

Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi-110001

Facilitation / 004 / 2020

12th September, 2020

To
All Registered Insolvency Professionals
All Registered Insolvency Professional Agencies
All Recognised Insolvency Professional Entities
All Registered Valuers
(By mail to registered email addresses)
Other stakeholders (On the website of IBBI).

Dear Madam / Sir,

Subject: Role of the Government and its Agencies in the Corporate Insolvency Resolution and Liquidation Processes¹

The Insolvency and Bankruptcy Code, 2016 (Code) consolidates and amends the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of the value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. The first order objective of the Code is resolution. The second order objective is maximisation of value of assets of the firm and the third order objectives are promoting entrepreneurship, availability of credit and balancing the interests of stakeholders. This order of objectives is sacrosanct, as held in *Binani Industries Ltd Vs Bank of Baroda & Anr. [CA (AT)(Ins)82/2018 & Ors]*.

2. The Government and its Agencies are key stakeholders of the Code as they contribute to economic growth, promote entrepreneurship and availability of credit, rehabilitate a company in distress through resolution process, and release under-utilised resources for more efficient uses through liquidation process. The Central Government has been driving the implementation of the Code. It subordinated its dues to claims of even unsecured financial creditors. It encouraged large corporates with high non-performing assets into corporate insolvency resolution process (CIRP) in the early days of implementation of the Code. The Central Government has brought in several changes in laws relating to banking, revenue, company, etc., to facilitate the smooth implementation of processes under the Code. It has piloted four Amendment Acts in the Parliament and the fifth one is under process, in the last three years, to address the challenges arising out of implementation of the Code, in sync with the emerging market realities, to further its objectives.

3. The Adjudicating Authority (AA) under the Code - the National Company Law Tribunal (NCLT), the Appellate Authority - National Company Law Appellate Tribunal (NCLAT), the High Courts and the Supreme Court have delivered numerous landmark judgments settling, clarifying and affirming the role of the Government and its Agencies in the processes under the Code. This Facilitation Note explains some aspects of this role, based on the provisions of the

¹This Facilitation Note has been prepared for the sole purpose of creating awareness and appreciation of the provisions of the Code and emerging jurisprudence. This is not a guide for taking or recommending any action, commercial or otherwise. The user must study the relevant provisions of law and / or seek professional advice if he wishes to take any action or decision in any matter covered in this Note.

Code and emerging jurisprudence, and provides a rationale for the same for better appreciation by all the stakeholders.

Primacy of the Code

4. The Code provides that its provisions shall prevail over anything inconsistent with in any other law. The Supreme Court upheld this in several matters and contexts:

(i) In *Innoventive Industries Ltd. Vs. ICICI Bank & Anr.* [CA No. 8337-8338 of 2017], it held that the Code shall prevail over State enactments, including the Maharashtra Relief Undertakings (Special Provisions Act), 1958.

(ii) In *Pr. Commissioner of Income Tax Vs. Monnet Ispat And Energy Ltd.* [SLP No. 6483-2018 & other petitions], it held that the Code would override anything inconsistent contained in any other enactment, including the Income-tax Act, 1961.

Tax Dues

5. The Code balances the interests of all stakeholders, including the Government. It provides for a waterfall which prioritises the claims of various stakeholders for payment from the liquidation proceeds. The stakeholders placed higher in priority get paid first, and the claims of the set of stakeholders placed next in priority are considered only if there is any surplus after fully satisfying the claims of the prior set of stakeholders. The Government is placed in the waterfall after unsecured financial creditors. The Code also provides minimum entitlements for operational creditors and dissenting financial creditors under a resolution plan during CIRP. It empowers the financial creditors to decide distribution of value realised under a resolution plan among the stakeholders.

6. The definition of 'operational debt' in the Code makes it clear that 'Government dues' are operational debts and the Government is an operational creditor. Several judgments have reaffirmed this position:

(i) In *Pr. Director General of Income Tax (Admn. & TPS) Vs. M/s. Synergies Dooray Automotive Ltd. & Ors* [Company Appeal (AT) (Insolvency) No. 205 of 2017 and connected matters], the NCLAT clarified that the statutory dues such as income-tax, sales tax, value added tax and various other taxes fall within the definition of 'operational debt' under section 5(21) of the Code and the statutory authorities claiming the aforesaid dues are operational creditors under the Code.

(ii) In *Leo Edibles & Fats Ltd. Vs. The Tax Recovery Officer (Central) Income Tax Department, Hyderabad and others* [WP No. 8560 of 2018], while deciding upon the nature of security interest of Government dues, the High Court of Telangana and Andhra Pradesh made it clear that the Government dues like income-tax dues are unsecured creditors and do not enjoy the status of a secured creditor. The tax dues, being an input to the Consolidated Fund of India and of the States, clearly come within the ambit of section 53(1)(e) of the Code.

7. Ordinarily, the Government is an operational creditor. However, the Government or any of its Agencies could be a financial creditor if the nature of debt is such that it comes within the definition of financial debt. The Code defines the rights and duties of financial creditors and operational creditors in CIRP and secured and unsecured creditors in liquidation process.

Corporate Insolvency Resolution Process

8. A threshold amount of default entitles a creditor or the CD itself to file an application to initiate CIRP of the company. If the application is admitted, the CIRP commences, the company moves away from 'debtor-in-possession'; management of the company and its assets vest in an insolvency professional (IP), who runs the company as a going concern, and a committee of

creditors (CoC) is constituted to evaluate options for the company. The IP invites claims from stakeholders, based on the same and other relevant records, prepares an information memorandum. He makes available information memorandum and invites feasible and viable resolution plans from eligible and credible resolution applicants for resolution of insolvency of the company. If the CoC approves a resolution plan within the stipulated time with 66% majority, the company continues as a going concern. If the CoC does not approve a resolution plan with such majority within this period, the company mandatorily undergoes liquidation.

(a) Submission of Claims

9. On commencement of CIRP, the IP invites claims from creditors to ensure that the resolution plan makes provisions for such claims. A resolution applicant submits a resolution plan after considering all available relevant information, including the claims. If claims are entertained after approval of resolution plan, this would discourage prospective resolution applicants from submitting resolution plans, leading to liquidation of companies, and defeating the objective of the Code. In *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.* [Civil Appeal No. 8766-67/2019 and other petitions], the Supreme Court observed that a successful resolution applicant cannot suddenly be faced with ‘undecided’ claims after the resolution plan submitted by him has been accepted, as this would throw into uncertainty in the amounts payable by him. For fear of fresh claims coming up, resolution applicants may not be willing to submit resolution plans.

10. The Code envisages submission of claims by creditors in time. Non-submission of claims in a CIRP timely may lead to loss to the State Exchequer. In *State of Haryana Vs. Uttam Strips Ltd.* [Company Appeal (AT) (Insolvency) No. 319/2020], the NCLAT observed that the appellant had failed to file the claim before the RP and has no right to claim its dues from the resolution applicant. It held that a successful resolution applicant cannot be burdened with past liabilities since this would make it impossible for it to run the business, ultimately defeating the entire purpose and mechanism of the Code. The AA, in *T. R. Ravichandran, RP Vs. The Asst. Commissioner (ST and 12 Ors)* [MA 1298/2019 in IBA/130/2019], held that being an operational creditor, the tax authorities are at liberty to make their claims before the resolution professional (RP) instead of insisting upon him to pay the pre-admission dues before accepting the tax liabilities arising during the CIRP period.

11. In *State of Haryana Vs. Uttam Strips Ltd.* (supra), the NCLAT observed that the approved Resolution Plan is binding on all the stakeholders; therefore, the appellant must abide by the terms of the approved resolution plan. In *Ultra Tech Nathdwara Cement Ltd. Vs. Union of India and Ors.* [DB Civil Writ Petition No. 9480/2019], after implementation of resolution plan, the Central Goods and Services Tax Department issued demand notices to the corporate debtor (CD) on the ground that the RP / CoC did not pay entire dues of the Department as claimed in the resolution process and they were not heard at the time of approval of resolution plan. The High Court of Rajasthan set aside the notices issued by the Department as illegal, stating that the fresh demand notices are illegal and arbitrary.

(b) Moratorium

12. The CIRP envisages a calm period to enable the stakeholders to work out a resolution peacefully and the CD continues as a going concern. It provides for a moratorium that prohibits institution or continuation of suits or proceedings against the CD and any alienation of property. In *Kitply Industries Ltd. Vs. Assistant Commissioner of Income Tax (TDS) and Anr.* [IA No. 54/2018 in CP(IB)/02/GB/2018], the AA held that the proceeding before the Income-tax Department which has resulted in freezing of the bank accounts is a proceeding of quasi-judicial

nature and continuation of such a proceeding during moratorium period is illegal in view of the prohibitions under section 14(1)(a) of the Code.

13. The Code prohibits recovery of any 'property' by an owner or lessor where such property is occupied by or in possession of the CD. In *Rajendra K. Bhutta Vs. Maharashtra Housing and Area Development Authority and Anr.* [Civil Appeal No. 12248 of 2018], The CD had entered into a Joint Development Agreement (JDA) with MHADA. On the CD getting into CIRP, MHADA issued notice to the CD for termination of JDA and to handover possession of the land and all structures. An application to restrain MHADA from taking possession was dismissed by the AA stating that section 14(1)(d) does not cover licences to enter upon land covered under JDA. On appeal, the NCLAT held that the land belongs to MHADA and cannot be treated as an asset of the CD under section 14(1)(d). While setting aside the order of NCLAT, the Supreme Court held that section 14(1)(d) speaks about recovery of property "occupied". It does not refer to rights or interests created in property but only actual physical occupation of the property. The JDA has granted a licence to the CD to enter upon the property, with a view to do all the things that are mentioned in it and hence the property is in possession of the CD. Therefore, the land is covered under section 14(1)(d). It reiterated that if there is any clash between the MHADA Act and the Code, the latter shall prevail.

14. The Code mandates that the Central Government or the State Government or any local authority, or any sectoral regulator shall not suspend or terminate any license, permit, registration, quota, concession, clearances or a similar grant or right given by it, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising from their use or continuation during the moratorium period. In *Aircel Limited [MA-337/2018 in CP(IB)-298/(MB)/2018]* and *Dishnet Wireless Limited [MA-336/2018 in CP(IB)-302/MB/2018]*, the AA observed that license is essential for the business of the CD. A resolution applicant will show interest in the business of the CD if it holds licence. Since no other valuable asset is available to the CD, no resolution applicant would show interest in its business revival. Licence / spectrum is thus sine qua non for getting good resolution plan. The AA directed: "... within the scope and ambit of Insolvency and Bankruptcy Code, 2016 hereby instruct the concerned DoT authority not to make any attempt to cancel the impugned license issued in favour of the debtor company."

15. The Code prohibits discontinuation of critical services. It provides that such goods and services, which are critical to keep the CD as a going concern, shall not be terminated, suspended or interrupted during the period of moratorium, except where such CD has not paid dues arising from such supply during the moratorium period. It also prohibits discontinuation of essential goods and services to the CD.

(c) Offences

16. The Code insulates the successful resolution applicants against the liability of the CD for any offence committed prior to commencement of insolvency proceeding. It mandates that the liability of the CD for an offence committed prior to the commencement of the CIRP shall cease, and the CD shall not be prosecuted for such an offence from the date the resolution plan has been approved by the AA, if the resolution plan results in the change in the management or control of the CD to an unrelated person. However, the persons, who were responsible to the CD for conduct of its business at the time of commission of such offence shall continue to be liable for such an offence. Similarly, no action - attachment, seizure, retention or confiscation - shall be taken against the property of the CD in relation to an offence committed prior to the commencement of the CIRP of the CD, where such property is covered under a resolution plan

approved by the AA, which results in the change in control of the CD or sale of liquidation assets to an unrelated person. This protects the *bona fide* resolution applicant and buyer of liquidation assets from enforcement action. However, the CD shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the CIRP.

17. In *Tata Steel BSL Limited & Anr. Vs. Union of India & Anr.* [WP(CRL) 3037/2019], the trial Court took cognizance of the offences punishable under the Companies Act, 2013 and the Indian Penal Code, 1860, based on a complaint filed by the Serious Fraud Investigation Office. The petitioner submitted that it took over the CD through a resolution plan and section 32A of the Code discharges it from the proceeding before the trial Court. The High Court held that the CD would not be liable for any offence committed prior to commencement of the CIRP. It also clarified that such an order will not affect the prosecution of the erstwhile promoters or any officers who may be responsible for committing the offences. In *JSW Steel Ltd. Vs. Mahender Kumar Khandelwal & Ors.* [CA(AT)(Ins)No. 957/2019 & Ors], the NCLAT observed that section 32A suggests that the ED / other investigating agencies do not have the powers to attach assets of the CD, once a resolution plan stands approved and the criminal investigations against the CD stand abated. It further observed that the intent and purpose of section 32A is to provide certainty to the resolution applicant that the assets of the CD, as represented to him, and for which he proposes to pay value / consideration in terms of the resolution plan, would be available to him in the same manner as at the time of submission of the resolution plan.

Corporate Liquidation Process

18. The liquidation process commences on failure of CIRP to yield a resolution plan. The RP appointed for the CIRP typically acts as the liquidator for the purpose of liquidation. The liquidator makes a public announcement inviting claims and verify them. He takes into his custody or control of all the assets of the CD and forms a liquidation estate. He endeavours to sell the assets of the liquidation estate through public auction, in consultation with the stakeholders' consultation committee. He distributes the sale proceeds among the stakeholders as per the waterfall. On completion of liquidation process, the liquidator submits an application with the final report to the AA for closure of the liquidation process and dissolution of the CD.

(a) Claims

19. The liquidator invites claims from creditors to ensure that they can be paid as per waterfall from the realisation from sale of liquidation estate. In *Leo Edibles & Fats Ltd. Vs. The Tax Recovery Officer (Central) Income Tax Department, Hyderabad and others* [WP No. 8560 of 2018], the High Court of Telangana and Andhra Pradesh held that the Income-tax Department necessarily must submit its claim to the liquidator for consideration as and when the distribution of the assets, in terms of section 53(1) of the Code, is taken up.

20. The priority in waterfall cannot be disturbed. In *Leo Edibles & Fats Ltd. (supra)*, the High Court held that the Income-tax Department cannot claim any priority merely because the order of the attachment was long prior to the initiation of liquidation proceedings under the Code. Even if the order of attachment constitutes an encumbrance on the property, it still does not have the effect of taking it out of the purview of section 36(3)(b) of the Code. The said order of attachment, therefore, cannot be taken to be a bar for completion of the sale under a liquidation proceeding under the Code. In *Om Prakash Agarwal Vs. Tax Recovery Officer 4 & Anr.* [Item No. 301, IA-992/2020 in CP/294/2018], the Income-tax Department submitted that the income-tax proceedings have overriding effect against other enactments and money attached by it is no more an asset of the CD. The AA held that the monies of the CD lying in the bank accounts

shall be construed to be an asset of the CD even if an attachment order is passed against the same. It noted that section 178 of the Income-tax Act, 1961 has been amended to allow the Code to have overriding effect and accordingly directed the Bank to defreeze the accounts.

(b) Moratorium

21. The moratorium declared during CIRP ceases when the AA passes an order for liquidation of the CD. However, during liquidation period, no suit or other legal proceedings shall be instituted by or against the CD, except by the liquidator, on behalf of the CD, with the prior approval of AA.

(c) Offences

22. The protection under section 32A is also available to sale of liquidation assets. In *Mr. Anil Goel, the Liquidator appointed in respect of Varrsana Ispat Limited Vs. Deputy Director, Directorate of Enforcement, Delhi and SBER Bank Vs. Varrsana Ispat Limited [IA (IB) No. /KB/2020 in CP (IB) No. 543/KB/2017]*, the liquidator sought permission to sell the assets of the CD which were attached by the ED, who objected on ground that an application under section 32A can be made only after the liquidation process is over and can be filed only by the successful resolution applicant and not the liquidator. The AA held that section 32A is applicable to the assets of the CD undergoing liquidation and a liquidator can file an application like the one in hand. It further held that a liquidator can proceed with the sale of the assets even if it is under attachment by the ED, to continue the time bound process of liquidation under the Code and upon completion of the sale proceedings, the buyer can take appropriate steps to release the attachment. In *Anil Goel, Liquidator Vs. Dy. Director, Directorate of Enforcement in the matter of REI Agro Limited [CA (IB) No. 453/KB/2018 in CP (IB) No.73/KB/ 2017]*, the liquidator sought orders against the ED to release the attachment of assets of the CD. The AA observed: “*In any case, the Court established under PMLA Act being a criminal Court can only decide whether the properties attached during investigation from possession of the Corporate Debtor could be said to be the properties acquired by them using proceeds of the crime. It is for this Tribunal to decide as to how the properties and assets of the Corporate Debtor under liquidation can be appropriated. The Liquidator must get possession of those properties attached by the Enforcement Director, New Delhi.*”

Assistance to Insolvency Professional

23. An IP, when acting as an IRP, RP, or Liquidator, is vested with an array of statutory and legal duties. He manages operations of the company as a going concern, protects the value of its property and complies with applicable laws on its behalf in a CIRP. He takes custody of the assets of the CD and sells them in a liquidation process. As clarified in *Asset Reconstruction Company (India) Pvt. Ltd. Vs. Shivam Water Treaters Pvt. Ltd. [C.P. No. (IB)1882 (MB)/2018]*, an IP is acting as an officer of the Court and any hindrance in the working of the CIRP amounts to contempt of court. In discharge of duties, he often does not receive required co-operation and at times encounters hostility and violence. In several such instances, the AA has directed the Police to provide protection to IRP, RP, or Liquidator to enable him to discharge his duties and the Police has been providing necessary protection.

Facilitation

24. The following is a list of illustrative facilitations that the Government and its agencies may extend for smooth conduct of the corporate insolvency resolution and liquidation processes under the Code while protecting their interests to the extent permissible under the law:

A. In respect of CIRP

- (a) deliver demand notice on the CD under section 8 of the Code on occurrence of default, wherever considered appropriate;
- (b) file application under section 9 of the Code for initiation of CIRP of a CD, wherever considered appropriate, when the dues are not settled despite serving demand notice under section 8;
- (c) submit claims, including contingent claims, along with proof of claim, within specified time, to the IP in response to the public announcement under section 15 of the Code in relation to a CIRP (public announcements are available on the IBBI website which provides alerts to subscribers);
- (d) refrain from raising or submitting any claim in respect of the CD after the timelines;
- (e) make use of the legal remedies available under the Code in respect of claims;
- (f) refrain from insisting on payment of the pre-admission dues during moratorium period;
- (g) refrain from instituting or continuing suits or proceedings against the CD to the extent prohibited under sections 14 of the Code;
- (h) refrain from discontinuing essential services to the CD during moratorium;
- (i) refrain from discontinuing critical services except when the CD is not paying the dues arising from supply during the moratorium;
- (j) refrain from terminating licence, permit, registration, quota, concession, clearance or similar grant or right during moratorium on the grounds of insolvency if there is no default in payment of current dues;
- (k) receive notice of each meeting of CoC, if the aggregate operational debt is not less than 10% of total debt of the CD and attend meeting to the extent permitted in section 24(4) of the Code;
- (l) join the CoC, where there is no financial debt of the CD, in the manner provided in regulation 16(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;
- (m) enable the IP to deposit GST for the current period without insisting on collection of past dues, to comply with his obligations under sections 17(2) (e) and 23(2) of the Code;
- (n) release attachments over properties of the CD undergoing CIRP;
- (o) receive the amounts due under resolution plans towards full settlement of claims as against the CD;
- (p) refrain from raising claims / issuing demand notices in respect of unpaid dues already dealt with under resolution plan, after the plan is approved;
- (q) refrain from initiating or continuing proceedings against the CD in respect of offences committed prior to commencement of CIRP, after resolution plan is approved;
- (r) seek all assistance and co-operation of the CD in investigating any offence committed prior to the commencement of the CIRP;
- (s) refrain from taking action - attachment, seizure, retention, or confiscation - against the property of the CD in relation to an offence committed prior to commencement of CIRP where such property is covered under a resolution plan approved by the AA;
- (t) initiate / continue proceedings against the persons responsible for offences committed by the CD prior to commencement of the CIRP;
- (u) honour the resolution plan approved by the Adjudicating Authority;
- (v) consider requests of the successful resolution applicant for necessary approval under section 31 of the Code;
- (w) extend police protection wherever sought by the IRP or RP;

B. In respect of Liquidation Process

- (x) submit claims, including contingent claims, to the liquidator in response to public announcement made under section 33 (1)(b)(ii) of the Code for the liquidation process (public announcements are available on the IBBI website which provides alerts to subscribers);
- (y) refrain from raising or submitting any claim in respect of the CD after the timelines;
- (z) make use of the remedies available under the Code in respect of claims;
- (za) join the stakeholders' consultation committee in the manner provided in regulation 31A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016;
- (zb) refrain from instituting or continuing suits or proceedings to the extent prohibited under sections 33(5) of the Code, against the CD;
- (zc) expedite refunds to the CD as claimed by the liquidator;
- (zd) demand claims relating to dues such as TDS, etc., collected by the CD on behalf of the Government, on priority;
- (ze) receive the amounts due from distribution of proceeds in liquidation process;
- (zf) release attachments over properties of the CD undergoing liquidation; and
- (zg) extend police protection wherever sought by the liquidator.

Yours faithfully,

(Sd-)
(K. R. Saji Kumar)
Executive Director