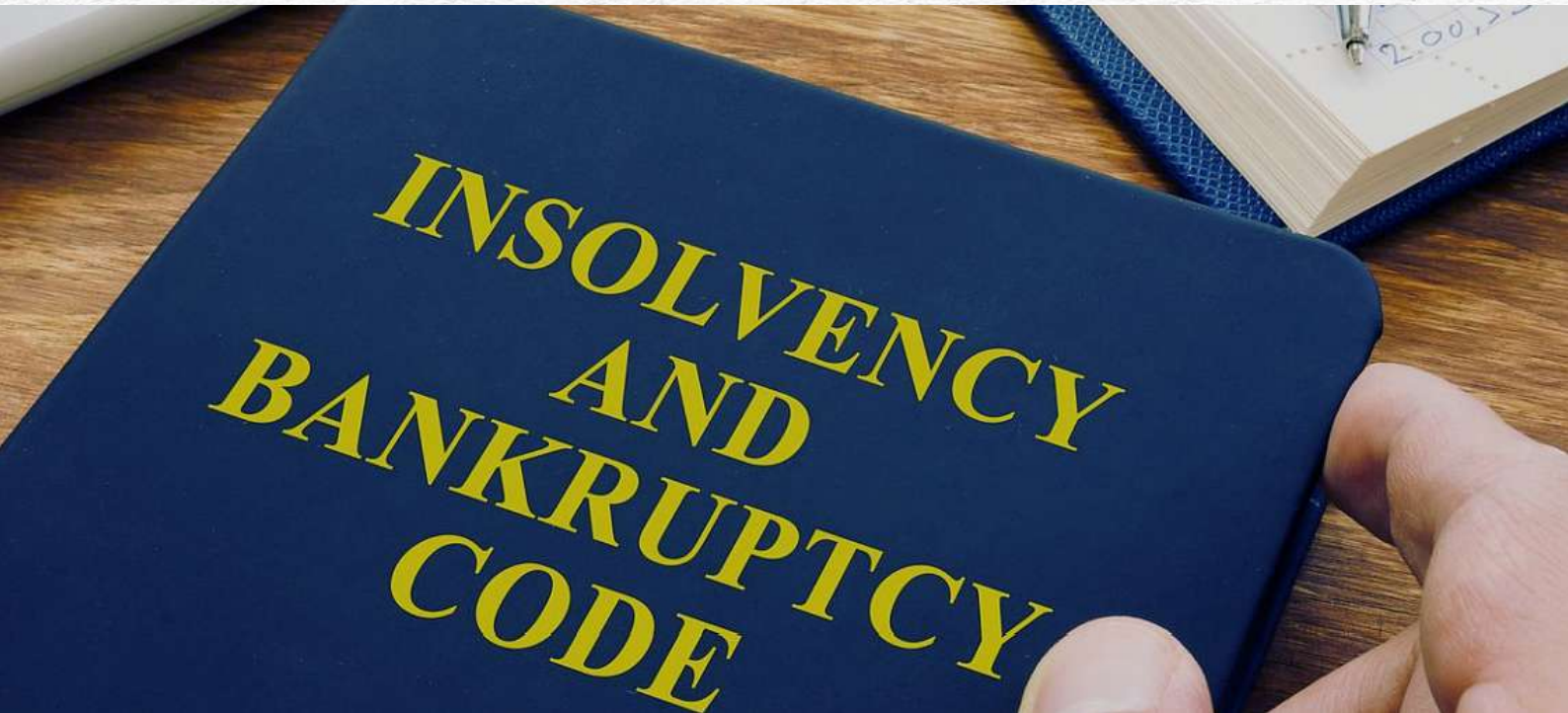


RESOLUTION TIMES

Newsletter of a Premier Insolvency Professional Entity

25 JUL 2021, ISSUE 2



STAY ON RESOLUTION PLAN OF VIDEOCON

The Corporate Insolvency Resolution Process (CIRP) of the Videocon group has taken a different toll. In the recent order by the NCLAT in the matter of Bank of Maharashtra v. Videocon Industries Ltd. & Ors. (Company Appeal (AT) (Ins.) No. 503 of 2021), the Appellate Authority has put a stay on the implementation of the resolution plan by Vedanta Ltd. (Successful Resolution Applicant (SRA)). The Appellant challenged the order of Mumbai NCLT which accepted the resolution plan given by the SRA and initiated the CIRP.

As per the Appellant, the impugned resolution plan lacks compliance with Section 30(2) of the Insolvency & Bankruptcy Code (IBC).

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Apart from this, it was also contended that the Appellant being the dissenting Financial Creditor was paid less than the liquidation value which goes against the provision under IBC.

Further, it was appealed that the SRA is paying the majority of the approved amount in form of Non-Convertible Debentures (NCDs) which further raised a serious question of whether an SRA can issue NCDs in place of payment in cash without the approval of COC. Lastly, it was also argued that there was a breach of confidentiality clause w.r.t. liquidation value as both the liquidation value and resolution plan amount were almost the same with a huge haircut of around 96%.

Countering this, the learned counsel for the Respondent argued that the resolution plan fulfills the provisions of IBC and further stated that the payments shall be made in compliance with Section 30(2) of the Code. It was further stated that the payment can be made in cash if the learned Adjudicating Authority directs so.

The Appellate Authority took notice of the admission order by the NCLT Mumbai. It took notice of the fact that out of the total claims of Rs 71,433.75 Cr, Rs 64,838.63 Cr were admitted and only 2962.02 Cr were part of the resolution plan. It was also observed that since the liquidation value and fair value were close to the resolution plan value, it seriously raises doubt on the confidentiality clause as per the CIRP Regulations.

After hearing the appeal, the NCLAT has put a stay on the impugned order and directed the Resolution Professional to continue to manage the affairs of the Corporate Debtor group till the next date of hearing.

MAJOR RELIEF TO OYO HOTEL GROUP BY NCLAT

In a major relief to Oyo Hotels and Homes Pvt Ltd. which was facing insolvency petition filed against it by one of the partner hotelier Yellow White Residency Hotel, owned by Rakesh Yadav, for a claim of Rs 16 lakhs, the NCLAT adjudicated in favour of the subsidiary of OYO Hotels, i.e., Oyo Hotels and Homes Pvt. Ltd.

Petitioner is an Operational Creditor who filed an application for initiation of Corporate Insolvency Resolution Process (CIRP) as per Section 9 of the Code.

INSOLVENCY TRIVIA

1) PIRP be initiated by a Registered MSME which is a unlimited partnership

- a) True
- b) False

2) Who can propose name of RP for conduct of PIRP?

- 1) Financial Creditor
- 2) Promoter
- 3) Unrelated Financial Creditor

3) Copies of audited financial statements of how many years need to be submitted by CD to initiate PIRP

- 1) 3 years
- 2) 2 years

4) Public Announcement for commencement of PIRP is to made in Newspapers

- 1) True
- 2) False

5) Promoter of an MSME with willful defaulter tag initiate PIRP, considering relaxation given in Sec240A IBC

- 1) True
- 2) False

After hearing the arguments, the NCLT-Ahmedabad admitted the application for initiation of the CIRP and declared the moratorium as per the provisions of Section 14 of the Code.

Post the admission of the CIRP, more than 40 partner hoteliers and several other creditors also filed their claims amounting to INR 250 Cr of which around INR 90 Cr came from the Federation of Hotel & Restaurant Associations of India (FHRAI). FHRAI was also leading the consortium on behalf of all the hoteliers involved in the matter. NCLAT in its order dismissed the insolvency proceedings against Oyo Hotels and stated that in general parlance the withdrawal of insolvency proceedings against a corporate debtor requires the approval of 90 percent of the value of the financial creditors as given under Section 12A of the IBC. However, this only applies to cases wherein the Committee of Creditors (CoC) has been constituted.

NCLAT while relying on the judgment of the Supreme Court which stated that where the CoC has not been constituted, the Adjudicating Authority may allow or disallow an application for withdrawal or settlement, dismissed the present appeal on similar grounds. Pertinent to note that in its previous order, the NCLAT had stayed the formation of CoC on the prayer of OYO Hotels for settling the claim with its partner hoteliers. Lastly, the NCLAT stated that due to the non-existence of CoC, the claims filed will not be considered as default within the meaning of the Code.

ONCE APPROVED, RESOLUTION PLAN CANNOT BE CHALLENGED FOR LESS PAYMENT

NCLAT in a recent order "Deputy Commissioner, CGST Kalol, Gujarat v. M/s Gopala Polyplast Ltd., Company Appeal (AT) (Insolvency) NO. 477 of 2021, has upheld the ratio laid down in the case of Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited & Others, Civil Appeal No. 8129 of 2019.

The appeal was filed against the impugned order passed by the NCLT Ahmedabad which approved the resolution plan. The plea of the appellant is that the respondent was under the successful resolution applicant (SRA). During the Corporate Insolvency Resolution Process

ANSWER KEY FOR PREVIOUS EDITION QUIZ

1. Is Sec 9(3)(c) directory or mandatory?
Ans: Mandatory
 2. Is Public announcement given by IRP treated as financial information?
Ans: Yes
 3. Can RP raise Interim Finance without prior permission of Committee of Creditors?
Ans: Yes
- Is RP obliged to give copy of Resolution Plan to suspended Board of Directors?
Ans: Yes

of Corporate Debtor (CD), appellant claims were admitted to the tune of Rs. 2,36,67,282/- but the resolution plan passed by the Committee of Creditors (COC) only includes Rs. 1,18,336/- as the full and final settlement of the claims which according to the appellant was too insufficient. Hence, the appellant sought the intervention of the Adjudicating Authority (AA).

Countering this, the respondent relied on the judgment of the Hon'ble Supreme Court in the case of Ghanashyam Mishra (referred above) and inferred that the claims of the claimants get frozen upon the approval of the resolution plan until the resolution plan is incongruent to Section 30(2) of the Code. The plan shall be binding upon all the stakeholders which shall include the claims by the Government. Further, if any claim not a part of the resolution plan will stand extinguished once the resolution plan is admitted. Hence, as per this reasoning, the Appellate Tribunal dismissed the appeal of the Appellant and gave the order in favor of the respondent.

IBBI NOTIFICATIONS AND UPDATES

1. IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (SECOND AMENDMENT) REGULATION, 2021

In a recent notification bearing No. IBBI/2021-22/GN/REG075 dated 14th July, 2021, Insolvency and Bankruptcy Board of India (IBBI) through IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulation, 2021 amended the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The said amendment is made applicable from the date of publication in the official gazette and shall be applicable on all the ongoing insolvency proceedings or CIRP proceedings commencing on or after the amendment is brought into force.

Followings are the list of amendments brought into the 2016 regulations:

1. Under Regulation 3 (1) & (2) which provides for the eligibility for the resolution professional (RP), the words "interim resolution professional (IRP)" is added.
2. Regulation 3 (3) is substituted and the new provision provides that if any IRP or RP is director or partner of any Insolvency Professional Entity (IPE) then he/she shall not continue to act as the IRP/RP of the Corporate Debtor (CD) if such IRP/RP or any partner or director of such IPE has stakes in the CD.
3. Regulation 4 which provides for the power of Insolvency Professional (IP) to access the books of the CD, the term IRP is to be added along with the RP.
4. Regulation 4A which provides for the choice of authorized representative, clause 2 (b) is amended and now the person who is eligible to become an RP under Regulation 3 is inserted.
5. A new regulation, i.e., Regulation 4B is inserted which provides for the disclosure in every communication in case of change in the name and address of the CD along with the new name and address if the same has happened during the period of two years from the date of commencement of CIRP.
6. In Regulation 13 (2) (b), the phrase "or their authorized representatives" is added in continuation with the CD. This regulation provides for the verification of claims of which the list of creditors shall now be available for inspection with the authorized representatives of the CD along with the members, partners, directors, and guarantors of the CD.

7.Regulation 27 has been substituted which provides for the appointment of professionals. It provides that the RP has to appoint two registered valuers to determine the fair and liquidation value of the CD as per Regulation 35. This has to be done within 7 days of the appointment of the RP and not later than 47th day from the CIRP commencement day. Further, clause (2) of the above-said regulation provides that the RP/IRP may appoint any other professional in conducting the CIRP if such services are required and not available with the CD and this appointment is to be made on arm's length basis in a transparent manner. Also, the fee and other payments for such professional shall be paid directly in his bank account.

2. SEBI (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS (LODR)) (AMENDMENT) REGULATIONS, 2021

The recent amendment to SEBI (Listing Obligations and Disclosure Requirements (LODR)) (Amendment) Regulations, 2021 has increased the disclosure requirements for the companies under Corporate Insolvency Resolution Process (CIRP). This amendment has been made under Point 16 in Para A of Part A of Schedule III of LODR Regulations which was brought in the year 2018 via SEBI (LODR) (Third Amendment) Regulations, 2018 and is made applicable from January 08, 2021. As per the 2021 amendment following disclosures were added in addition to the existing LODR Regulations on disclosure requirements in case of CIRP/Liquidation.

1. The Resolution Professional (RP) shall inform SEBI about the date of hearing in NCLT wherein the resolution plan would be considered. This has to be made at least 2 days before the date of hearing.
2. The RP shall have to inform SEBI within 30 minutes of the approval of the resolution plan or any order concerning the resolution plan on an immediate basis.
3. The RP shall have to inform about the impact on the existing shareholders or investors regarding the status of the listing, value of existing shareholders or cancellation/extinguishment of securities, if there is no payment made to such holders.
4. RP or the Corporate Debtor (CD) are advised to maintain the confidentiality of the resolution plan until information related to the resolution plan is submitted to the CD and also to adhere to LODR Regulations.

Earlier, in a circular issued by the Insolvency and Bankruptcy Board of India (IBBI), it was directed that the RP/ Liquidator shall have the duty to adhere to the applicable laws while undergoing a CIRP. It was also mentioned that if any entity under the CIRP/ Liquidation suffers any loss then the RP/Liquidator shall be liable for the non-compliance and the penalty for the same shall not be a part of CIRP cost or liquidation cost.

3. INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY PROFESSIONALS) (SECOND AMENDMENT) REGULATIONS, 2021

Recently, the Insolvency and Bankruptcy Board of India (IBBI) notified the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Second Amendment) Regulations, 2021 on 22nd July 2021. (Notification No. IBBI/2021-22/GN/REG077). The said amendment is aimed at bringing more transparency and enhancing expertise by changing the criteria for registration as Insolvency Professional. The amendment further ensures that the limited number of assignments can be taken up by the Insolvency Professional. Let's have a glance at the major changes brought in through the said amendment.

Amendment in the requisite experience to be eligible for registration as Insolvency Professional

Changes were made in Regulation 5 clause (iii) and inserted the following experience criteria:

1. Ten years in the field of law, after receiving a Bachelor's degree in law
2. Ten years in management, after receiving a Master's degree in Management or two-year full-time Post Graduate Diploma in Management
3. Fifteen years in management, after receiving a Bachelor's degree from a university established or recognized by law or an Institute approved by the All India Council of Technical Education.

Further, an explanation was added after sub-clause (iv) which says that for the purposes of this regulation, the only professional and managerial experience shall be considered. Also, the second explanation says that for the purpose of computing,-

- The total experience of 10 or 15 years under sub-clause (iii), there shall be included experience of any period under sub-clause (iv);
- The total experience of 10 years under sub-clause (iv), there shall be included experience of any period under any of the items of that sub-clause

Amendment in the limitation on the number of assignment an Insolvency Professional can entertain

Clarification was added under clause 22 of the principal regulations which state that an insolvency professional may, at any point of time, not have more than ten assignments as a resolution professional in the corporate insolvency resolution process, of which not more than three shall have admitted claims exceeding one thousand crore rupees each.

DISCIPLINARY COMMITTEE ORDER ON MR. PRABHJIT SINGH SONI (IP)

In the matter of Mr. Prabhjit Singh Soni, Insolvency Professional under Section 220 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.

Major contraventions identified and the response of the insolvency professional thereon are as under.

1. IN THE MATTER OF JNC CONSTRUCTIONS PVT LTD.

CONTRAVENTIONS IDENTIFIED BY IBBI

Interim finance was raised by the RP without the approval of the COC as required under Section 28 of IBC.

SUBMISSIONS MADE BY IP

Interim finance was taken after approval of COC which was passed with 95.52 % votes in. Only two Financial Creditors had rejected the resolution for the interim finance with 4.48% voting percentage.

2. IN THE MATTER OF MARINERS BUILDCON INDIA LTD

CONTRAVENTIONS IDENTIFIED BY IBBI

1. As per regulation 34 of CIRP Regulations, fixation of fee of IRP/RP strictly falls within the domain of CoC. However, RP had entered into an engagement with the applicant of CIRP, wherein he had proposed his fees as RP.
2. IRP mentioned that he will take 5% of the recovery of the value of assets as insolvency cost while working as RP. It has been observed that an engagement letter mentioning the said terms and conditions is available on records.

SUBMISSIONS MADE BY IP

1. It was submitted by the IRP that the letter given to Applicant i.e., Corporate Debtor is not part of CIRP as it was prior to IRP being approved as the IRP by AA for the CIRP.
2. The letter contained a brief of the possible costs to be incurred by the Applicant and the expenses of 5% of the recovery value mentioned, referred to the liquidation fees as realization value relates to Liquidation process and only in the eventuality that the CD goes into liquidation the issue of realizable value will arise

3. IN THE MATTER OF GRANITE GATE PROPERTIES PRIVATE LIMITED

CONTRAVENTIONS IDENTIFIED BY IBBI

1. COC set an agenda to appoint Mr. Anuj Aggarwal as the project manager in the 1st meeting of COC and subsequently rejected the agenda to appoint Mr Anuj Aggarwal as project manager in the 2ndCOC meeting. Although it was observed that Rs 4,00,000/- has been paid by the RP to the project manager and mentioned the same in the Insolvency Resolution Process Costs.

SUBMISSIONS MADE BY IP

1. Mr Anuj was appointed as advisor in 1st COC meeting dated 18.02.2019 which was duly noted by COC while he was appointed under section 20 of the Code by IRP on 10.01.2019. Mr. Agarwal resigned in March 2019 he was paid fees for two months amounting to Rs 4,00,000/- as per section 20 of the Code and as per minutes of the 1st COC Meeting. In 2ndCOC Meeting his further appointment was not approved hence, he was not paid thereafter.

2. Authorized Representative (AR) had attended only 10 meetings of COC. As per the regulations, AR was entitled to only Rs 2,50,000/- as his fees (@ rate of Rs.25,000/- per meeting). However, IRP had already paid Rs. 6,75,000/- to the AR against his bill for approx. Rs.16 Lac.

3. Minutes of COC, evaluation matrix and request for resolution plans are critical documents which consist of vital information during the CIRP and should be available to concerned stakeholders only. However, it is noted that IRP uploaded this confidential information on the website of the CD.

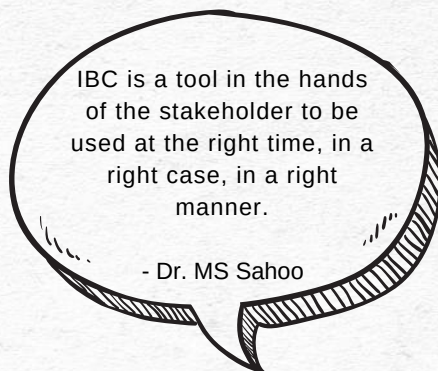
4. As per Regulation 33(4) of CIRP regulations, only the amount of expense ratified by COC shall be treated as IRPC. However, IRP did not get CIRP expenses ratified from COC. Further, no details of payments made during CIRP process were disclosed to COC except in 1st COC meeting. Above acts and omissions are observed to be in contraventions regulations 16A(8), 33(4) and 34 of CIRP Regulations.

2. Authorised Representative wrongly inflated bills by including fees for meeting with the representatives of homebuyers of different areas created by IRP. The AR submitted bills of all these meetings for a total amount of Rs. 16,21,500. These bills of expenses were not approved by IRP and the total amount paid to the AR was Rs.2,50,000 as fees for attending COC Meetings. Hence extra money paid by IRP is due to the inflated bills of AR.

3. In the present matter there are 9000 homebuyers who were financial creditors, therefore in order to provide information to these homebuyers in a unified manner. The secured platform was created for homebuyers and was not accessible to the public. Confidentiality was maintained and only concerned homebuyers can access it by registering themselves.

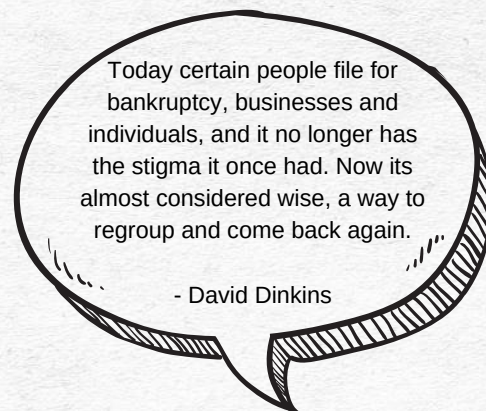
4. IRP submitted that he has passed all the CIRP expenses ie. IRP/RP fees, Forensic Auditors and Transactional Auditors fees, Advocates consultants' fees, Website Provider fees, CA accounts work, publication expenses, Valuers, E-voting, etc. in first, second, third and fourth COC Meeting.

IP was restrained from accepting or seeking any assignment for 30 days and advised to take reasonable care while publishing data on website and performing his duties.



IBC is a tool in the hands of the stakeholder to be used at the right time, in a right case, in a right manner.

- Dr. MS Sahoo



Today certain people file for bankruptcy, businesses and individuals, and it no longer has the stigma it once had. Now its almost considered wise, a way to regroup and come back again.

- David Dinkins

PRIMER ON FAST TRACK INSOLVENCY

Chapter IV of the Insolvency & Bankruptcy Code, 2016 (IBC) provides for the "Fast Track Corporate Insolvency Resolution Process" (FTCIRP) consisting of Section 55-58. Section 55 of the IBC provides for the Corporate Debtors (CD) against whom the FTCIRP may be initiated, i.e., a Small company or a Startup company or an unlisted company whose value of total assets does not exceeds Rs 1 crore as evident from the financial statement of the previous financial statement.

Section 56 of the IBC provides for the maximum time limit within which the FTCIRP shall be completed, i.e., 90 days from the date of commencement of insolvency. However, this limit can be extended further by 45 days, if the Resolution Professional (RP) has filed an application to the Adjudicating Authority (AA) in this behalf preceding to the resolution passed by the Committee of Creditors (COC) having 75% of the voting share.

Further, Section 57 provides that an application for initiating the FTCIRP can be filed by the Creditor or the CD itself along with the proof of existence of default or any other information specified by the IBBI which establishes the fact that the CD is eligible for FTCIRP. Lastly, Section 58 states that the provisions of Chapter II & VII of the IBC shall apply to the FTCIRP.

Moreover, Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 shall be applicable to the FTCIRP. Following is the brief of the regulations.

- Regulation 3 provides for the eligibility of the RP. It provides that the RP should be independent to the CD.
- Regulation 4 - power of Insolvency Resolution Professional (IRP) to access the books and other relevant documents.
- Regulation 6 - IRP to make public announcement within 3 days of his appointment in Form A as per the procedure given in clause (2) & (3).
- Regulation 7 - submission of claims by the Operational Creditor (OC) other than workman or employee of the CD to the IRP in Form B along-with the documentary evidence.
- Regulation 8 - submission of claims by the Financial Creditor (FC) in electronic form to the IRP in Form C along-with the documentary evidence.
- Regulation 9 - submission of claims by the workmen & employees to the IRP in Form D.
- Regulation 9A - submission of claims by a creditor other than FC/OC/workmen/employees to the IRP in Form F along-with the documentary evidence.
- Regulation 10 - IRP/RP to call for other evidences for substantiating the claims of the creditors.
- Regulation 12 - submission of proof of claim by the creditors till the date mentioned in the public announcement. If he fails to do so, he can file it before the approval of the resolution plan.

- Regulation 14 - IRP/RP to determine the claim if it is not precise by making the best estimate of the amount of the claim.
- Regulation 16 - COC to comprise of OC if there is no financial creditor of the CD or the financial creditors are related parties. COC shall have 18 largest OC by value and one elected representative each of the workmen and the employees other than those included already. Voting rights shall be in proportion of the debts owned.
- Regulation 17 - IRP to file a report within 21 days from his date of appointment certifying formation of COC. First meeting of the COC shall be convene within 7 days of filing the report.
- IRP can file for conversion application if he is of the opinion that FTCIRP is not applicable to the CD.
- Regulation 18 - RP to convene meeting of the COC as and when required or on the request by the members having 33% of voting rights.
- Regulation 19 - notice of meeting of the COC to be given at least 7 days before the date of meeting, which can be reduced subject to approval of the COC.
- Regulation 21 - provides that the contents of the notice should be sent in detailed manner to the members.
- Regulation 22 - members representing at least 33% of the voting rights shall form a quorum for the meeting.
- Regulation 24 - RP to act as Chairperson of the meeting who shall check that the required quorum is present throughout the meeting. RP shall ensure that minutes are made of the meeting which shall be circulated to all the participants within 48 hours of the meeting.
- Regulation 25- actions listed under Section 28(1) and others to be considered for the meeting. RP to take a vote on items listed for voting after discussion. Further, RP shall circulate minutes to all members within 48 hours. Also, RP is required to circulate the decision within 24 hours of the conclusion of voting or 48 hours of the conclusion of the meeting if no electronic vote is required to be sought
- Regulation 26 - The RP shall appoint a registered valuer within 7 days of his appointment for determining fair value and liquidation value of the CD as per Regulation 34.
- Regulation 27 - RP shall notify each creditor and the AA of any change in the COC due to the assignment of transfer of any debt by a member to any other person within 2 days of such change.
- Regulation 28 - RP has the power to sell the assets of the CD which are outside the course of business post-approval of the COC. Provided such sale shall not exceed 10% of the total claims admitted by the IRP.
- Regulation 30-33 - provides for Fast track process cost.
- Regulation 34 - after receipt of fair value and liquidation value from the valuer and resolution plan from the COC respectively, the RP shall provide the former to the members.
- Regulation 35 - RP to prepare and share information memorandum, as required, with the members, post their undertaking for maintaining confidentiality, within 2 weeks of his appointment.

- Regulation 35A - RP to invite prospective resolution applicants for submission of resolution plan at least 15 days before the last date of submission. Further, brief particulars of the invitation shall be published in Form G on the website of the CD and the Board, if any.
- Regulation 36 - Resolution plan to provide for measures as mentioned for maximization of the value of the assets of the CD.
- Regulation 37 - provides for the mandatory contents of the resolution plan which shall include funds to meet the FTCIRP cost, liquidation value to OCs and dissenting FCs and a statement to the effect that how the resolution plan is going to deal with the interest of the stakeholders which includes FCs and OCs. Also, the plan should have the implementation schedule and the term period in which it has to get implemented.
- Regulation 38 - RP shall submit the resolution plan to the AA at least 15 days prior to the expiry of the maximum period under Section 56 along with the certification that the contents of the plan meet the needed requirements and it has been approved by the COC. The RP upon admission or rejection of the plan will put forward the copy of the order to the participants and the resolution applicant.
- Regulation 39 - It provides for the extension of the period of FTCIRP if the process is not completed within 90 days. This has to be approved by the COC under Section 56 and an application to that effect should be made to the AA.

Case Law on this issue:

Sanjay Kumar Ruia v. Catholic Syrian Bank Ltd. & Anr. (*Company Appeal (AT) (Insolvency) No. 560 of 2018*)

The appeal arises from the order of AA under Section 55 of the Code giving extension for the CIRP and treating the same as FTCIRP. The issues which arose were that whether the AA is competent to convert a CIRP into FTCIRP and whether the RP can be changed by the COC post the completion of 270 days

The Appellate Authority while referring to Section 55 of the IBC categorically held that neither the CD doesn't fall within the categories of CD given under Section 55 nor it owes the amount of debt required to fall under this categorization. Hence, the applicability of Section 55 to the CD is not justified.

Further, the NCLAT also held that the COC under the Code doesn't have the power to replace the RP post completion of CIRP as the CIRP comes to an end after the completion of 270 days. Here in this case, 270 days were passed since the order of admission of the petition and hence the COC has ceased to be in existence. Thus, the COC cannot replace the RP.

INTERVIEW OF MR. PAWAN KUMAR SINGAL



In this edition of our Newsletter, we bring a conversation with Mr. Pawan Kumar Singal, who is an Insolvency Professional and a partner at AVM Resolution Professionals LLP. Mr. Singal is a Chartered Accountant & a Company Secretary with decades of experience in working at large corporates as a seasoned finance professional. The discussion revolved around the status of Home Buyers under IBC 2016 and admissibility of Indirect taxes as part of their claim.

Q. What is the status of Home Buyers under the IBC?

In the initial stages of IBC 2016, courts consistently held that home buyers are not financial creditors and therefore, their application u/s 7 of IBC 2016 for initiation of CIRP was not maintainable. Subsequently, in order to provide relief to Home Buyers, section 5 of IBC 2016 was amended by inserting an explanation as follows: -

“(i) any amount raised from allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.”

The use of the words “having the commercial effect of a borrowing” in the explanation, confirms that legislature was conscious of the fact that Home Buyers are not creditors but customers only, but in order to provide them relief, same need to be treated as financial creditors under IBC 2016.

However, in other statute(s), namely, Companies Act 2013 and GST Act, Home Buyers are still being classified as customers. In annual financial statement of a real estate company, advance amount received or receivable from Home Buyers is being classified as advance from customers.

Q. What is the admissibility of interest as part of the claims of Home Buyers?

Regulation 16(7) of CIRP Regulation states as follows: -

“The voting share of a creditors in a class shall be in proportion to the financial debt which includes an interest at the rate of eight percent per annum unless a different rate has been agreed to between the parties.”

Probably, at the time of framing CIRP Regulations, Legislature was conscious that amount being given by Home Buyers is not a debt and therefore, such amount may not have any time value. **Therefore, deeming interest rate of 8% has been provided in CIRP Regulation, only for the purpose of calculating voting rights.**

Q. Whether Homebuyers are liable to pay GST?

Sale and purchase of immovable property is outside the scope of GST Act and on such transactions, stamp duty is charged; however, on construction services, GST is levied.

As per Section 2(119) of the CGST Act, 2017 (“Act”) ‘works contract’ means a contract for building construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.

As per schedule II of the Act, construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier, is supply of services.

Pursuant to above provisions, all payments, made for the booking of a flat, which is still under construction, attracts GST but no GST is levied on ready to move flats.

Q. When are the homebuyers liable to pay GST?

Under CGST Act 2017, the supply of flats to Home Buyers is a supply of services. As per section 2(33) of the Act, continuous supply of services means a supply of services which is provided or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations. Also, section 31 (5) of the Act states, in case of continuous supply of service, time of issuing invoice shall be: -

- Where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before due date of payment.
- Where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time supplier of service receives the payment.

Where payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.

Further, as per section 12 of the Act:

“The time of supply of the goods shall be the earlier of the following dates, namely;

- The date of issue of invoice by the supplier or
- the last date on which he is required to issue the invoice with respect to the supply or
- The date on which the supplier receives the payment with respect to the supply.”

Construction of flats is a **continuous supply of services** and when there is construction linked payment plan, supply of services comes into effect as soon as any stage of completion is achieved and payment demand is issued, in accordance with the builder buyer agreement. Therefore, booking amount / any other payment made by Home Buyer, even if advance, attracts GST, as there is no exemption on payment of GST on advance payment for services as opposed to advance payment for goods.

Q. When is the supply of service completed, in case of Home Buyers?

As per the GST Act, periodic payments made by Home Buyers, in accordance with construction linked payment plan, is against receipt of construction services. Therefore, immediately on such payment, Home Buyers acquire a right in the said immovable property, which is still under construction.

Q. How does the Builder/ Real Estate company account for the amount received from the Home Buyer?

As soon as a flat is booked and allottee pays booking amount, builder treats the same as advance. Pursuant to Section 12 of the Act, Builder pays the applicable GST and balance amount is credited in allottee account.

Accounting Entries: -

DR Bank Account
CR Home Buyer Account
CR GST Payable Account

DR GST Payable Account
CR Bank Account

Periodically, builder raises demand as per builder buyer agreement and same is treated as invoice in GST return and accordingly Builder pays GST.

Accounting Entries: -

DR Home Buyer Account
CR Sales Account
CR GST Payable Account

DR GST payable Account
CR Bank Account

DR Bank Account
CR Home Buyers Account

Advance received at the time of booking is also transferred in sales / turnover account in accordance with the terms of payment plan.

In view of the above, if there is default in payment by Home Buyers, default amount (including GST) is shown as customers outstanding in the books of real estate company. Accordingly, the amount received from Home Buyers, which is still not recognized as revenue (net of GST), is shown as advance from customers.

Q. What is the difference between Operational Creditors and Home Buyers under GST Act?

In the case of operational creditors, claim for GST is admitted when Operational Creditor is able to demonstrate that it had deposited GST with Govt department. Presently, most of the big corporate(s) are insisting on depositing of GST amount with Govt. before release of payment for supplies. The main difference between Operational Creditors and Home Buyers are as under: -

Operational Creditors

- Suppliers of goods and services
- Raises Invoice and charges GST
- Under obligation to deposit GST with Government even if not collected from the customers

Home Buyers

- Receiver of services
- Receives invoice only
- No obligation to deposit GST

Q. Whether Indirect taxes paid by Home Buyers are refundable on cancellation of flats?

i) Flat booked by customer in Service Tax Regime and cancellation in GST Regime

If a flat is booked by a customer in service tax regime and service tax was paid on any such amount during service tax regime and subsequently, the real estate project goes

under CIRP, when GST regime is in force, the principal amount can be admitted but service tax refund cannot be claimed under GST Act. Therefore, service tax paid is a sunk cost and builder/ resolution applicant is under no obligation to refund such service tax amount.

ii) Flat booked under GST Regime

As per section 34 of CGST Act, 2017 where there is any deficiency in supply of service, then supplier can issue a Credit Note and adjust the GST in the Credit Note against the subsequent GST liability by disclosing the Credit Note in the GST Return. However, such Credit Note in a Financial Year (FY) cannot be issued later than September month of the following FY or date of furnishing of the Annual Return for that particular FY whichever is earlier.

Though, there is a provision in section 34 of CGST Act, 2017 for issuing Credit Note towards the refund of advance amount but there is a time limitation for such adjustment. Further, an advance can be refunded only when the supply is not completed. As mentioned earlier, in case of a construction contract, the supply is on continuous basis and, as and when, a demand is raised (as per agreement), the supply is complete. Hence, there will be no advance remaining and, therefore, Credit Note cannot be issued under GST Act. This has been explained very clearly in FAQ No.22 released for Real Estate by CBIC dated 07.05.2019. Further, CBIC vide Circular No.137/07/2020-GST dated 13.04.2020 has clarified that in case, any GST is paid by the supplier on advances received for an event which got cancelled subsequently and for which no invoice has been issued in terms of section 31(2) of CGST Act, he is required to

issue a Refund Voucher in terms of section 31(3)(e) of the CGST Act read with Rule 51 of the CGST Rules. The taxpayer can apply for refund of GST paid on such advances.

The above circular confirms that if advance is refunded in the year of receipt, then adjustment with other GST liability is possible, otherwise, one has to apply for refund.

Since, Home Buyers make payment on receipt of demand only, therefore, they have deemed to have accepted supply of services. By virtue of such payment, Home Buyer is deemed to have acquired right in immovable property, hence, as per the provisions of GST, supply is complete and Home Buyers are not entitled to claim such GST amount.

iii) GST claim when construction has yet not started

There could be a situation, where the builder has booked a flat and received booking advance but construction could not start and the project is abandoned. In such a scenario, no supply has been affected in GST records, the amount received will be counted as advance and a refund application needs to be filed with the GST department. Since, recipient of the refund would be an allottee, GST department before granting refund would require a confirmation from concerned allottee also.

The Builder/ Real Estate project Corporate Debtor acts as a collecting agent only and whatever amount he collects, he deposits with the Government. Therefore, if any Home Buyer claims any refund of GST, then the same has to be given by Government only.

Q. What is the prevalent business practice for return of indirect taxes on cancellation of a flat?

i) In normal business practice, if a Home Buyer cancels the flat, builder reallocates the same to another allottee and adjusts the transaction through Credit / Debit Note only, instead of reversing revenue. It means that he does not give any effect to GST liability in his Books of Accounts and simply pays whatever he agrees with the allottee in lieu of the cancellation of the flat. All accounting is done through memorandum records only and transaction is called "Transfer of name".

ii) Legally speaking, if an allottee cancels a flat, it tantamounts to extinguishment of his rights and a supply under GST Act. Accordingly, he needs to raise an invoice and charge GST.

However, an allottee will not be able to raise tax invoice due to:

- Not having a GST number
- Transaction is not entered in the course or furtherance of business

Nevertheless, buyer of such rights, whether builder or any other person, will be entitled to take input credit for GST paid to Allottee. In turn, Allottee will have to deposit GST amount collected on such sale, with Govt. Therefore, net receipt in the hands of Allottee will be basic sale price only i.e. excluding GST. Practically, Home Buyers never get GST refund on sale of flats during construction and GST / service tax is a sunk cost.

Q. Are Home Buyers' claims for indirect taxes admissible during CIRP?

No, as the real estate company has already deposited the GST with the government, it is not liable to refund the same to Home Buyers.

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