



# ASC

INSOLVENCY TIMES

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# INSOLVENT?





## From the Editor's Desk



Dear Insolvency Professionals,

### **New registration functionality under GST for Insolvency Resolution Professionals**

The Goods & Services Tax Network (GSTN) on 31<sup>st</sup> May, 2020 said that it has enabled new registration functionality on the GST portal for registered entities who are now corporate debtors under the provisions of the Insolvency & Bankruptcy Code (IBC). This will benefit companies undergoing the Corporate Insolvency Resolution Process (CIRP) & whose management affairs are being undertaken by Interim Resolution Professionals (IRPs) or Resolution Professionals (RPs). The IRP or RP appointed should choose the reason to obtain new registration in the drop-down menu as “Corporate Debtor undergoing the Corporate Insolvency Resolution Process (CIRP) by IRP/RP” while applying for registration on the GST portal.

A corporate debtor undergoing insolvency is liable to submit its GST Returns to the CBIC, make payment of tax & fulfills all other GST compliances as per the GST law during the period of CIRP. They shall be treated as a distinct/separate person & are liable to obtain new registration through IPR/RP w.e.f. the date of appointment of such IRP/RP. Further, corporate debtors who not defaulted in furnishing the return under GST would not be required to obtain a separate registration.

Expect more vibrancy from Insolvency Resolution Process.

Stay Alert!

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Partner

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## **NEWS FLASH FROM THE LAST MONTH**

### **IBC proceedings suspended for defaults post- March 25**

The Union Cabinet on 3<sup>rd</sup> June, 2020 cleared the proposal to suspend insolvency proceedings under the Insolvency & Bankruptcy Code (IBC) to avoid companies at large from being forced into insolvency proceedings for Non-Performing Assets (NPAs) during the COVID-19 period starting from 25<sup>th</sup> March, 2020. This move has been proposed as the Government gave a proposal to introduce Section 10A under Section 10 of IBC, 2016 by passing an Ordinance soon. The creditors of a company cannot file an insolvency application against a company, which will be in effect for the next six months & can be extended up to one year. This would mean that any default from 25<sup>th</sup> March, 2020 until a date which will be notified later, cannot be dragged for insolvency proceedings before the tribunals. This is an exception to such defaults.

The Union Finance Minister Smt. Nirmala Sitharaman announced suspension of any fresh initiation of insolvency proceedings up to one year on 17<sup>th</sup> May, 2020 as a part of the Atmanirbhar Bharat Package, excluding debt arising due to COVID-19 to be considered as default. But, the Government had not notified the date from which the move was to be considered. It was on March 24<sup>th</sup> 2020, when Smt. Sitharaman had said that if the situation remained exposed before 30<sup>th</sup> April, 2020 then the Government may consider suspending Section 7, 9 & 10 of IBC for a period of six months to prevent companies from being forced into insolvency proceedings during these difficult times.

This new clause overrides (makes void & null) Sections 7, 9 & 10 of IBC, 2016. Section 7 deals with financial creditors of a company to initiate insolvency proceedings before the National Company Law Tribunal (NCLT), whereas, Section 9 deals with operational creditors to initiate an action & Section 10 allows a defaulting company to file an application before the NCLT to declare it as insolvent. However, it is also to be noted that the old proceedings will continue under the Code.

### **Lenders to take sharp haircut as NCLT passes the Aircel Resolution Plan**

The National Company Law Tribunal (NCLT) has approved the insolvency resolution plan for Aircel. UV Asset Reconstruction Co. Ltd (UVARCL) to take control over the Aircel's assets. Aircel's resolution professional Deloitte had checked cases to Rs. 20,000 crore, which means recoveries for lenders of about Rs. 2,000 crore- Rs 3,000 crore cash lent-out to Aircel. In any case, the plan was to recover about Rs. 5000 crore – Rs. 6000 crore. Aircel's lenders includes State Bank of India, Bank of Baroda, Punjab National Bank, China Development Bank Corporation (CDB) & Canara Bank.

UVARCL is to acquire control over the business as a going concern and run the smaller units. The remaining assets were to be sold with cash going to the lenders. At that point, recovery was assessed at 12-36 months. Aircel's most desired asset is its 4G spectrum in the 900 Mhz, 1800 Mhz and 2100Mhz groups in the Andhra Pradesh, Delhi, Karnataka, Mumbai, Rajasthan, and Tamil Nadu circles, which are valid until 2026. The telecom operator had recently told the NCLT that the spectrum was worth Rs 1,100-2,000 crore. However, that worth has been quickly diminishing as expiry is near and the administration intending to sell 4G wireless transmissions by September-October.

The new owners may face legal challenges, especially from the telecom department, which has been fighting to take spectrum – Aircel's principal asset, saying it belongs to the Government and should

be returned back since the telecom company failed to take care of its duties. In the Aircel case, DoT had fought that a negligible Rs. 16.50 crore was reserved for every operational creditor, including itself, in the plan. The telecom department had filed claims worth about Rs. 10,000 crore, of which just Rs 2,000 crore was approved by the resolution professional.

## **NCLT: The right to company's assets lies with Liquidator over tax department**

The Bankruptcy Court ordered the revenue department that if the liquidator has taken in account his/her tax dues, they cannot attach the assets of a company in liquidation. Under the Insolvency & Bankruptcy Code, liquidator has powers to take over the assets of the Corporate Debtor, including cash balances etc. as it was ruled by the principal bench of the National Company Law Tribunal in New Delhi. The case between liquidator S Kumars Nationwide Ltd. (SKNL) and the revenue department finally came to an end and rulings came on 15 June, 2020. The revenue department cannot attach the bank accounts of the corporate debtors.

SKNL liquidator Om Prakash Agarwal's lawyer argued that revenue department previously submitted its claims and they were admitted by the company. Tax dues, as it is, comes under the ambit of operational creditor claims. Agarwal's lawyer also argued that tax department is entitled to claim dues under the provisions of the IBC, but not permitted to appropriate monies lying in the company's account with the help of an attachment order.

The tribunal also stated that the money held by corporate debtor in his bank account shall be considered as his asset, even in the cases when the order was against that money, as long as the money was lying in the account of the corporate debtor. It does not matter if it is in cash or kind.

## **NCLT gives nod to Surana Power Liquidation**

The National Company Law Appellate Tribunal (NCLAT) has held that liquidation process of a company under the IBC holds precedence over the result of arbitration proceedings under IBC. Objections raised to Bharat Heavy Electricals Limited (BHEL) liquidation of Tamil Nadu-based Surana Power were invalid as majority of secured creditors consented to its liquidation. It would be prejudicial to hamper the liquidation process of a single creditor having only 26.24% share (in value) in the secured assets of the company. BHEL is not superior from the rest of the financial creditors.

A valid resolution plan was not received by the company & was ordered to be liquidated by the National Company Law Tribunal (Chennai Bench). An ex-parte arbitration award was granted to state-run BHEL against Surana Power, which gave a lien over all the equipment & goods which were lying at Surana Power's plant, & also for its partially or fully constructed buildings. Further, BHEL, one of the secured creditors refused to give its consent for liquidation as it would result into getting lesser share.

It can be concluded that the Adjudicating Authority ruled in favour of BHEL & set-aside the ruling of NCLT. It also stated that the state-run company has full rights over the realization of security interests which it had won as a part of the arbitration proceedings.

## GSTN enables new registration functionality for Insolvency Resolution Professionals

The Goods & Services Tax Network (GSTN) on 31<sup>st</sup> May, 2020 said that it has enabled new registration functionality on the GST portal for registered entities who are now corporate debtors under the provisions of the Insolvency & Bankruptcy Code (IBC). This will benefit companies undergoing the Corporate Insolvency Resolution Process (CIRP) & whose management affairs are being undertaken by Interim Resolution Professionals (IRPs) or Resolution Professionals (RPs). To use this function, the IRP or RP appointed should choose the reason to obtain new registration in the drop-down menu as “Corporate Debtor undergoing the Corporate Insolvency Resolution Process (CIRP) by IRP/RP” while applying for registration on the GST portal.

In March, 2020, the Central Board of Excise & Customs (CBIC) said that the corporate debtors shall be liable to obtain new registration through IRP/RP. The IRP/RPs can now apply for new registration on behalf of its corporate debtors within 30 days from the date of their appointment or by 1<sup>st</sup> June, 2020, whichever is later.

A corporate debtor undergoing insolvency is liable to submit its GST Returns to the CBIC, make payment of tax & fulfills all other GST compliances as per the GST law during the period of CIRP. They shall be treated as a distinct/separate person & they are liable to obtain new registration through IPR/RP w.e.f. the date of appointment of such IRP/RP for managing the affairs of the corporate debtors. Further, corporate debtors who not defaulted in furnishing the return under GST would not be required to obtain a separate registration. If statements in form GSTR-1 & returns in form GSTR-3B for all tax periods before the appointment of IRP/RP have been furnished under the registration of corporate debtor (earlier GSTIN), then he would not be required to take a fresh registration.

## Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Second Amendment) Regulations, 2020

Insolvency and Bankruptcy Board of India had passed the (Second Amendment) Regulations, 2020 while exercising the powers given under sections 196, 1207 and 208 read with section 240 of the

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1. **Section 196 defines Powers & Functions of the Board:** The IBBI shall as per the directions of the Central Government perform the functions such as registration of insolvency professional agencies, insolvency professionals, information utilities, renew, withdraw, suspend or cancel the registration etc., specify the minimum eligibility requirements for registration of insolvency professional agencies, insolvency professionals etc., levy fees or other charges for the registration of insolvency professional agencies, insolvency professionals etc.

**Section 207: Registration of insolvency professionals:** Every insolvency professional shall after obtaining membership of insolvency professional agency, register himself with the IBBI within such time, in such a manner & on payment of fees as specified by regulations.

**Section 208: Functions & obligations of insolvency professionals:** A fresh start order process, individual insolvency resolution process, corporate insolvency resolution process, individual bankruptcy process, liquidation of a corporate debtor firm. Insolvency professionals shall abide by the code of conduct as to take reasonable care & proper due diligence while performing their duties & tasks, complies with all requirements & terms & conditions specified in the bye-laws of the insolvency professional agency of which he is a member, allows the insolvency professional agency

Insolvency and Bankruptcy Code, 2016 and amended the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, namely:

1. These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Second Amendment) Regulations, 2020.
2. They shall come into force on the date of publication in the Official Gazette.

## LATEST JUDGEMENTS

### **Aviva Life Insurance Co. India Ltd. v. Appejay Trust- NCLT, New Delhi**

An agreement came to be executed between the Operational Creditor i.e., Appejay Trust & Corporate Debtor for leave and license for office premises & other services at Mumbai. The Operational Creditor provided office premises and other services as required by the Corporate Debtor. As per the agreed terms, the Corporate Debtor had to pay the license fees, car parking, maintenance, service charges and service tax which the Corporate Debtor failed to pay after its last payment on 05.10.2017. Thus, the Operational Creditor prayed for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor for its inability to liquidate their claim of Rs. 27,76,203/- pending since 05.10.2017. It was contended by the Corporate Debtor that the application is not maintainable on the grounds that they are an insurance company & therefore, they are “Financial Service Provider”, a business which is strictly regulated by the “Financial Service Regulator”. It was prayed that therefore, as per Section 3(17) & 3(18) of the Insolvency & Bankruptcy Code, 2016, the application was liable to be quashed & set-aside.

The adjudicating authority held that the financial service under Section 3(16) of the IBC, 2016 includes the transactions effecting contract of insurance. However, it was observed by the Tribunal the Corporate Debtor had not provided any insurance cover or any kind of financial assistance to the Operational Debtor as defined under Section 3(16) of the Code & further the defaulted dues were for the lease and rentals & therefore held that the Corporate Debtor was not covered as a ‘financial service provider’ under Section 3(17) of the Insolvency & Bankruptcy Code, 2016. The petition was thus admitted & an Interim Resolution Professional was appointed.

### **Jet Airways (India) Ltd. v. State Bank of India- NCLT, Mumbai Bench**

A lease agreement was made between the Corporate Debtor & Fleet Ireland Aircraft lease 2007-B2 Limited for aircraft with Registration No. VT- JEW. An application was filed by the Resolution Professional against a holder of Irrevocable De-registration and Export Requested Authorization (IDERA) who had requested for de-registration of Aircraft from the aircraft registry of the Respondents. The intent of seeking de-registration was to recover the possession of aircraft from Corporate Debtor & utilize the aircraft for recovery of dues. The applicant contended that the proposed action of Respondent is against the moratorium period imposed under Section 14 of the

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to inspect his records, submits a copy of records of every proceeding before the Adjudicating Authority to the IBBI & also to the insolvency professional agency.

**Section 240: Power to make regulations:** The IBBI makes regulations by a notification regarding the form & manner of accepting electronic submission of financial information, persons to whom access to information is stored with the information utility, other costs & information, liquidation costs incurred during the period of liquidation, other record or evidence of default, any other information etc.

Insolvency & Bankruptcy Code, 2016 & this would lead to loss of valuable assets of the Corporate Debtor.

It was held by the adjudicating authority that the application filed by IDERA holder, & as per Aircraft Rules, 1937 within five working days, DCGA has to cancel the registration of the Aircraft without seeking consent or any documents from the operator of the Aircraft. During CIRP, if such process is permitted, not only this Aircraft but other property of the Corporate Debtor in this case, most of the leased Aircrafts, a similar situation may occur, & the application may be filed by IDERA holder for de-registration of the Aircraft, & the peculiar situation will be created, & the most valuable assets of the Corporate Debtor will be taken away by IDERA holder.

Thank You

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