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## INSOLVENCY PROCESS AGAINST THE TAXPAYER AND PROVISIONS OF GST THEREOF

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**T**he Insolvency and Bankruptcy Code, 2016 (IBC) is the bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy. The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha in December 2015. It was passed by Lok Sabha on 5 May 2016 and by Rajya Sabha on 11 May 2016. The Code received the assent of the President of India on 28 May 2016. Certain provisions of the Act have come into force from 5 August and 19 August 2016. The bankruptcy code is a one stop solution for resolving insolvencies which previously was a long process that did not offer an economically viable arrangement. The code aims to protect the interests of small investors and make the process of doing business less cumbersome.

### Liability prior to the period of appointment of CIRP

Any tax liability of Goods & Service Tax and taxes under earlier laws, which are subsumed in GST namely Central Excise Act 1944, Finance Act 1994 (For Service Tax), Central Sales Tax, Maharashtra Value Added Tax 2002 / State Value Added Tax, Luxury Tax, Entertainment Tax & Amusement Tax, Local Body Tax, Duties of Excise (Medicinal and Toilet Preparations), Additional Duties of Excise (Goods of Special Importance), Additional Duties of Excise (Textiles and Textile Products), Cesses and surcharge in so far as they relate to supply of goods and services, Taxes on advertisements, Taxes on lotteries, betting and gambling, State cesses and surcharges in so far as they relate to supply of goods and services etc. etc. has to be borne by the company and dues has to be settled as per the provisions of Section 53 of Insolvency & Bankruptcy Code 2016, which is reproduced below:

#### Quote :

#### 53. Distribution of assets:

- 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
    - ii. debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
  - 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 creditors;
  - e) the following dues shall rank equally between and among the following: -
    - i. any amount due to the Central Government and 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;
    - ii. debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
  - f) any remaining debts and dues;
  - g) preference shareholders, if any; and
  - h) equity shareholders or partners, as the case may be.
- 2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.
- 3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

*Explanation.* – For the purpose of this section-

- i. it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and
- ii. the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

### **Un-Quote**

Further, CBIC also clarified in the circular no 134/04/2020-GST dtd 23.03.2021 that In accordance with the provisions of the IBC and various legal pronouncements on the issue, no coercive action can be taken against the corporate debtor with respect to the dues for period prior to insolvency commencement date. The dues of the period prior to the commencement of CIRP will be treated as ‘operational debt’ and claims may be filed by the proper officer before the NCLT in accordance with the provisions of the IBC. The tax officers shall seek the details of supplies made / received and total tax dues pending from the corporate debtor to file the claim before the NCLT.

Moreover, section 14 of the IBC mandates the imposition of a moratorium period, wherein the institution of suits or continuation of pending suits or proceedings against the corporate debtor is prohibited.

Therefore, it is very important to determine and crystallized duty liabilities prior to appointment of CIRP period and such claim has to be accepted by respective department.

### **1) Post appointment of CIRP Period:**

In terms of provisions of IBC 2016, Resolution Professionals, so appointed is solely responsible for managing the affairs of the company including statutory compliances of corporate debtors, which includes filing of returns and payment of tax dues. However, most CDs defaulted in filing of GST returns and/or payment of dues at the commencement of CIRP. This made it impossible for IRP/RP to file GST returns and discharge dues for the CIRP period. Based on some of the judicial pronouncements, the GST department directed acceptance of GST returns in hard copies from IRP/RP. However, there was no uniform approach and the IRP/RP struggled to comply with filing requirements of GST returns Under an IBC, an IRP/RP has the responsibility for managing affairs including statutory compliances of the corporate debtor (CD). This includes filing of returns and payment of tax dues. However, most CDs defaulted in filing of GST returns and/or payment of dues at the commencement of CIRP. However, there was no uniform approach and the IRP/RP struggled to comply with filing requirements of GST returns. However, GST Registration prior to the appointment of CRP period should not be cancelled. It is clarified that the GST registration of an entity for which CIRP has been initiated should not be cancelled under the provisions of section 29 of the CGST Act, 2017. The proper officer may, if need be, suspend the registration. In case the registration of an entity undergoing CIRP has already been cancelled and it is within the period of revocation of cancellation of registration, it is advised that such cancellation may be revoked by taking appropriate steps in this regard.

Returns for Pre-appointment of CIRP to be filed by earlier management and RP should not file the return for pre-appointment period. It has been clarified in the circular by CBIC in accordance with the provisions of IBC, 2016, the IRP/RP is under obligation to comply with all legal requirements for period after the Insolvency Commencement Date. Accordingly, it is clarified that IRP/RP are not under an obligation to file returns of pre-CIRP period.

### **Need of New Registration :**

Considering the difficulties as mentioned above faced by Resolution Professionals, government issued the Notification No. Notification No. 11/2020 Central Tax dtd 21<sup>st</sup> March 2020 specifying the separate procedure for registration, Return, Input Tax Credit and also clarified the same vide Circular No.134/04/2020-GST dtd 23<sup>rd</sup> March 2020.

### **Registration:**

In terms of the said Notification, IRP / RP was treated as distinct person of a corporate debtor and made liable to take new registration of each of the States or Union territories where the corporate debtor was registered earlier, within thirty days of the appointment of the IRP/RP. However, in cases where the IRP/RP has been appointed prior to the date of this notification, he shall take registration within thirty days from the commencement of this notification, with effect from date of his appointment as IRP/RP.

The corporate debtor who is undergoing CIRP is to be treated as a distinct person of the corporate debtor and shall be liable to take a new registration in each State or Union territory where the corporate debtor was registered earlier, within thirty days of the appointment of the IRP/RP. Further, in cases where the IRP/RP has been appointed prior to the issuance of notification No.11/2020- Central Tax, dated 21.03.2020, he shall take registration within thirty days of issuance of the said notification, with effect from date of his appointment as IRP/RP.

## **GST procedures for corporates under IBC**

Under an IBC, an IRP/RP has the responsibility for managing affairs including statutory compliances of the corporate debtor (CD). This includes filing of returns and payment of tax dues. However, most CDs defaulted in filing of GST returns and/or payment of dues at the commencement of CIRP. This made it impossible for IRP/RP to file GST returns and discharge dues for the CIRP period. Based on some of the judicial pronouncements, the GST department directed acceptance of GST returns in hard copies from IRP/RP. However, there was no uniform approach and the IRP/RP struggled to comply with filing requirements of GST returns. Under an IBC, an IRP/RP has the responsibility for managing affairs including statutory compliances of the corporate debtor (CD). This includes filing of returns and payment of tax dues. However, most CDs defaulted in filing of GST returns and/or payment of dues at the commencement of CIRP. This made it impossible for IRP/RP to file GST returns and discharge dues for the CIRP period. Based on some of the judicial pronouncements, the GST department directed acceptance of GST returns in hard copies from IRP/RP. However, there was no uniform approach and the IRP/RP struggled to comply with filing requirements of GST returns.

## **Need for separate GST registration**

A registered person (referred to as erstwhile/existing registered person), who is CD under the provisions of IBC and presently undergoing CIRP, shall be liable to obtain new registration (referred to as new registered person) in each of the states/UTs where it was registered earlier, within 30 days of the appointment of IRP/RP and in case, where the IRP/RP was appointed prior to the issuance of this notification, then within 30 days of the issue of this notification. Recently, CBIC has extended [3], the due date for obtaining new registration is 30 June 2020.

The CBIC has further clarified that existing registration of an entity for which CIRP has been initiated should not be cancelled. If required, the proper officer (PO) may suspend the registration. However, where the registration of an entity undergoing CIRP has been cancelled already and the period of revocation of cancellation (i.e., 30 days from the date of service of cancellation order) has not yet lapsed, then such cancellation order needs to be revoked.

## **How to file First Return after obtaining new registration**

The IRP/RP will be liable to furnish returns, make payment of tax and comply with all the provisions of the GST law during CIRP period. The IRP/RP is required to ensure that the first return is filed under section 40 of the CGST Act, for the period beginning the date on which it became liable to take registration till the date on which registration has been granted.

## **Relaxation measures amidst COVID-19**

Initially, insolvency filings could be initiated against the amidst the coronavirus pandemic, the default threshold company/LLP failing to make the payment above INR 1 lakh. limit has been raised to INR 1 crore to prevent triggering all. However, in order to bring some relief to the company/LLP insolvency filings.

## **How to avail ITC for invoices issued to the erstwhile registered person in case the IRP/RP has been appointed before issuance of notification No.11/2020- Central Tax, dated 21.03.2020 and no return has been filed by the IRP during the CIRP?**

In terms of the aforesaid notification to avoid the losses and avoid the cascading effect of tax due to a taxpayer, where IRP / RP has been appointed. Input tax credit accumulated in earlier GST registration

of pre-appointment period should not get lapsed and invoices where old GST number is appearing, ITC should not be deprived of. Therefore, law has been amended.

**Input tax credit:**

(1) The said class of persons shall, in his first return, be eligible to avail input tax credit on invoices covering the supplies of goods or services or both, received since his appointment as IRP/RP but bearing the GSTIN of the erstwhile registered person, subject to the conditions of Chapter V of the said Act and the rules made thereunder, except the provisions of sub-section (4) of section 16 of the said Act and sub-rule (4) of rule 36 of the

Central Goods and Service Tax Rules, 2017 (hereinafter referred to as the said rules).

(2) Registered persons who are receiving supplies from the said class of persons shall, for the period from the date of appointment of IRP / RP till the date of registration as required in this notification or thirty days from the date of this notification, whichever is earlier, be eligible to avail input tax credit on invoices issued using the GSTIN of the erstwhile registered person, subject to the conditions of Chapter V of the said Act and the rules made thereunder, except the provisions of sub-rule (4) of rule 36 of the said rules.

(3) Any amount deposited in the cash ledger by the IRP/RP, in the existing registration, from the date of appointment of IRP/RP to the date of registration in terms of this notification shall be available for refund to the erstwhile registration.

*Explanation.-* For the purposes of this notification, the terms “corporate debtor”, “corporate insolvency resolution professional”, “interim resolution professional” and “resolution professional” shall have the same meaning as assigned to them in the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

The special procedure issued under section 148 of the CGST Act has provided the manner of availment of ITC while furnishing the first return under section 40.

The said class of persons shall, in his first return, be eligible to avail input tax credit on invoices covering the supplies of goods or services or both, received since appointment as IRP/RP and during the CIRP period but bearing the GSTIN of the erstwhile registered person, subject to the conditions of Chapter V of the CGST Act and rule made thereunder, except the provisions of sub-section (4) of section 16 of the CGST Act and sub-rule (4) of rule 36 of the CGST Rules. In terms of the special procedure under section 148 of the CGST Act issued vide notification No.11/2020- Central Tax, dated 21.03.2020. This exception is made only for the first return filed under section 40 of the CGST Act.

The CBIC has further clarified that the above exception has been made only for the first returns filed under the relevant GST Legislation.

**Illustration:**

ABC Ltd. is registered under GST in Maharashtra and is undergoing the CIRP process. IRP was appointed on 1 April 2020. Company applied for new registration in Maharashtra and the same was duly granted on 2<sup>nd</sup> April 2020. Company received supplies with invoices dated 2 February 2020 and 3 April 2020 carrying ITC under IGST amounting to INR 45 lakh and INR 90 lakh respectively bearing the erstwhile registration of entity. What would be the eligible ITC under both the erstwhile and new registration of ABC Ltd., considering the recent amendments made under GST law?

**Solution:**

The new registration was availed within the period prescribed in the notification.

Therefore, the IRP shall avail only the ITC accrued since the date of his appointment in the first return to be filed for the new registered person. Accordingly, ITC of INR 90 lakh will be available to the new registered person in its first return. ITC of INR 45 lakh pertaining to the prior period may be eligible under the registration of erstwhile registered person; however, there are no specified procedures with respect to its availment, adjustment/utilisation.

Further, the registered buyers receiving supplies from the new registered person will be eligible to avail the ITC on invoices issued using the GST details of erstwhile registered person on or after the date of appointment of IRP/RP till the date the new registration is granted or 30 days from the date of this notification, whichever is earlier, subject to provisions of the ITC.

### **Balance in electronic cash ledger**

Any amount deposited by IRP/RP in the electronic cash ledger of erstwhile registered person shall be eligible for refund. However, the refund shall be eligible, only if the amount has been deposited after the date of appointment of IRP/RP till the date the new registration is granted.

#### **Illustration:**

Under the erstwhile registration, the IRP/RP has deposited an amount of INR 20 lakh under the IGST head of electronic cash ledger on 31st March 2020. What shall be the correct treatment considering the procedures recently notified by the government?

#### **Solution:**

Any amount deposited in electronic cash ledger of erstwhile registered person from the date of appointment of IRP/RP to the date the new registration is granted shall be eligible for refund. Accordingly, an amount of INR 20 lakh deposited on 31st March 2020 will be eligible for refund in the erstwhile registration under 'refund from electronic cash ledger'.

The CBIC has further clarified that erstwhile registered person can file refund application under the head 'refund from electronic cash ledger', even though the relevant Form GSTR-3B/GSTR-1 is not filed for the said period.

#### **Important Takeaways:**

- 1) When IRP has been appointed and approved by NCLT, the date of order of such approval will be the relevant date for the purpose of determination of dues, pre-IRP period and any govt. dues will be paid in accordance with provisions of Section 53 of Insolvency & Bankruptcy Code 2016.
- 2) IRP is not accountable for non-filing of returns or any non-payment of taxes pre-approval period
- 3) RP is required to take new registration within 30 days of his appointment and such new registration will be treated as a distinct entity
- 4) IRP / RP is accountable for compliances under GST Law including penal provisions
- 5) Accumulated ITC pre-IRP period can be carried forward in the new GST registration, which is obtained post CIRP period.
- 6) During the transitional period, but prior to the date of registration, obtaining the registration by IRP, any invoices of inward supplies on which GST is charged, ITC will be allowed in the new registration during the period of RP.
- 7) It is utmost important to determine the duty liability for the prior period of appointment of IRP/RP.