

INSTITUTE OF INSOLVENCY PROFESSIONALS

A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

KNOWLEDGE REPONERE (15th February-1st March, 2020)

Dear Professional Members,

Greetings!

We are glad to inform you that to provide our Professional Members with even better and greater services, and further to enable them to discharge their functions efficiently and effectively, ICSI IIP has entered into an arrangement with M/s Taxmann Publications (P) Ltd. wherein Taxmann has agreed to provide an yearly subscription of its Modules at a discounted rate to ICSI IIP members.

The table below provides details of different modules (as aforementioned) with comparative annual subscription price.

DESCRIPTION	ANNUAL SUBSCRIPTION PRICE (INR) (<u>Excluding GST</u>)*	AGREED ANNUAL SUBSCRIPTION PRICE (INR) (<u>Excluding GST</u>)*
	INR	INR
Taxmann.com - Insolvency & Bankruptcy Code Module - (IBC) Module	5700/-	5000/-
Taxmann.com - Company & SEBI Laws Module	6500/-	5590
Taxmann.com - Indian Act and Rule Module (This module will be provided free of cost as complimentary module on combo purchase of IBC module and Company & SEBI laws module)	5100/-	Combo Complimentary

***Note:** Please note that GST is payable on the aforementioned amount.

Realising the relevance and necessity of using search engines by Professionals, and with a view to encourage them to keep themselves abreast of all latest developments in the Insolvency and Bankruptcy law (and allied laws), the aforementioned arrangement has been arrived at.

Further, the link to Taxmann's website is made available on ICSI IIP's website (www.icsiip.com).

We encourage all our Professional Members to make best use of this opportunity.

NEWS UPDATE

- Application of 37 Central laws (including IBC, 2016) extended retrospectively to J&K

After the act of decommissioning Article 370 and the resultant withdrawal of special status *wrt* Jammu & Kashmir, the Union Cabinet has now made as many as 37 Central Laws applicable to the recently formed Union Territory of Jammu & Kashmir with the spirit to ensure administrative effectiveness and smooth transition, and removing any ambiguity, in line with the Constitution.

The 37 central laws ranging from *Indian Penal Code, 1860* (IPC) to *Income Tax Act, 1961* to *Representation of the People Act, 1951* to the Insolvency and Bankruptcy Code, 2016, will now be applicable (retrospectively from October 31, 2019) to the union territories of for Jammu and Kashmir.

Read more at:

https://economictimes.indiatimes.com/news/politics-and-nation/central-laws-to-apply-retrospectively-in-jk/articleshow/74410116.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

- **MCA notifies the Companies (Winding Up) Rules, 2020; Rules made effective from 1st April, 2020.**

In pursuance of its object to facilitate 'ease of exit' to small firms, the MCA has notified the Companies (Winding Up) Rules, 2020, thus, making it easier for small firms to close down without going to the Tribunal. The Rules provide for a summary procedure for liquidation of companies which have:

- taken a deposit and its total outstanding deposit does not exceed twenty-five lakh rupees; or
- has total outstanding loan including secured loan does not exceed fifty lakh rupees; or
- has turnover upto fifty crore rupees; or
- has paid up capital not exceeding one crore rupees.

The Rules can be accessed at http://www.mca.gov.in/Ministry/pdf/Rules_28012020.pdf.

LIST OF COMPANIES THAT HAVE RECENTLY UNDERGONE LIQUIDATION

S. No	Case Title	Bench	Date of Order
1.	<i>In the matter of Amira Pure Foods Pvt. Ltd.</i>	New Delhi	17.02.2020
2.	<i>In the matter of Space Matrix Limited</i>	Kolkata	17.02.2020
3.	<i>In the matter of Achariya Techno Solutions (India) Pvt. Ltd.</i>	Kochi	19.02.2020

BRIEF OF JUDGEMENTS

S. No	Case Details	Date of Order	Courts	Case link
1	<i>Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs Axis Bank Limited Etc. Etc.</i>	26.02.2020	Supreme Court	https://ibbi.gov.in/uploads/order/907727a75205927c2d2d7689c4ece444.pdf

Brief: Findings of the Apex Court:

1. The following questions shall have to be examined in a given case for a Section 43 application: (i). As to whether such transfer is for the benefit of a creditor or a surety or a guarantor? (ii). As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor? (iii). As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53? (iv). If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date? (v) As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?

2. A combined application under sections 43, 45 and 66 should not have been filed as the degree of examination in preferential and undervalued & fraudulent are different. In a *preferential transaction*, the question of intent is not involved by virtue of legal fiction of deeming provision, whereas for *undervalued transaction* requires a different enquiry under section 45 and 46 in which AA is required to examine the intent if such undervalued

transactions was to defraud the creditors.

3. If a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the Code.

2	<i>Mrs. R. Mangalam v. M/S SPML Infra Ltd</i>	25.02.2020	NCLAT	https://nclat.nic.in/Useradmin/upload/3688582515e4e805286079.pdf
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Brief:The application under Section 7 was challenged as being time barred. The Appellant claimed that in 2004 SEBI passed orders against the Corporate Debtor. The said order was challenged by Respondent before Securities Appellate Tribunal and SAT upheld the findings of the SEBI. The Appellant also claimed that she got the copies available from SAT in 2017. It was claimed that on receipt of knowledge and getting copies from SAT the application was filed. The Appellant had referred to orders of SEBI of 2004 and orders of SAT of 2006 to save limitation.

NCLAT while stating that getting a copy of order of SEBI and SAT was not necessary for moving application under Section 7 of the Code, observed as under,

"The appellant slept over her rights from 1996. Even with some diligence she would have known what market regulator was doing. With due diligence she would have known about the orders passed by SEBI & SAT."

Hon'ble NCLAT while disposing the appeal held that the appeal was hopelessly barred by limitation and there was no error in the Order of the Adjudicating Authority.

3	<i>Neeraj Jain Director of M/s Flipkart India Private Limited v. Cloudwalker Streaming Technologies Private Limited</i>	24.02.2020	NCLAT	https://ibbi.gov.in/uploads/order/5a91ac556e474826ed2c61666394cf08.pdf
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Brief:The question raised in the appeal was whether it is the discretion of the Operational Creditor, or the nature of the Operational Debt, that determines the issuance of notice in Form 3 or Form 4 under Sec 8 (1) of the Code?

NCLAT while deciding on the issue stated that if the demand notice is sent in Form 3, then the Operational Creditor has to submit the document to prove the existence of operational debt and the amount in default along with the notice. The said document may either be invoice or any other document to prove the existence of the operational debt and the amount in default. This situation may arise when the operational debt, is of such nature where no invoice is generated and hence,

"47. Thus, it is clear that the choice of issuance of demand notice u/s 8(1) of the Insolvency and Bankruptcy Code 2016, either in Form 3 or Form 4, under the Insolvency and Bankruptcy Code Application to Adjudicating Authority Rules 2016, depends on the nature of Operational Debt. Section 8(1) does not provide the Operational Creditor, with

the discretion to send the demand notice either Form 3 or Form 4, as per its convenience. The applicability of Form 3 or Form 4 depends on whether the invoices were generated during the course of transaction or not. It is also made clear that the copy of the invoice is not mandatory if the demand notice is issued in Form 3 of the Insolvency and Bankruptcy Code Application to Adjudicating Authority Rules 2016 provided the documents to prove the existence of operational debt and the amount in default is attached with the application.”

NCLAT allowed the appeal and directed the AA to pass an order for costs. to Adjudicating Authority) Rules 2016.

4	<i>Rakesh Kumar Gupta Director, M/S Gupta marriage halls Pvt. Ltd v. Mahesh Bansal Interim Resolution Professional M/S Gupta Marriage Halls Pvt. Ltd</i>	20.02.2020	NCLAT	https://nclat.nic.in/Useradmin/upload/10158010475e54e66aa3e2a.pdf
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Brief: The Appeal was filed by the Appellant in view of admission of an application under Section 7 of Code which was filed by Punjab National Bank (Financial Creditor) against Gupta Marriage Hall Private Limited (Corporate Debtor). The Application of the Financial Creditor was admitted by the Adjudicating Authority.

The main contention raised is that the Bank had already resorted to various proceedings under the SARFAESI Act and had also resorted to proceeding under recovery of debts due to Banks and Financial Institutions Act, 1993. As the Bank resorted to those remedies, the Bank could not have filed an Application under Section 7 of IBC and the Application should have been rejected.

NCLAT while deciding on the issue relied on the matter of *Pegasus Assets Reconstruction Pvt. Ltd. Vs Haryana Concast Ltd. and Anr.*, and *Aditya Kumar Jajodia Vs. Srei Infrastructure Finance Ltd. and Ors.*, to conclude that,

“The pendency of actions under the SARFAESI Act or actions under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 does not create obstruction for filling an Application under Section 7 of Insolvency and Bankruptcy Code 2016, specially in view of Section 238 of IBC. The Application is more to bring about a Resolution of Corporate Debtor than any penal action or any recovery proceedings. We do not find any substance in the Appeal.”

The appeal was dismissed.

5	<i>Vyomit Shares Stock & Investments Pvt. Ltd. Vs. Securities and Exchange Board of India (SEBI)</i>	15.02.2020	NCLAT	https://nclat.nic.in/Useradmin/upload/18271877195cdd4d2d36dab.pdf
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Brief: The 'Corporate Applicant' filed an application u/s 10 of IBC for initiation of CIRP against it. NCLT, Mumbai Bench by impugned order dated 12th February, 2019 rejected the application on the ground that the CD is earning sufficient income. Therefore, prima facie, it appeared that there was no reason for the Appellant (CD) to declare it eligible for filing an application u/s 10 of IBC.

Hon'ble NCLAT also observed that AA (NCLT, Mumbai Bench) had refused to accept SEBI as an Operational Creditor. NCLAT refused to accept this issue in light of the case of *Pr. Director General of Income Tax (Admn. & TPS) v. M/s. Synergies Dooray Automotive Ltd. & Ors. etc., Company Appeal (AT)(Insolvency) No. 205 of 2017 etc.* wherein it was stated that 'Operational Debt' in normal course means a debt arising during the operation of the Company (Corporate Debtor).

NCLAT concluded that,

"However, from the record, it appears that there is income and profit generated by the Company in the financial year 31st March, 2017, we are not inclined to interfere with the impugned order. The appeal is dismissed. No Costs."

The appeal was thereby dismissed.

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

Wish you good luck in all your endeavors!!

Team ICSI IIP

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