

# Interface Between Tax Laws And IBC

**Ms. Devashree Awasthy<sup>1</sup>, Dr. Mahesh Koolwal<sup>2</sup>**

<sup>1</sup>Research Scholar JECRC University.

<sup>2</sup>Dean & Professor, School of Law JECRC University.

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## ABSTRACT

The Insolvency and Bankruptcy Code, was instituted with the essential goal of restoration of monetarily bothered corporates and became effective on first December 2016. The sanctioning of the Insolvency and Bankruptcy Code, 2016 ("Code") has had huge consequences on the corporate world. Over the long run, the Code has seen a complex expansion in case since the Code achieved a change in outlook from the account holder in-control strategy to a bank driven process. The arrangements of IBC have an superseding impact over different institutions if there should arise an occurrence of any consistency. To give accord to the IBC, corrections have been made in various regulations in particular the Companies Act, Personal Tax Act, SARFAESI Act, and so on Presently, it is relevant to look at the interaction of duty regulations with the IBC. The vendors and the Resolution Professionals have once in a while thumped on the entryways of the Adjudicating Authority to discover the privileges and the liabilities of the partners. The chief inquiry whether the IBC beats the Personal Tax Act and the Goods and Services Act, can be broke down considering Section 238 of the IBC, 2016 which expresses that the arrangements of the IBC supersedes any remaining authorizations to the degree they are conflicting with the arrangements of the Code. The inquiries which are thought about in this article are whether the legal levy draw near the importance of functional obligations or not and what is the treatment of the duty regulations opposite the IBC.

While the Goods and Service Tax (GST) has been generally depicted as free India's greatest expense change after the financial advancement of 1991, the Insolvency and Bankruptcy (Code), one more milestone contemporary regulation, is simply starting to be surveyed for adequacy. Appropriately hailed as a significant official change, the Code is relied upon to determine the predominant nonperforming resources (NPA) emergency, the resultant logjam in accessibility of credit, and the weighty effect on development. This paper would briefly trace the development of the Insolvency and Bankruptcy laws in India, elaborate the interface between various tax laws and analyze some of the major jurisprudential developments. At the end, some major areas which requires further progress or the unfinished agenda will be brought forward. Paper intends to provide a general overview of the modern tax laws in India.

**Keywords:-** Income Tax, Gst, IBC, Corporate Insolvency, Bankruptcy, India

## I. INTRODUCTION

"Caste Section 53 of the Code accommodates a cascade component which endorses for a need of installment to all class of banks of the organization going through liquidation. Further, Under the Code, according to Section 5(21), neglected charge levy of the Corporate Debtor like personal assessment, Goods and Service Tax and so forth are viewed as functional obligations.<sup>1</sup> In the case of LML Ltd., In re2 , the NCLT ruled that a capital gain tax has to fall under operational debt and has to be recovered in accordance with the waterfall mechanism provided under the Code.

Subsequent to rejecting, changing, and combining plenty of regulations connecting with Insolvency, <sup>2</sup> goal and liquidation of individual and business undertakings the Indian government presented a creative piece of regulation for example the IBC 2016. The Indian Contract Act, 1872, The Code of Civil Procedure, 1908, wrapping up arrangements under the Companies Act, 1956, Sick Industrial Companies (Special Arrangements), Act, 1985, Recovery of Debt Due to Banks and Financial Institutions Act, 1993, Securitization, Securitization and Recreation of Financial Assets and Requirement of Security Interest Act, 2002(SARFASI) and the Corporations Act of 2013 was not ending up exceptionally accommodating for organizations in regard of obligation rebuilding, resource seizure and deal for reimbursement of exceptional advances, or organization reconstitution.<sup>3</sup>

Additionally, the Presidency Towns Insolvency Demonstration of 1909 (PTI ACT) and the Provincial Bankruptcy Act of 1920 (PI Act), which administer individual bankruptcy goal, didn't satisfy the changing requirements of the time. This has hampered the loan specialist's certainty and the advancement of India's credit markets. To address the upsetting deficiencies in India's existing staggered Insolvency regulations, the government instituted the Code, a solitary piece of regulation that permits obligation ridden organizations to redesign and resolve their obligations to augment the worth of their resources in a sensible time span. The Code would upgrade lawful lucidity and simplify it for partners who are impacted by business disappointment or obligation inadequacy to uphold reliable also cognizant arrangements. IPs is a managed group of specialists, who play out a huge number of exercises to finish the Insolvency Goal Process, are among the most significant mainstays of the Code.

The government and the Reserve Bank of India (RBI) have, inter alia, taken the following initiatives to ensure that the law is put to effective use:

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<sup>1</sup> Author is a student at Vivekananda Institute of Professional Studies, GGSIPU, India.

<sup>2</sup> M. Koolwal and D. Awasthy "LEGAL LANDSCAPE OF INSOLVENCY AND BANKRUPTCY IN INDIA" Vidyabharati International Interdisciplinary Research Journal (Special Issue) ISSN 2319-4979

<sup>3</sup> Situation involved an employee at NCLAT detected COVID positive and due to which NCLAT was closed. See Marathe Hospitality vs. Mahesh Surekha, SLP 8139 of 2020 decided on 10.07.2020

- Amendment to the Banking Regulation Act to enable RBI to ensure that banks file the details of defaults under the Code;
- An initial list of companies prepared by RBI that accounts for at least 50 percent of total NPAs.

Before introduction of the Code, legislations relating to insolvency and bankruptcy proceedings were many but scattered, as there were multiple legislations dealing with such proceedings:

- The Companies Act, 2013
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- The Sick Industrial Companies (Special Provisions) Act, 1985
- The Presidency Towns Insolvency Act, 1909
- The Provincial Insolvency Act, 1920
- The Recovery of Debts Due to Banks and Financial Institutions Act, 1993

The Code targets solidifying all current bankruptcy related regulations as well as correcting various regulations covering indebtedness suggestions. Per Section 238 of the Code, the Code overridingly affects any remaining regulations connecting with indebtedness and insolvency. There are a few potential issues required while going through goal under the Code. It is basic to comprehend these while outlining the goal plan. Drafting a goal plan is important since there could be potential duty liabilities in the possession of acquirer due to rebuilding of shareholding or hair style of liabilities.<sup>4</sup>

## II. INCOME TAX LAWS

On an exposed examination of Section 178 of the Income Tax Act, 1961, one might say that this arrangement projects an obligation on the Liquidator to accommodate installment of duty levy in need and furthermore makes a limitation on splitting of resources except if charge duty are paid. Segment 178 likewise has a non obstante statement which gives it an abrogating impact over any remaining regulations.<sup>5</sup>

In any case, at the hour of order of IBC, the council has obviously changed subclause 6 of Section 178 to make this non-obstante statement subject to the arrangements of the IBC.

This infers that where liquidation is done under IBC, Section 178 isn't pertinent and charge overdue debts are paid according to the cascade instrument endorsed under Section 53 of the Code.<sup>6</sup>

In the case of Om Prakash Agarwal Vs. Boss Commissioner Of Income Tax (TDS) and Anr. - NCLT Principal Bench on 8 February 2021, it was held that the derivation of Tax at source under Section 194-IA of the IT Act doesn't mean evaluation and raising interest for assortment of assessment by the Department. Assortment of assessment will emerge solely after passing

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<sup>5</sup> M. Koolwal and D. Awasthy, IBC 2016- Ways Ahead Strengthening The Process, Elementary Education 19 (4), 5038-5047

<sup>6</sup> Company Appeal (AT) (Insolvency) No. 205 of 2017

requests under the IT Act resulting to documenting of Income Tax Return by the assessee. Hence, the derivation of TDS doesn't equivalent to installment of Government contribution in need to different banks since it's anything but a Tax interest for acknowledgment of Tax levy. It is the obligation of the buyer to credit TDS to the Income Charge Department.

Notwithstanding, oppressed by the aforementioned request, the Appellant documented an allure before the NCLAT. The NCLAT held that as per Section 178(3) and (4), Income Tax Department has to be treated as a got lender however by the uprightness of revision in 178(6), the entire of Segment 178 has no application to liquidation procedures under IBC.

According to Section 194 IA of the IT Act, 1% TDS is recuperated in need to different loan bosses of the transferor, which is fractional capital addition charge, while,<sup>7</sup> Section 53(1)(e) of the Code in cascade instrument gives that the Government levy comes fifth arranged by need. Consequently, in respect to recuperation of the Government duty (counting Income Tax) from the Company in Liquidation under the Code, there is irregularity between Section 194IA of the IT Act and Section 53(1) (e) of the Code. Therefore, by goodness of Section 238 of the Code, Section 53 (1)(e) of the Code will have superseding impact on the arrangements of the Section 194 IA of the IT Act.

Hence, in conclusion one might say that the allowance of duty at source implies raising interest for assortment of expense by the Department. TDS under Section 194 IA is a development capital increase charge, recuperated through transferee on need with different banks of the organization. Subsequently, it is conflicting with the arrangement of Section 53(1)(e) of the Code and by temperance of Section 238 of the Code, the arrangement of Section 53(1)(e) will have superseding impact.

The Hon'ble Supreme Court in **Commissioner of Income-Tax V. KTC Tires (India)**<sup>3</sup> dismissed the dispute that the capital increases charge payable by a corporate debt holder to the Union of India should be treated as liquidation costs and, along these lines, should be paid first, even before the contribution of gotten banks and workers are released. The fact that the Code does makes it hence summed up not treat the income charges as liquidation costs.

Also, in **Pr. Director General of Income Tax (Admn. & TPS) Vs. M/s. Synergies Dooray Automotive Ltd. & Ors** <sup>4</sup>, it was held that 'Operational Debt' in normal course means a debt arising during the operation of the Company ('Corporate Debtor'). The 'goods' and 'services' including employment are required to keep the Company ('Corporate Debtor') operational as a going concern. If the Company ('Corporate Debtor') is operational and remains a going concern, only in such case, the statutory liability, such as payment of Income Tax, Value Added Tax etc., will arise. As the 'Income Tax', 'Value Added Tax' and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all

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<sup>7</sup> Situation involved an employee at NCLAT detected COVID positive and due to which NCLAT was closed. See *Marathe Hospitality vs. Mahesh Surekha*, SLP 8139 of 2020 decided on 10.07.2020

statutory dues including 'Income Tax', 'Value Added Tax' etc. come within the meaning of 'Operational Debt'.<sup>8</sup>

In the previously mentioned case, it was in this manner held that 'Personal Tax Department of the Central Government' and the 'Business Tax Department(s) of the State Government' and 'nearby power', who are entitled for levy emerging out of the current regulation are 'Functional Creditor' inside the significance of Section 5(20) of the 'I&B Code'.

**In Leo Edibles and Fats Ltd. V. The Tax Recovery Officer (Central) Income Tax Office, Hyderabad and others** 5, while choosing the idea of safety interest of Government levy, the High Court of Telangana and Andhra Pradesh clarified that the Government duty like annual expense levy are unstable lenders and loath the situation with a got leaser. The duty contribution, being a contribution to the Consolidated Fund of India and of the States, obviously come quite close to area 53(1)(e) of the Code. Commonly, the Government is a functional loan boss. Nonetheless, the Government or any of its organizations could come extremely close to a monetary bank, on the off chance that the idea of obligation is such.<sup>9</sup>

### **III. GST LAWS**

Under Section 88 of the Central Goods and Services Act, 2017, when any organization is being twisted up or exchanged, the "vendor" selected will give suggestion of his arrangement to the Commissioner and the Commissioner consequently will tell the outlet inside three months from the date on which he gets the suggestion of his arrangement, any sum which is payable by the organization.<sup>10</sup>

Segments 88(3) of CGST Act, 2017 joined the standard of vicarious obligation of the overseers of the debt holder organization. It gives that when any privately owned business is exchanged and any expense, interest not entirely set in stone under this Act remains unrecovered, then, at that point, the chiefs of such borrower organization will be mutually and severally obligated for the installment of such expense, interest or then again punishment.

#### **Treatment of GST on Sale of Assets under Liquidation**

According to the arrangements of the IBC ("Code"), when a goal plan is proposed by the goal candidate ("RP") for the indebtedness of the corporate debt holder ("Album"), the RP makes different expected strides to secure and protect the worth of the property of the CD and furthermore deal with the tasks as a going concern. With regards to deal or move of the business as a going concern, the exchange among GST and IBC expects us to ask whether there is necessity to release GST responsibility on such exchanges. The Authority for Advance Rulings (Karnataka), on account of M/s Rajashri Foods Pvt Ltd analyzed this by talking about, whether the exchange of business as a going concern could be treated as supply under GST? In the event

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<sup>8</sup> 2017 SCC OnLine NCLT 1685.

<sup>9</sup> M. Koolwal and D. Awasthy, IBC 2016- Ways Ahead Strengthening The Process, Elementary Education 19 (4), 5038-5047

<sup>10</sup> 2017 SCC OnLine NCLT 1685.

that indeed, whether it could be a stock of labor and products?<sup>11</sup> Alluding to the Schedule II of the Central Goods and Services Tax Act, 2017 ("GST Act") which contains a rundown of exercises to be treated as supply of merchandise or then again supply of administrations, the Authority arrived at the resolution that according to S.no. 4(c), where any business is moved as a going concern, such exchange doesn't add up to supply of products. Along these lines, since the exchange will not be treated as a stock of merchandise, GST wouldn't be appropriate on the exactly.

Also, according to the Notification No. 12/2017-Central Tax (Rate)<sup>2</sup>, dated 28 June 2017 No GST is payable on "administrations via move of a going worry, overall or a free part thereof". A similar inquiry emerges when we analyze whether the Sale of Assets under Liquidation (Slump Sale or Piece dinner Sale) draws in Liabilities under the GST Act or, at the end of the day, we want to look at whether the Sale of Resources under liquidation bring about an inventory of merchandise and additionally benefits or both inside<sup>12</sup> the significance of "supply" as characterized under Section 7 of the GST Act. As of late, the Authority of Advance Ruling (West Bengal) on account of M/s Mansi Oils and Grains Pvt Ltd.<sup>3</sup> (Mansi Oil) (click here), in the wake of alluding to S.no. 4(a) of Schedule II of the GST Act, reasoned that, since, merchandise framing part of the resources of a business are moved or discarded by or under the bearings of the individual carrying on the business so as no more to shape part of those resources, regardless of whether for a thought, such move or removal is a stockpile of products by the individual, GST liabilities will apply.

### **What are the implications under GST regime?**

Transparency in IBC provisions with respect to GST implications and other aspects triggering other indirect tax implications is required. Some of them have been discussed below.

### **GST impact on business transfer:**

Per the Code, "goal plan" signifies an arrangement proposed by goal candidate for indebtedness of the corporate account holder as a going concern. Further, the interval goal proficient is expected to take fundamental activity to secure and safeguard the worth of property of the corporate account holder and deal with the activities of the corporate borrower as a going concern. In regard of move/offer of business as a going concern, an inquiry emerges with respect to whether there is a necessity to release GST responsibility on such exchange/offer of business. To respond to this inquiry, it is to be discovered whether move of business as a going concern could be treated as supply under GST? If indeed, whether it could be a stock of labor and products?

Plan II of the Central Goods and Services Tax Act, 2017 gives a rundown of exercises to be treated as supply of products or supply of administrations. Sequential No. 4(c) of this timetable expresses that, where any business is moved as a going concern, such exchange doesn't add up to supply of merchandise. Since the said exchange will not be treated as supply of merchandise, no GST would be appropriate. Further, plan II doesn't cover the exchanges including move of

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<sup>11</sup> Company Appeal (AT) (Insolvency) No. 205 of 2017

<sup>12</sup> Author is a student at Vivekananda Institute of Professional Studies, GGSIPU, India.

a business as a going concern. No GST is payable on "administrations via move of a going worry, overall or a free part thereof", via an exclusion notification.

The above view has likewise been maintained by the Authority for Advance Rulings, in Karnataka. Given the abovementioned, GST isn't payable on move of business as a going worry, as the equivalent doesn't qualify as supply of products. Likewise, administrations in regard of move as a going concern, are generally excluded from GST.

### **GST implications on activities of resolution professional:**

The Code characterizes "goal proficient" as an indebtedness proficient delegated to lead the corporate

indebtedness goal process and furthermore incorporates a break goal proficient. Under the GST regulation, bankruptcy, and receivership administrations are grouped under the heading 9982 40 and are chargeable at the GST pace of 18%. Given the abovementioned, administrations given by goal proficient/indebtedness expert will be chargeable to appropriate GST (IGST, CGST and SGST/UTGST). Further, if there should arise an occurrence of liquidation of an organization, the vendor would sell the unflinching and portable properties, furthermore significant cases of the corporate indebted person in liquidation, via public sale or private agreement. The vendor additionally has the ability to move such property to any individual or body corporate, or to sell something very similar in bundles in such way as might be determined. Such exchanges would be treated as supply of products (other than significant cases) under the GST regulation; henceforth, pertinent GST would be expected to be charged on such supplies.

### **IV. CONCLUSION**

The treatment of legal contribution will be according to goal plan endorsed by the Committee of Lenders. Once, the goal plan, as endorsed by the Committee of Creditors, is supported by the Adjudicating Authority the equivalent will be restricting on all partners associated with the goal plan including government specialists to whom legal contribution are payable. In this manner, the destiny of legal contribution payable to government specialists will be at first chosen by the Committee of Creditors and from that point by the Adjudicating Authority when it considers the goal plan. Regardless of whether legal levy are given vital in logical inconsistency with Section 53 of the Code, it would expel the entire order of reimbursement of duty and would be profoundly inconvenient to the freedoms of the got loan bosses whose particular treatment is the foundation of the Code.

Taking everything into account, one might say that charge contribution don't have a need over got banks or even unstable monetary lenders. One thing is sure that the broadness of the assessment regulations and the conventional need of the cases under it have assumed a lower priority post the sanctioning of the Insolvency and Bankruptcy Code.

The Code has started an interesting journey and is a step in the right direction. It appears that the intention of the legislature has been to not burden a stressed company with tax levies, while it is undergoing reorganisation for survival. While the Finance Act 2018 has provided some relaxation, there exist various areas where more clarifications or relaxations could be provided.

There are various issues/questions being faced by corporates/investors who embark on acquisition of these assets. These clarifications could go a long way in providing certainty to the acquirer and support the overall intention of timely, faster, and efficient resolution of NPAs in India.

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