBC

Section 46 - Capital gains on distribution of assets by companies in liquidation

- Where the assets of a company are distributed to its shareholders on its liquidation
- Such distribution shall not be regarded as a transfer by the company for the purposes of section 45
- Shareholder who have received any money or assets would be taxed in his individual hands
- These provisions are applicable to most of the Companies undergoing Voluntary Liquidation under IBC

Capital Gain tax on sale of assets during liquidation process

Section 178, which was used for recovering tax dues and not for taxing sale of assets, is not applicable to companies under liquidation

Section 140 does not provide for verification of return by Companies under liquidation, it only provides for verification of return of income during CIRP

Section 238(2) provides a right to liquidator claim refunds under Income tax Act

Section 46 provides for capital gain tax on distribution of assets or money to shareholders by Companies in liquidation

On sale of secured assets – sale proceeds are paid to secured creditors and tax if any on sale of asset would be payable as a claim of operational creditor



Capital Gain tax on sale of assets during liquidation process

On sale of unencumbered assets of companies under liquidation – sale proceeds would be paid to claimants as per priority u/s 53, in case funds are available the same would be paid to Operational Creditors also.

In case any asset or money is transferred to shareholders, the same would be taxable u/s 46 in the hands of shareholders and not in the hands of Company

Return of Income can be filed for the Company as a whole and not as 'Head of Income' basis. Return of income can not be filed for each source separately. No return of income can be filed unless financial statements are not drawn during Liquidation Process.

Regulation 15 of the IBBI (Liquidation Process) Regulations, 2016 provides that Liquidator is required to maintain and get the auditing done for Receipt and Payment account of the Liquidator. Preparation and auditing of financial statements are not required

TDS & TCS Provisions during CIRP & Liquidation Process

All TDS provisions are applicable during CIRP and Liquidation Process

Resolution Professional is under obligation to comply with all TDS /TCS provisions during CIRP and file all returns as required

Liquidator is also required to comply with the TDS /TCS provisions during Liquidation Process and file all returns as required

Liquidator is entitled to claim refund of any TDS deducted for the Corporate Debtor while selling some assets u/s 238(2)

Section 179: Liability of directors of private company in liquidation

- Tax dues of a company under liquidation can be recovered from directors, if: -
 - i) The dues cannot be recovered from the company
 - ii) The director(s) fails to prove that the non-recovery of tax dues is not because of his gross neglect, misfeasance or breach of duty

Section 167C: Liability of partners of limited liability partnership in liquidation

Similar provisions as in section 179

Section 140: Return by whom to be verified

The returns under section 139 or 115WD (Return of Fringe Benefits by employers) would be signed by: -

- i) Resolution Professional in case the Corporate Debtor is under Corporate Insolvency Regulation Process**
- ii) There is no provision in the Act for returns during liquidation of a Company**

Sec 41(1) of Income-tax Act

Where an allowance or deduction has been made in the assessment for any year

- In respect of loss, expenditure or trading liability incurred by the assessee
- And subsequently during any previous year,—

(a) The first-mentioned person or the successor in business has obtained,

- Whether in cash or
- In any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof,
- The amount obtained by such person or
- The value of benefit accruing to him

Shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or

Sec 28(iv) of Income-tax Act

the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession

**Profits
chargeable
to tax –
remission
or
cessation
of liability**

Logitronics Pvt. Ltd. vs. Commissioner of Income Tax and Anr. (High Court of Delhi) MANU/DE/0475/2011



It has been held that any amount which has not been claimed as deduction before by the assessee, the write back would not be taxable

loss, expenditure or trading liability incurred by the assessee and later written off would become income

liability incurred for any other purpose and later written off would not be an income for the assessee or successor in business.

Liability incurred for acquisition of capital assets and later waived and written off does not qualify for tax u/s 41(1) or 28(iv)

The Commissioner vs. Mahindra and Mahindra Ltd. (Supreme Court)

MANU/SC/0513/2018



Profit u/s 41(1) and 28(iv) would be taxed as business income and following deductions are allowed from business loss

- 1. Loss on sale of assets on which depreciation is claimed by the assessee**
- 2. Write off of non recoverable current assets e.g. sundry receivables, advances, etc.**
- 3. Loss of stock can be claimed as business loss**
- 4. Brought forward business loss can be set off against the business profit and MAT is also not applicable upto the amount of brought forward losses**
- 5. However, the future depreciation would be reduced as any remission or cessation of liability which is raised for investing in capital assets**

Section 115JB: Provision of Payment of Minimum Alternative Tax by some Companies

- If tax payable by any Company under the provisions of Income-tax Act is less than 18.5% of its book profits, then tax would be payable on the book profits @18.5%
- Book Profit would be as per Schedule III of the Companies Act
- the aggregate amount of unabsorbed depreciation and loss brought forward in case of a company against whom Corporate Insolvency Regulation Process has been started under the provisions of IBC
- This would work as a relief to Companies earning book profits on account of waiver or reduction of loans or dues of creditors in a Resolution Plan approved under Corporate Insolvency Regulation Process

**Section 79:
Carry
forward and
set off of
losses in
case of
certain
companies**

- No losses can be Carry forward or set off, if shareholding of the Company is changed to the extent of 51% in a year
- This clause would not be applicable to Companies where a Resolution Plan has been approved by NCLT and the shares have been transferred under the provisions of IBC
- This exemption would facilitate and generate interest in taking over loss making companies and will set off the profit with carried forward losses.

Tax Liability in case liability is converted into Equity Shares instead of waiver

-

Option of section 115BAA for companies under IBC

- Allotment of shares after converting a debt would not be considered as waiver and would not be considered as remission and cessation of liability u/s 40(1) of Income tax Act
- Would depend upon each case scenario depending upon amount of waiver of liabilities and amount of assets written off
- Tax rate of 22% is attractive but carries forward losses would not be allowed with other restrictions on depreciation and other deductions and exemptions under sec 10, 32, 33 ,35 and 80

VERIFICATION OF CLAIMS FILED BY INCOME TAX AUTHORITIES DURING CIRP CASES

- Proper Form used or not during CIRP or Liquidation
 - Authority of the officer filing the claim and signing the claim documents
 - Certified copies of the assessment orders / appeal orders are attached
 - Recovery certificate u/s 222 is issued or not, if yes, the same need to be attached
 - Disclosure of any appeal filed by the assessee or not
 - Relief given by any appeal order is effected or not
-
- Information can be obtained from the Corporate Debtor
 - Any refund dues for different Asstt Years are considered or not
 - In case CD has authentic information regarding some payments, adjustments, deletion of demand or adjustment of refunds with the demands, the same can be considered before admitting the claim
 - Information provided by CD can be confronted to Tax Authorities and claim can be admitted thereafter.



HOW ASSESSMENT /REASSESSMENTS PROCEEDING (UNDER SECTION 143, 144, 147, 153A) AND PENDING APPEALS UNDER THE INCOME TAX LAW WILL BE DEALT WITH AT DIFFERENT STAGE OF CIRP



TAX LIABILITY NOT CRYSTALLISED



i. **Assessment / Reassessment Notice Received during CIRP Period for Pre-CIRP Period**



- Proceedings would be kept in abeyance or suspended till the moratorium is lifted as fresh proceedings are prohibited u/s 14(1)(a)
- Continuation of the proceedings would also be suspended till moratorium is lifted (sec. 14(1)(a))
- Sec 60(6) of the Code:
- “Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded”

i. Assessment / Reassessment Notice Received during CIRP Period for Pre-CIRP Period...Contd.

- The proceedings would resume once the moratorium is lifted either on approval of Resolution Plan by NCLT or on an order for liquidating the Corporate Debtor
- Tax authorities would be intimated that CD is under CIRP and the tax proceedings need to be kept in abeyance.
- In case, the RP is required to attend to the notices then it may suffocate the RP and resolution focus may be disturbed.

i. Assessment / Reassessment Notice Received Post CIRP Period for Pre-CIRP Period



- **Moratorium is lifted and the proceedings would be attended by either liquidator or Resolution Applicant through Monitoring Agency**
- **It is the duty of the Monitoring Agency to implement the Resolution Plan and to make sure that Resolution Applicant is protected against any such contingent liabilities**
- **Monitoring Agency would provide the details of debt (information memorandum) and liquidation value to tax authorities and will present before them the amount payable to them as per Resolution Plan and the minimum liquidation value payable to them in case the CD is liquidated.**

i. Assessment / Reassessment Notice Received Post CIRP Period for Pre-CIRP Period...Contd.



- In case the liquidation value is due to operational creditors, the tax authorities will make the assessment of tax diligently and the monitoring agency or Resolution Applicant will also attend to the Proceedings with due care. Any tax demand raised by tax authorities will be payable to the extent payable to other OCs.
- In case no liquidation value is due to OCs, then the information can be provided to tax authorities and the assessment can be concluded by them summarily by recording a note that tax would not be recoverable. The Resolution Applicant or the Monitoring Agency can also say that records are not available as any tax demand would not be payable 'no Liquidation value due to OCs'.

iii. **Assessment / Reassessment Notice Received Post CIRP Period for the Period when the CD was under CIRP Period**

- **RP Shall be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor – Sec 17(2)(e)**
- **The proceedings will have to be attended by the liquidator or monitoring agency/Resolution Applicant and all the information would be provided to Tax Authorities.**
- **Any tax levied will be paid by the liquidator or Resolution Applicant and would be considered as CIRP cost.**

iii. Assessment / Reassessment Notice Received Post CIRP Period for the Period when the CD was under CIRP Period...Contd.

- Any penalty or other penal charges levied by Tax Authorities would be paid by the Resolution Professional as the same would not form part of CIRP Cost as per Circular no. _____ dated _____ issued by IBBI. RP can prove himself bonafides or can establish that he was prevented by sufficient and reasonable cause for the non-compliance.
- The tax can be on account of default in TDS provisions or TCS provisions or regular tax payable on the income of the Corporate Debtor during CIRP



TAX LIABILITY CRYSTALLISED

i. Assessment / Reassessment Order/Demand Notice Received during CIRP Period for Pre-CIRP Period when assessment proceedings are completed during Pre-CIRP Period



- **RP will receive the order or demand notice and will ask the tax authorities to file claim**
- **RP can also file an appeal during CIRP as moratorium is not applicable to RP and protecting the assets of the Corporate Debtor is the responsibility of RP**
- **RP may not have information about the Liquidation Value of the Corporate Debtor or final debt amount at the time of receipt of demand notice /order, therefore it is advisable to file an appeal.**
- **In case no possibility of any relief in appeal, the processing of claim is the only option.**

ii) Assessment / Reassessment Order / Demand Notice Received Post CIRP Period for Pre-CIRP Period when assessment proceedings were completed during Pre-CIRP Period /during CIRP Period



- **Tax authorities can not be asked to file claim as the CIRP is completed and moratorium is lifted**
- **Resolution Applicant or Monitoring Agency will take up the matter with tax authorities and will provide them Resolution Plan, Information Memorandum, Liquidation Value, final debt profile to establish that nothing is payable to tax authorities as, 'No liquidation value is due to them'**
- **Corporate Debtor can also file an appeal to NCLT against any stakeholder who is not implementing the Resolution Plan as approved. An application can be filed before NCLT u/s 60(5)(a) & 60(5)(c) for necessary direction to the stakeholders.**

iii. Assessment / Reassessment Order / Demand Notice Received Post CIRP Period for the Period when the CD was under CIRP Period



- RP Shall be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor – Sec 17(2)(e)**
- Appeal can be filed by the Corporate Debtor or Monitoring Agency. The proceedings will have to be attended by the liquidator or monitoring agency/Resolution Applicant and all the information would be provided to Tax Authorities.**
- Any tax levied will be paid by the liquidator or Resolution Applicant and would be considered as CIRP cost. Even Resolution Applicant can ask the creditors to indemnify him for any loss caused to him, which was not disclosed to him before the Resolution Plan was submitted.**

iii. Assessment / Reassessment Order / Demand Notice Received Post CIRP Period for the Period when the CD was under CIRP Period...Contd.



- Any penalty or other penal charges levied by Tax Authorities would be paid by the Resolution Professional as the same would not form part of CIRP Cost as per Circular no. IP/002/2018 dated 3rd Jan., 2018 issued by IBBI. RP can prove himself bonafides or can establish that he was prevented by sufficient and reasonable cause for the non-compliance.**
- The tax can also be on account of default in TDS provisions or TCS provisions or regular tax payable on the income of the Corporate Debtor during CIRP.**



ASSESSMENT ORDER IN RELATION TO SEARCH AND SEIZURE /SURVEY CONDUCTED UNDER SECTION 132

Assessment / Reassessment Order/Demand Notice Received during CIRP Period for Pre-CIRP Period when assessment proceedings are completed during Pre-CIRP Period

- Same treatment as explained for regular demand notice or assessment order

Assessment / Reassessment Order / Demand Notice Received Post CIRP Period for Pre-CIRP Period when assessment proceedings were completed during Pre-CIRP Period /during CIRP Period

- Same treatment as explained for regular demand or assessment order

Assets attached during search & seizure

- The assets attached under search and seizure would be de-attached during CIRP or liquidation and tax authorities would file their claim to RP / Liquidator
- Assets attached and appropriated towards tax dues would not be treated as the asset of Corporate Debtor and RP/Liquidator would not have any claim on those assets. Refund can be claimed if the tax liability is lower than the tax appropriated.



**APPEALS PENDING WITH VARIOUS AUTHORITIES
(CIT, ITAT, HIGH COURT, SUPREME COURT)**

**i. Dispute related to the matter appealed by the Corporate Debtor
(certain amount deposited under protest by Corporate Debtor)**

Appeal proceedings need to be attended; matter can be decided by tax authorities based on the liquidation value due to tax authorities as Operational Creditors.

Tax demand can be crystallised and then recoverability can be decided by tax authorities based on Liquidation Value.

Appeal can be summarily closed by the tax authorities depending upon the information submitted to them about Liquidation Value and amount of debt of the Corporate Debtor

Claim for refund cannot be considered an asset of the Corporate Debtor unless the claim is accepted and crystallised by tax authorities. Tax deposited under protest would be appropriated against tax demand, if any for the same period, otherwise it would be refundable.

Section 245 of the Income-tax Act provides for set off of refund due against tax demands by tax authorities.

Sec 36(4) of IBC: The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation

- any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.**

DELAY IN RECOVERY OF REFUNDS PENDING WITH TAX AUTHORITIES /AMOUNT DEPOSITED UNDER PROTEST / AMOUNT DEPOSITED ON ACCOUNT

- **Refund for Pending assessment can be collected by RP or Liquidator, if no demand is pending with that tax authority**
- **All refunds processed can be adjusted with previous pending demands of tax by providing a notice to the assessee u/s 245 of Income tax Act**
- **Any tax deposited under protest for which an appeal is pending can be claimed after the appeal is decided, however the same can also be adjusted by the tax authorities with previous pending demands**

**ii. Dispute related to the matter appealed by the Corporate Debtor
(No amount deposited under protest by Corporate Debtor)**

- Appeal proceedings need to be attended; matter can be decided by tax authorities based on the liquidation value due to tax authorities as Operational Creditors.**
 - Tax demand can be crystallised and then recoverability can be decided by tax authorities based on Liquidation Value**
- Appeal can be summarily closed by the tax authorities depending upon the information submitted to them about Liquidation Value and amount of debt of the Corporate Debtor**
 - The outcome of the appeal will further be subject to liquidation value available for payment of tax dues u/s 53(1)(e)(i)**

- **CAN IBC BECOME A HINDRANCE IN INCOME TAX RECOVERY MECHANISM UNDER SECTION 222 OF INCOME TAX ACT**
 - IBC can become a hindrance in recovery of tax as the assessee can take shelter and protection of IBC and use moratorium for find a resolution of tax dues.
- **IBC AS VEHICLE OF TAX LIABILITY AVOIDANCE BY MSME**
 - MSME can plan an insolvency for finding rescue from tax authorities as they can file a Resolution Plan seeking relief from tax authorities based on low liquidation value.
- **WHETHER CIRP COST IS ALLOWED AS EXPENDITURE UNDER INCOME TAX ACT**
 - CIRP cost is an expenditure for carrying of business and would be an expenditure allowed u/s 37.

RELEVANT JUDICIAL PRONOUNCEMENTS

/ORDERS



- **T R Ravichandran, RP of Kiran Global Chem Ltd vs. Asstt Commissioner(ST) – NCLT, Chennai order dated 05/12/2019**
- “the Corporate Debtor to have access to GST portal account and can file returns and make payment of GST, even if the payment pertaining to pre-cirp period is pending.
- **NCLT, Principal Bench, Delhi Order in the case of Oriental Bank of Commerce vs. Sikka Papers Ltd dated 22/11/2019**
- Direction to ROC to enable RP to upload statements, forms etc. should be done in a week’s time
- ROC to update the master data of Corporate Debtor so as to inform the public at large about the status of the Corporate Debtor which has come under CIRP

RELEVANT JUDICIAL PRONOUNCEMENTS

/ORDERS



- **Pr. Director General of Income Tax (Admn. and TPS) and Ors. vs. Synergies Dooray Automotive Ltd. and Ors. (20.03.2019 - NCLAT) : MANU/NL/0113/2019**

“In the other appeal, the statutory dues have been treated as 'Operational Debt' and equated them with similarly situated 'Operational Creditors', we find no reason to interfere with the impugned order(s)”
- **NCLT, Delhi Order in the case of Pooja Bahry (CD : Gee Ispat Pvt Ltd) dated 22/10/2019**

“The applicability of Section 178 or 194 IA of the IT Act will not have an overriding effect on the water fall mechanism provided under Section 53 of the Code, which is a complete code in itself, and the capital gain shall not be taken into consideration as the liquidation cost.



In "Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.--Writ Petition (Civil) No. 99 of 2018",



The Hon'ble Supreme Court while dealing with the different provisions of the 'I&B Code', including Section 5(20), observed as follows:

"23. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an 'operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority."

RMS Employees Welfare Trust vs. Anil Goel (30.05.2019 - NCLAT) : MANU/NL/0242/2019



This appeal has been preferred by the Appellant- 'RMS Employees Welfare Trust'- ('Resolution Applicant') against part of the impugned order dated 14th September, 2018, wherein the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh, while approving the 'Resolution Plan' submitted by the Appellant observed as follows:

"We find that in para C.4 of the minutes of the meeting of COC held on 23.03.2018 (Annexure Q of the petition), it is inter alia stated that no payment under the resolution plan is envisaged for Government dues. The matter relating to the waiver of Government dues, including waiver of MAT liability under Section 115J of the Income Tax Act 1961, may be considered by the respective Government Department."

In view of the aforesaid findings, we hold that the part of the impugned order passed by the Adjudicating Authority, as quoted above, relating to waiver of Income Tax is without jurisdiction. **The debt of the Central Government or the State Government arising out of the existing law being 'Operational Debt', the question of asking for waiver does not arise as per the 'Resolution Applicant' to decide how much to be paid to the Central Government or the State Government against the 'Operational Debt' (Income Tax or G.S.T. or any other statutory debt), which should not be less than the amount to be paid to the 'Operational Creditors' in the event of a liquidation of the 'Corporate Debtor' under Section 53.**

The part of the impugned order dated 14th September, 2018 as quoted above is set aside. The rest part of the impugned order approving the 'Resolution Plan' is upheld.





Thank

You

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