

KNOWLEDGE REPONERE

**(A WEEKLY BULLETIN)
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INSOLVENCY PROFESSIONALS AGENCY

KNOWLEDGE REPONERE (31st Bulletin: January 8 - January 19, 2018)

Dear Professional Members,

Greetings!

We are pleased to share with you our 31st bulletin on the Insolvency and Bankruptcy Code, 2016 (Code).

- Relaxation in the provisions relating to levy of Minimum Alternate Tax (MAT)

With a view to minimize the genuine hardship faced by companies undergoing corporate insolvency resolution process (CIRP), Central Board of Direct Taxes (CBDT) has relaxed the provisions of Minimum Alternate Tax (MAT). Under the MAT, tax liability is calculated on the basis of Book Profits. Book Profit means the net profit as shown in the profit & loss account for a year as increased and decreased by various additions and deductions.

Under the regime of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), the companies got the benefit of MAT which was not applicable under the insolvency regime. For instance, if a company's loan stood at Rs. 50,000 crore and under the insolvency process, it gets sized to Rs 25,000 crore, the reduced amount is gain to the company. Under the SICA regime, this notional gain was adjusted against the accumulated losses or there was concession provided under the MAT provisions. For an incoming management or investor under the insolvency regime, this will be a huge liability. However, with the extension of this relaxation, it will be a huge incentive for prospective investors.

- Central Government notifies the Companies (Amendment) Act, 2017

The Central Government has notified the Companies (Amendment) Act, 2017 (Amendment Act) on 3rd January, 2018. Few provisions in the Amendment Act have important bearing on the working of the Code. Section 53 of the Companies Act, 2013 prohibited issuance of shares at a discount. The Amendment Act now allows companies to issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan such as resolution plan under the Code or debt restructuring scheme.

The Amendment Act now also prohibits a registered valuer from undertaking valuation of any asset in which he has direct or indirect interest or becomes so interested at any time during three years prior to his appointment as valuer or three years after valuation of assets was conducted by him.

- RBI issued a clarification dated January 4, 2018, that, provisions with regard to submission of financial information to information utilities by all scheduled commercial banks, co-operative banks, NBFCs, as contained in Notification dated December 19, 2017 issued by RBI, are also applicable to registered Asset Reconstruction Companies (ARCs). Thus, registered ARCs are also obliged to submit financial information to Information Utilities.
- On the issue whether NCLT can approve a resolution plan which has not been approved by super majority of 75% voting share of members of Committee of Creditors ("CoC"), different opinions were expressed by different benches of NCLT. While NCLT, Hyderabad Bench in K. Sashidar vs. Kamineni Steel held that even if the CoC fails to approve a resolution plan with 75% of voting share, the NCLT could approve a resolution plan; NCLT, Mumbai Bench in ICICI Bank vs. Innoventive Industries Ltd. held that it did not have such a power as the language of the Code was clear. However, recently, the judgment of NCLT, Hyderabad Bench has been stayed by NCLAT in its order dated 04.01.2018 passed in Indian Overseas Bank & Ors. vs. Kamineni Steel & Power India Pvt. Ltd. & Ors. The appeal is next listed before NCLAT on 23.01.2018
The order of NCLAT is available at:
http://www.nclat.nic.in/interim_orders/Jan2018/04012018AT3352017.pdf
- The Hon'ble Supreme Court has stayed the judgment of NCLAT passed in M/s Speculum Plast Pvt. Ltd. vs. PTC Techno Pvt. Ltd. vide its interim order dated 10.01.2018. NCLAT in the above judgment had held that Limitation Act is not applicable to the proceedings under the Code.

The order of the Hon'ble Supreme Court is available at:

http://supremecourtfindia.nic.in/supremecourt/2017/41322/41322_2017_Order_10-Jan-2018.pdf

1) CASE UPDATES

Cases under the Code are being filed expeditiously across the various benches of NCLT. It is therefore imperative for our readers to be cognizant of the developments taking place. The newly admitted cases with regard to CIRP under the Code are as below:

S. No.	Case Title	Relevant Section	NCLT Bench	Amount in default as mentioned in application (in Rupees)
1.	State Bank of India V/s. Bhushan Energy Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	398.08 Crores
2.	Export Import Bank of India V/s. CHL Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	USD 3,51,64,530.19
3.	Innovsource Private Limited V/s. Getit Grocery Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Principal Bench	3.96 Crores
4.	Shalby Limited V/s. Dr. Pranav Shah	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Ahmedabad	77.80 Lakhs

5.	M/s. Phoenix Marketing V/s. United Breweries Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Bengaluru	7.87 Crores
6.	Kamal Chemicals V/s. M/s. T. C. Terrytex Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chandigarh	68.20 Lakhs
7.	Satyanarayan Shyamsunder (HUF) V/s. Balaji Paper and Newsprint Private Limited	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	Kolkata	33.08 Lakhs

2) BRIEF NOTE

NCLT JUDGMENTS

Superways Enterprises Private Limited ...Applicant/Financial Creditor
Versus
Topworth Steel & Power Private Limited ...Respondent/Corporate Debtor

Date of Judgment: 03.01.2018

- The application was filed by Superways Enterprises Private Limited, Financial Creditor ("Superways"), against Topworth Steel & Power Private Limited, Corporate Debtor ("Topworth") under section 7 of the Code.
- It was stated by Superways that Topworth availed an Inter-Corporate Deposit ("ICD") facility on 25.01.2016 for an amount of Rs 10 Crores. When Superways made a demand for repayment on 31.03.2017, it was mutually agreed by an oral

agreement between the parties that ICD shall be repaid along with interest @ 17% p.a. payable on monthly basis after deduction of TDS. The , defaulted in making repayment.

- As ICD was payable on demand, Superways issued a letter dated 21.03.2017 for repayment of ICD contending that an amount of Rs. 11,72,78,518/- is payable as on 28.02.2017 while Topworth confirmed that balance as per their books of accounts is only 10,28,08,492/-.
- Accordingly, Superways filed application before NCLT, Mumbai Bench. Topworth contended that application was not maintainable as a company petition for winding up of Topworth was pending before Hon'ble High Court of Bombay and a provisional liquidator had been appointed in that case. Superways contended that proceedings under the Code are independent proceedings and the company petition was filed by some third party. Further, it stated that in view of section 238 of the Code containing non-obstante clause, the provisions of Code would have overriding effect. Topworth replied by contending that non-obstante clause under section 238 of the Code will not have any overriding effect on the proceedings filed under some other law which is not inconsistent with provisions of the Code.

NCLT observed that on perusal of the case law cited by Topworth, it was clear that the provisions of the Companies Act, under which provisional liquidator was appointed, were not inconsistent with provisions of the Code. Thus, the winding up proceedings pending before High Court against same Corporate Debtor will not be hit by non-obstante clause envisaged under section 238 of the Code because winding-up proceedings are being saved under section 255 read with 11th schedule of the Code and since the provisional liquidator has already been appointed in the said, the application deserved to be dismissed without dealing with the merits of the case.

Innovsource Private Limited

...Applicant/ Operational Creditor

Versus

Getit Grocery Private Limited

...Respondent/Corporate Debtor

Date of Judgment: 08.01.2018

- The application was filed by Innovsource Private Limited, operational creditor (“Innovsource”) against Getit Grocery Private Limited, corporate debtor (“Getit”).
- The case of Innovsource was that Getit approached it for providing man power outsourcing services, through its associates, for their business of providing online services related to the grocery items and in relation to that, a staffing service agreement (“**agreement**”) was entered and executed on 04.06.2015, that was made valid for a period of one year from 14.05.2015 to 13.05.2016 and was subsequently extended for further period of one year from 14.05.2016 to 13.05.2017 vide addendum agreement dated 27.05.2016.
- In terms of the aforesaid agreement, Getit was under an obligation to reimburse an amount every month for the cost of the services provided by Innovsource, which included all amounts to be paid and payable by Innovsource to the associates including their salary and statutory benefits such as provident fund, ESI, maternity benefit, gratuity leave, salary, bonus and all periodic labour welfare payments as per applicable laws, including other incidental expenses.
- Innovsource contended that Getit failed to reimburse the amount for the months of July and August, 2016, despite the fact that the invoices for the said months were raised by Innovsource and same approved by Getit.
- The total amount of debt claimed to be due by Innovsource was Rs. 3,96,16,509/- in respect of the invoices for the months of July and August, 2016. Innovsource attached with its application, the e-mails exchanged between the parties, whereby Getit had admitted the debt.
- A demand notice in respect of unpaid operational debt was also sent by Innovsource which was duly delivered. Innovsource made various attempts to serve at the e-mail address of Getit reflected in the master data available at the website by MCA as well as through post. However, Getit had been deliberately avoiding to accept notice and thus did not choose to come before the NCLT.
- On the request of Innovsource, an order for substituted service was passed and publication in two newspapers was carried out but this also resulted in vain and thereafter, Getit was proceeded ex-parte.

- NCLT after quoting the definitions of the operational creditor and operational debt provided under Section 5 (20) and 5 (21) of the Code, respectively, concluded that, the definition of the operational creditor given in the aforesaid section is not exhaustive but illustrative and thus, is capable of covering even those heads which are not specifically mentioned in the definition. Accordingly, NCLT held that Innovsource had rendered the services for manpower supplies in different locations suggested by Getit.
- Further, considering the e-mails sent by Innovsource and other documents submitted before it, NCLT, held that there was 'default' within the meaning of Section 3 (12) r/w Section 4 and Section 9 of the Code of the amount of Rs. 3,96,16,509/- committed by Getit. Further, NCLT held that the notice required to be sent under Section 8 of the Code was duly sent and delivered by Innovsource, and the copy of the certificate from the financial institution/ bank maintaining accounts of Innovsource satisfied the requirement of Section 9 (3) (c) of the Code. Accordingly, the application was admitted.

Kamal Chemicals

...Applicant/ Operational Creditor

Versus

M/s. T. C. Terrytex Limited

...Respondent/Corporate Debtor

Date of Judgment: 08.01.2018

- The application was filed by M/s Kamal Chemicals ("Kamal Chemicals"), a proprietorship concern, through its sole proprietor Mr. Kamal Kant Singhania claiming to be an Operational Creditor against M/s T.C. Terrytex Limited ("Terrytex").
- Kamal Chemicals had been supplying goods/materials to Terrytex and raised invoices for the period September, 2012 to May, 2017. Payments/part payments received from Terrytex from time to time were duly debited and credited on regular basis in the running account of Terrytex being maintained by Kamal Chemicals. As on November, 2017, balance amount in default of Rs. 70,33,514.60/- was due after adjusting/setting off the amount of purchase made by Terrytex.
- Kamal Chemicals issued demand notice dated 06.11.2017 and the instant application was filed after 10 days of service of demand notice. An affidavit was also filed by Kamal Chemicals to the effect that neither any reply to the

demand notice nor notice of dispute was received. Certificate from financial institution was also filed to the effect that the debt amount had not been credited to Kamal Chemicals.

- Upon issuance of notice, Terrytex appeared and filed objections to the application. It stated that there was an oral arrangement between the parties under which Terrytex was required to supply 'Yarn' against price of chemicals supplied by Kamal Chemicals and outstanding amount was to be paid by Terrytex after making adjustments. However, for the last couple of years, Kamal Chemicals had backed out of the settlement and the same has resulted in huge increase in debt being shown towards Terrytex. Terrytex disputed the amount claimed to be due which according to Terrytex was Rs. 68,20,235/-. It was averred that the application was pre-mature and that Terrytex had never received any demand notice. Further, it was objected that the application does not indicate as to how and when the default can be said to have occurred.
- NCLT dismissed the objection with regard to non delivery of demand notice as the tracking report of the postal department with regard to delivery was conclusive proof of the same.
- NCLT observed that a resolution process can be initiated on occurrence of default. Admittedly, Terrytex had committed default as according to it, there was outstanding liability of Rs. 68,20,235/-. The counsel for Kamal Chemicals stated that it purchased 'Yarn' from Terrytex as the latter was in financial difficulty in addition to part payments.
- NCLT noted that Kamal Chemicals cannot be forced to buy goods from Terrytex and the former has every right to claim the outstanding amount which is overdue. Kamal Chemicals admitted stopped making purchases from Terrytex from May, 2017 and send the demand notice which should have been a sufficient alert for Terrytex. NCLT also rejected the contention that there was 'dispute' as there was no term fixed for payment for the outstanding amount.
- Accordingly, the application was admitted, IRP was appointed and moratorium issued.

We trust you will find this issue of our weekly bulletin useful and informative.

Wish you good luck in all your endeavors!!

Team ICSI IPA