

## RECOVERY OF GST DUES OF COMPANIES/LLP AND ATTACHMENT OF ASSETS UNDER INSOLVENCY AND BANKRUPTCY CODE (IBC), 2016 –AN OVERVIEW

In the light of provisions of the IBC (Code), 2016 this article provides an overview of the legal procedures and practical approaches for recovery of GST dues from the Corporate Debtor and remedies/shield available to the Corporate Debtor under Insolvency and Bankruptcy Code (IBC), 2016. Read on to know more.....



### Procedure to Recovery of GST Dues in CGST Act, 2017 V/s IBC Code, 2016:

The detailed procedure to recover the tax dues from defaulter taxable person including companies /LLP has been provided under section 78 and 79 of the CGST Act, 2017 which is reproduced as below:.

**Section 78:** Any amount payable by a taxable person in pursuance of an order passed under this Act shall be paid by such person within a period of three months from the date of service of such order failing which recovery proceedings shall be initiated:

*Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within such period less than a period of three months as may be specified by him.*

**Section 79: (1)** Where any amount payable by a person to the Government under any of the provisions of this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely: —

(a) the proper officer may deduct or may require any other specified officer to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other specified officer

(b) the proper officer may recover or may require any other specified officer to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the proper officer or such other specified officer;

The term '**operational debt**' in the normal course means a debt arising during the operations of a company. As dues towards Income Tax, VAT, GST and other Statutory levies

arise when a company is operational, it has a direct nexus with the operations of a company and would therefore be considered as operational debts. As all statutory dues including income tax and GST fall within the meaning of 'operational debt' and consequently, the GST shall qualify as 'operational creditor' under Insolvency and Bankruptcy Code, 2016. **Hon'ble NCLAT, New Delhi in Company Appeal (AT)(Ins) No. 405 of 2019** has held that Central Govt. /State Govt. dues are operational debt .

In a recent judgement passed on March 20, 2019 in the case of ***Pr. Director General of Income Tax (Admn. & TPS) vs M/s. Synergies Dooray Automotive Ltd. & Ors.*** (clubbed with certain other company appeals), NCLAT held that statutory dues such as income tax, sales tax, value added tax and various other taxes fall within the definition of 'operational debt' under section 5(21) of the Code and the statutory authorities claiming the aforesaid dues will be treated as operational creditors under the Code.

The Hon'ble NCLT, Chennai Bench in case of ***The Asst. Commissioner (ST) Kilpauk Assessment Circle & 12 Ors*** also held that the Tax Authorities fall within the ambit of operational creditors and they can recover the GST dues, for the period prior to the CIRP, by making a claim to the resolution professional against the corporate debtor as per the provisions of IBC.

From the reading of above said case laws, it is concluded that the GST dues are operational debt and the Proper officials can file the claim against Corporate Debtor (Company/LLP) in the capacity of operational creditors as per provisions of section 8 and section 9 read with regulation 7 of the IBC. Thus, the proper officer from Central Govt. /State Govt. may recover GST dues from the Corporate Debtor if the resolution plan is approved by the NCLT under section 31 read with regulation 39 of the IBC. If the corporate debtor is under liquidation process, then recovery will be made out of sale proceeds of liquidation assets in the order of priority to other creditors as per provisions of section 53(1)(e) of the IBC.

**Meanwhile, some questions may arise as to fate of recovery proceedings initiated or suit filed by GST proper officers against Corporate Debtor undergoing CIRP and pending GST dues even after disposal of claims under IBC as in some cases, notices of recovery of GST are being issued by proper officers even after completion of resolution plan under section 31 of the IBC. The said queries are dealt as below:**

**Q1.** Firstly, whether any suit or legal proceeding filed by the GST Tax officers of Central/State Govt. against Corporate Debtor before commencement of Corporate Insolvency Resolution Process under IBC, are tenable under IBC Code, 2016 after the commencement of CIRP against Corporate Debtor?

**A1: As per section 14 of the IBC, 2016** When an application is accepted by the Adjudicating Authority (NCLT) against Corporate Debtor , a Moratorium period is declared and all suits or

legal proceedings against the Corporate Debtor are held in abeyance to allow time to the entity to resolve its status.

**Q2.** The next question arises now is whether recovery of GST dues shown as recoverable by the proper officer of Central Govt./State Govt. even after settlement of claim under the IBC is tenable under the law? It is seen that tax recovery officers keep sending the notices of recovery even after resolution plan is approved by the NCLT. Whether, they are justified in sending notices after resolution plan as per provisions of section 31 read with regulation 39 of IBC is duly approved by the NCLT?

**A2:** Section 31 of IBC specifically covers the central and state government. The resolution plan once approved will be binding on all financial creditors, operation creditors, central and state governments.

Further, in case of “**ULTRA TECH NATHDWARA CEMENT LTD., (FORMERLY KNOWN AS BINANI CEMENTS LTD.) vs. UNION OF INDIA**” The appellant filed an appeal under Article 226 of the constitution of India. Once the resolution plan is approved, there can be no further demand. Applicant request to quashed the notices issued by department and bar any further issuance of notices. The hon’ble Rajasthan high court decided in favour of the applicant. **The notices issued by the department were quashed.**

**Q3: Thirdly, whether provisions of provisional attachment of property of the defaulter taxable person as per provisions of section 83 of the CGST Act, 2017 are applicable to corporate debtor undergoing CIRP under Insolvency and Bankruptcy Code, 2016.**

**A3:** section 83 of GST Act read with Rule 159 of [Central Goods and Services Tax Rules, 2017](#) (CGST Rules) talks about the provisional attachment of property of taxable person to protect the interest of revenue in case of pendency of any proceeding under sections 62,63,64,67,73 and 74 **except the IBC.**

Provisions under **Section 82** of the Central Goods and Services Tax (CGST) Act, 2017 relating to “**Tax to be First Charge on Property**”, are as under:

Notwithstanding anything to the contrary contained in any law for the time being in force, **save as otherwise provided in the Insolvency and Bankruptcy Code, 2016**, any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person.

Moreover, **Section “238 of IBC** provides for its overriding nature on any other law for the time being in force. It will provide immunity from any proceeding in any Law.

“The provisions of this Code shall have effect, **notwithstanding anything** inconsistent therewith contained in **any other law for the time being in force** or **any instrument** having effect by virtue of any such law. “

**Q4:** Lastly, whether the Corporate Debtor under CIRP is liable for prosecution under section 137 of CGST/SGST Act, 2017 for any offences done by it before CIRP( Corporate Insolvency Resolution Process) ?

**A4:** Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

**Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:**

**Provided further that every person who was a “designated partner” as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, or an “officer who is in default”, as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor’s liability has ceased under this sub-section.**

**I hope that the interface between this GST Vs IBC will be easy to decide in the future.**

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