VIRTUAL INSOLVENCY CONFERENCE

An Initiative by Center for Insolvency and Bankruptcy

INTERFACE BETWEEN IBC & GST

CONFERENCE PROCEEDINGS

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GRADUATE INSOLVENCY PROGRAMME

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Agenda 1:Treatment of GST on Sale of Assets under Liquidation

As per the provisions of the IBC ("Code"), once a resolution plan is proposed by the resolution applicant ("RP") for the insolvency of the corporate debtor ("CD"), the RP takes various required steps in order to protect and preserve the value of the property of the CD and also manage the operations as a going concern.

When it comes to sale or transfer of the business as a going concern, the interplay between GST and IBC requires us to inquire whether there is requirement to discharge GST liability on such transactions. The Authority for Advance Rulings (Karnataka), in the case of M/s Rajashri Foods Pvt Ltd1 (Click here), examined this by discussing, whether the transfer of business as a going concern would be treated as supply under GST? If yes, whether it would be a supply of goods or services?

Referring to the Schedule II of the Central Goods and Services Tax Act, 2017 ("GST Act") which contains a list of activities to be treated as supply of goods or supply of services, the Authority reached the conclusion that as per S.no. 4(c), where any business is transferred as a going concern, such transfer does not amount to supply of goods. Therefore, since the transaction shall not be treated as a supply of goods, GST would not be applicable on the same.

Moreover, as per the Notification No. 12/2017- Central Tax (Rate)2 (Click here), dated 28 June 2017 No GST is payable on "services by way of transfer of a going concern, as a whole or an independent part thereof".

The same question arises when we examine whether the Sale of Assets under Liquidation (Slump Sale or Piece meal Sale) attracts Liabilities under the GST Act or, in other words, we need to examine whether the Sale of Assets under liquidation result in a supply of goods and/or services or both within the meaning of "supply" as defined under Section 7 of the GST Act.

Recently, the Authority of Advance Ruling (West Bengal) in the case of M/s Mansi Oils and Grains Pvt Ltd.3 (Mansi Oil) (click here), after referring to S.no. 4(a) of Schedule II of the GST Act, concluded that, since, goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person, GST liabilities will apply.

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[1] Advance Ruling No. KAR ADRG 06 / 2018. (April 23, 2018) Available at: http://gstcouncil.gov.in/sites/default/files/ruling-new/06-Rajashree%20Foods-AAR-order.pdf

[2] Notification No. 12/2017- Central Tax (Rate) (June 28, 2017) Available at: https://www.cbic.gov.in/resources/htdocs-cbec/gst/Notification12-CGST.pdf

[3] Advance Ruling No. 024/WBAAR/2020-21 (June 29, 2020) Available at: http://gstcouncil.gov.in/sites/default/files/ruling-new/WB_AAR_02_2020-21_29.06.2020_MOGPL.pdf

The CD in this case was not a going concern, and the liquidator was required to sell its assets like plant and machinery, office equipment and furniture etc, and all under GST attract different rates. At the time of liquidation, the liabilities to discharge dues does not shift to the Buyer and, the liquidator continues to be responsible for them. Therefore, as per the judgement, the resolution professional, since he was selling the goods, had to be registered under the GST regime, and these liabilities become part of the liquidation costs.

It is interesting to note that the CD in this case had ceased its business operations long back under the VAT regime and therefore did not have any registrations under GST Act.

Experts believe that this ruling might have the effects of discouraging stakeholders, as big share of distributions from the sale of the assets of an ailing company will go towards the tax liabilities. Moreover, now Liquidator will be responsible for all compliances under the GST.

Another notable case in this respect, which in some sense differs from the above-mentioned judgement, is Pooja Bahari, Liquidator & othrs vs. Gee Ispat Pvt Ltd.4 (Pooja Bahari) (click here) This case discussed whether the liquidator was required to deposit the capital gains and include it as a liquidation costs to be defrayed in the first instance.

So, while the courts in Mansi Oil case held that, liabilities will become part of the liquidation costs, on the other hand, in the case of Pooja Bahari, concerning capital gains dues under the Income Tax Act, the court held that the tax liability arising out of the sale shall be distributed in accordance with the waterfall mechanism under Section 53 of the IBC as Government dues and not as part of the liquidation costs.

Discussion

In conclusion, experts believe that, as far as the sale of assets is concerned, if the transaction is being done in the form of going concern, then a very clear-cut GST exemption exists, although the issue of what exactly constitutes a going concern will still arise as there is no fixed definition and it will be largely left to judicial. However, if its slump sale or a piecemeal sale, in case of transfer of immovable properties, no GST will be applicable, while in the case of transfer of movable property GST liability will be attracted, and therefore it is important for the RP to keep this liability in mind. Regarding the nature GST arising, it is pertinent to note that it is not a claim on liquidation of assets, rather it's a liability arising during the process of liquidation itself. RP should, therefore, be cautious when the liquidation is happening about the uncertainty of whether it will qualify as a

[4] CA666/2019 in (IB)-250(ND)/2017 (NCLT, New Delhi) (October 22, 2019). Available at: https://ibbi.gov.in/uploads/order/45768a234b1517b1f12a186d23368459.pdf

going concern sale or a piece meal sale, because if it's a case of piece meal sale he may be exposing the CD to the GST liability. How exactly a going concern sale is defined is still a grey area and more clarity is required from the lawmakers.

Agenda 2: If there are any offences under GST Act, whether the Resolution Professional (RP) is personally liable or subject to criminal/civil liability in case of non-compliance with the provisions.

Discussion

The discussion on this agenda was majorly bifurcated into the following points:

- Responsibility of RP enshrined under I&B Code, 2016
- Comparison on the responsibility of an Independent Director (ID) to that of an RP, will the corporate debtor bear the penalty cost imposed upon the RP, lastly what is the distinction between good faith versus bad.

Responsibility of Resolution Professional enshrined under I&B, Code, 2016: RP is a trustee, custodian and he works in a fiduciary capacity, he is appointed to step in the shoes of the board of director and is wholly and solely responsible in running the company, nursing it back to health or finding ways to preserve the value of the company during Corporate Insolvency Resolution Process (CIRP) period. The statutory compliances have amended Sec 17(2) of the I&B, Code, 2016, which states that all the statutory compliances are now the responsibility of the RP. Therefore, whether its GST or any other Act the RP cannot escape his duties. A RP cannot be personally liable or a criminal/civil liability can be imposed, cause the issue will be, if we impose any criminal liability then how will the RP run the Company as a going concern. The I&B, bill 2015 stated that RP had to deposit a security deposit only then would he be appointed as an RP, the joint parliamentary committee stated that such provisions cannot be incorporated in the Code and basis on the joint parliamentary committee recommendation on the provision was deleted. Therefore, a RP has to be faithful to the role which is assigned to him and he is expected to exercise ordinary due diligence that is expected to be discharged by a board.

The due diligence which is expected from the RP, whether its equivalent to that of an ordinary due diligence or is it a case of professional due diligence. Many UK ruling on Insolvency Law states that RP is a professional and professional negligence and ordinary negligence are quite different. RP is bought as a professional to run the company. Thus, he should be considered as a professional who is responsible to run the company.

Another moot point is whether the RP can be held liable by the corporate debtor, considering that there are two parts civil and criminal liability. A civil liability will mean a financial outgo, example delay in filing GST return and there is an interest that is charged, clearly that will be a liability on the corporate debtor and not individually on the RP. Therefore, the question is that who would be bearing the cost of the penalty which will be imposed, whether the cost will be borne by the RP or by the corporate debtor.

Comparison on the responsibility of an Independent Director (ID) to that of an RP, will the corporate debtor bare the penalty cost imposed upon the RP, lastly what is the distinction between good faith versus bad.

An independent director of the company, also hold up under different provisions of the law, for any default on the part of the company, the ID can be held liable. The question is whether an ID is expected to exercise ordinary due diligence, which is required by an ID in taking the decisions at board level. Even if the RP comes under Sec 233 of the I&B, code therefore does not give him a blanket immunity. The view will be that RP would not be liable for any financial liability but he can be held criminally liable if it can attribute to malfeasance, gross negligence on his part. There have been cases where the Enforcement Directorate (ED) has carried out search, at the premises of the RP, if the RP has acted in collusion with the erst while management or the RP is guilty of fraud or neglect the immunity in sec 233 of the I&B Code, 2016 would therefore not cover the action of RP. ID is not responsible to make the company work as a going concern, RP has to run the entire show and claim to be in the same position of an ID. The reference to an ID was given in this discussion was that the ID should act in good faith, good faith will only rise and a RP is supposed to act in the highest standard of due diligence.

Whether the penalty cost on the company will be a cost on the corporate debtor, the definition of CIRP cost coming from Sec 5 (13) of &B Code, 2016 talks about five elements of the CIRP cost and all cost are well defined and penalty cost is not a part of CIRP cost, question of treating any penalty as a part of CIRP cost is not valid, unless approved by the corporate debtor. CIRP cost states that penalty is not included, and one cannot define the words exhaustively, the law does not take care of all the situation and no penalty is civil penalty. The cost can also arise while carrying out the actions in bona fide consideration, the financial penalty which is levied.

Ordinary due diligence is the word that we use with respect to the action taken by the person and the standard of due diligence will depend on your qualification or role. For a professional, ordinary due diligence is that which is expected while he is carrying out his duties. The one who fits into the dimensions of ordinary changes. Coming to the question of good faith versus bad faith, the law does not define what is bad faith, but what can be interpreted is that it will be lack of good faith. The question is that on whom

do u put the onus to act in good faith, does the RP has to demonstrate that the action was in good faith, or does the authority alleging lack of good faith to proves it. The question is upon whom does the onus lie upon, another view which can be taken is whether the action was in good faith or motivated by extraneous consideration.

Sec 233 of I&B Code, 2016 is a unique section which clearly states that protection of the acts done in good faith by an RP. Statutory compliance means steps to take the compliance, eventually an RP must show that he has attempted to comply with the provisions. However, if RP is working in good faith and has taken all steps then he cannot be held liable for civil or criminal liability. Sec 233 of I&B Code, 2016 states that no prosecution shall lie against an RP, and an RP can take good faith as an umbrella. The Sec 137 of the GST Act is a section relating to compounding offence and can prosecute a person responsible for defaults, but if an RP does an act in good faith then he will be exonerated. The RP in such instance will have to demonstrate that he has acted in a bona fide manner and has exercised due diligence and carried out the duties which were expected by him. Further that no gross negligence or maleficence was conducted on his part which lead to default or inaction, based on that situation only an RP can claim immunity from prosecution.

Question of good faith would depend upon the facts and circumstances of each case. Lack of good faith is not same as having bad faith.

Agenda 3

To unburden the Corporate Debtor undergoing CIRP from past liabilities, the CBIC vide Notification 11/2020 dated 23rd March (read with Circular No. 134/04/2020-GST and 138/08/2020-GST) notified that such CDs shall be treated as distinct persons and shall follow special procedures regarding registration, filing of return, and availing ITC. The move of the GST Council in notifying such rules can be seen in the light of the difficulties faced by entities under CIRP, particularly the inability to file new returns without filing of past returns.

<u>Registration</u>

As per the notification, such CDs shall be liable to take a new registration in each of the States or Union Territories where the CD was registered earlier, within 30 days from the date of appointment of IRP/RP. However, it has been clarified via Circular 138/08/2020-GST that such registration shall not be required in cases where the CD has complied with all the provisions

of GST law under the earlier GSTIN. This notification gives rise to several eventualities that might not have been envisaged.

1. The rules set a period of 30 days within which new registration shall be obtained by the CD. This is also the period during which a transition happens between the IRP and the RP under IBC. Given the fact, that the IRP it is unclear as to who shall be held responsible for obtaining the registration. Another question that arises is that in cases where the CD has businesses in multiple States, whether it would be possible to obtain new registration within a period of 30 days for all the places of business. This question holds greater importance in the light of the delays being caused due to the pandemic. Our discussion will try to delve into the problems surrounding the above situations and whether a period of 30 days is adequate for obtaining fresh registration.

2. The notification states that special procedures need to be followed "from the date of appointment of the IRP/RP till the period they undergo the corporate insolvency resolution process." This seems to suggest that registration is a temporary measure that aims to create a bubble in which the CIRP process can be undertaken. If the old registration is continued post-CIRP, then the entire purpose of IBC to protect the new entity from past liabilities shall be defeated. It is also unclear as to what shall happen in case the CD gets liquidated or the CIRP proceedings are withdrawn under section 12A of the Insolvency and Bankruptcy Code, 2016.

<u>Input tax credit (ITC):</u>

1. Notification No. 11/2020 (read with circular 134/04/2020-GST) states that any amount deposited in the cash ledger of the erstwhile GSTIN by the IRP/RP, from the date of his appointment to the date of registration, shall be available for refund.

   In light of these provisions, should the department give an additional option to transfer the balance in the cash ledger to the new registration since the refund usually takes some time to get credited?

   Further, there is lack of clarity on what shall happen to the unutilized credit, if any, left in the credit ledger of the erstwhile registration. In case the credit is allowed to be transferred, then what provisions shall be applied, since Section 18 of CGST Act 2017 does not explicitly cover such a situation.

2. Circular No.134/04/2020-GST has clarified that no coercive action can be taken against the corporate debtor with respect to the dues for the

period prior to the insolvency commencement date. The dues of the period prior to the commencement of CIRP will be treated as 'operational debt' and claims may be filed by the proper officer before the NCLT in accordance with the provisions of the IBC.

As per Proviso to Section 16(2) of CGST Act 2017:- "Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on a reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed."

There can be situation where an amount due to a creditor has not been paid for 180 days and the time of 180 days has lapsed after the IRP/RP has taken charge. Under such circumstances, will this be considered as a pre-CIRP default or a post CIRP default?

Discussion

Registration

While discussing about the time limit of 30 days within which an IRP/RP has to obtain new GST registration, it is pertinent to note that that such time limit has been prescribed via Notification 11/2020. Notifications and circulars being delegated legislation do not hold a very strong legal backing. Therefore it can be said that the time limit prescribed is a directory provision and not a mandatory one. When an IRP/RP takes over the affairs of a company, he may not have all the adequate documents/books of accounts required. In such a scenario, it is excusable if he is unable to obtain the registration within 30 days. Keeping that aside, he should strive to complete all compliances as soon as possible. This notification needs to be seen as a facilitation mechanism that attempts to create a firewall between pre-CIRP liabilities and liabilities that may devolve post-CIRP. Also given the fact that the registration happens online, it shall not be an excruciating task to obtain the registration within 30 days.

Circular 138/08/2020-GST also states that such registration shall not be required in cases where the CD has complied with all the provisions of GST law under the earlier GSTIN. The spirit of this directive is to facilitate the RP in complying with all the liabilities that occur after the commencement of the CIRP. Under the GST mechanism, an assessee cannot file a new return unless previous tax liabilities have been paid off. This notification is a

welcome step as it creates an environment for smooth implementation of the IBC process. Section 233 of the IBC states that no suit, prosecution or other legal proceeding shall lie against an Insolvency professional for anything which is done in a good faith. This provision will provide a shield to the IRP/RP provided he has made a genuine attempt to comply with the requirements of the notification.

Input Tax Credit (ITC):

Fresh registration is required primarily to shield the Resolution professional (RP) from the liabilities of past defaults of erstwhile management.

If the law will become very strict on 180 days provision to prevent Input tax credit (ITC) reversal or to prevent creation of new tax payment liability, then it will become very harsh on the insolvency proceedings as the funds are very scarce to allocate for this additional output tax liability and therefore one needs to look at whether this should be considered as past liability. In view of the practicality of the situation perhaps the existing provision of ITC reversal needs to be amended with respect to IBC and separate mechanism needs to be thought of for companies which are undergoing CIRP. Since a CIRP entity is required to undertake a separate registration and is considered a separate entity in a way then there can also be a separate ITC provision for such entities. Therefore, even if courts will have to interpret it, then also will interpret it very liberally.

This may be treated as a pre-CIRP liability and can be considered as a claim that the GST department may have on a Corporate debtor and may be resolved like any pre-CRIP operational debt. Recent Rajasthan High Court judgement in the case of Ultratech extensively dealt with pre-CIRP liabilities and whether they can be recovered from Corporate debtor or Resolution applicant post resolution under IBC. In the said case, court took a view at Pre-CIRP liabilities are frozen on insolvency commencement date and are considered to the extent claimed before approval of resolution plan. Tax departments cannot recover more than what was admitted as Accounts payable to the operational creditors. In case earlier management has claimed credit for which payment has not been made within 180days period in such a case since the earlier credit taken and acts of management relates to the period pre-CIRP date, we can take a view that such amount can only become a claim on Corporate debtor as part of Operational debt and will be resolved under the resolution plan. So even if the default is getting crystalized in the resolution period it should be dealt as pre-CIRP dues as the act relates back to pre-CIRP period only.

Moreover, the Corporate debtor is supposed to take a new separate registration and is considered as a new tax entity therefore there is a disassociation between debts of pre and post CIRP regime and consequently debts of earlier GST registration should not percolate into new GST registration or post- CIRP liabilities.

The procedural laws such as provisions in GST must be sub servient to the overall spirit and language of IBC. If we see it form that light, then we can say that such procedural aspects relating to 180 days credit reversal or other related aspects can be answered accordingly.

Questions and Answers

Q1. That the earlier management before the CIRP period, the input tax credit has been claimed within days. The supplier still not paid and then during CIRP process 180 days period gets over now the requirement is this that the input tax credit which has been availed by the previous management that will required to be reverse. So, whether that will create any kind of liability respect to the resolution proceeding whether should this provision treated as applicable it is in fact default committed by earlier management that is now getting reflected on the RP working which is impacted my resolution proceeding so provide some clarification?

A1. ASHISH MAKHIJA: As this provision has been concerned as fresh registration is required primarily to shelved the RP from the pass liability or the pass default or by the earlier management. If you are very strict on 180 days be a problem so one needs to look at whether it's a cast liability whether it can be paid because we are talking about payment. I will take it this provision as a pinch of salt.

GST and CGST provision will be there that needs to be amended respect of the IBC. Separate mechanism needs to be thought as per company under CIRP company with CIRP having a separate entity. So why can't there should not be separate provision. So, I think this is not a good provision and also court had interpreted very well.

Ajay Vohra- First clarify the law. I would like to pitch it at the higher level that this may be treated as pre CIRP liability that it has involved the GST department may have all the corporate debtor and this will be treated as an operational debt that is due from the company.

Now look into recent judgement Rajasthan v/s Ultratech. Extensively deal with the issue of pre liability and whether they can recover from the resolution applicant of corporate debtor. So, Rajasthan High Court held that pre liability are frozen.

They are extended to extend by the resolution approval. Indirect tax department like GST, Excise and so on they cannot see to recover anything more the what was admitted amount payable to creditors increase these

department. So are erstwhile management has claim credit for pay which has not paid within 180-day period and consequently that credit is not available today. Since it relates to the period prior to the CIRP so I would like to take the view it become a claim against corporate debtor as part of operational debt and that will be resolve under resolution plan.

That means default is getting crystalized during CIRP but actually related to the pre CIRP accordingly needs to be dealt with.

Q2. How is resolution plan under Section 30 which has taken care by RP?

A2. Going concern with the sale of company is the last chance. Suppose I am selling the company as a going concern for 300 crores. Now this money coming to whom and this money distributed in what form so what the judgement of Southern-Bio under NCLT Hyderabad says liquidator has been invited the claims. Now the money has been distributed according to section 53 so it is kind of hybrid situation company has taken it as going concern identify the asset and liability, we don't know then rest of the liability paid by the liquidator.

Also, as per regulation 45 in case company is sold as going concern then liquidator will apply to Adjudicating Authority for close of the liquidation. And in case of dissolution has to apply for dissolution but in case of Southern bio NCLT Hyderabad is was kind of hybrid concern so don't know about the precedent so don't law has firm up over time

Also, law need to keep pace with changing reality also has to mold according to business agencies. Idea is to realize maximum value for the business to pay up financial creditor. Money comes to liquidator the liquidator applies for close to NCLT and distribution has to fall with waterfall mechanism.

For the purpose of liquidation cost vis-a-vis waterfall mechanism do we make distinction between direct and indirect tax.

Because GST can recover from buyer but may not go waterfall mechanism but in case of direct tax impact or capital gain whether that should go to water fall mechanism.

Question of any taxes arise out of liquidator actions going into sec into sec 3 waterfall will not arise at all at all sale done by liquidator gives rise to tax liability could be GS or capital gain. This liability goes into sec 53 doesn't resile at all capital gain is though very remotely likely because if we talk about decriable asset are treated as per Sec 50.

And there is capital gain mostly will not be their because it will go from the block. And probably have substantial extent another way of losses. And delayed then filling

Of return as a liquidator I must also careful to continually file my return even after commencement of liquidation so continuously unabsorbed

process. And debt. if am not doing that question of capital gain may not arise. If it does come assuming as sale of share which is happened as sale of appreciation then the question of capital gain may come that is surely a liability from out of liquidation proceed it cannot go as apart of Sec 53.

Q3. Regarding GST sec 18 if we sale the capital asset after interpretation we have to pay the tax either ITC which is to reversed to the remaining life of the asset .or the tax calculate in case ITC is more and operation debtor get a haircuts will not give a undue advantage to resolution applicant because he has to reversed the less amount the ITC ?

A3. Looking from pure income tax angle suppose there is some assessment completed for cd before the CIRP at certain amount of loss. Under income tax law. Can take advantage of losses going forward for the period of 8 years now the losses have that would return have been substantially reduced as a result of huge addition this allowance made by the tax dept and matter are pending in appeal; now what is situation appeal do the appeal automatically rebate or the resolution applicant can prosecute the appeal get some relief take advantage of higher loss that become available of setoff

Pre CIRP the cd has one sum up appeals against which department appeal in higher forum now does the appeal that the department is seeking to prosecute freeze and automatically abate while the resolution applicant can take advantage of any favorable outcome in pending appeal which re prosecuted by Corporate Debtor or the resolution applicant post and the appeal filled by revenue they must automatically freeze on reassessment so this dichotomy being contemplated which the court have to answer there is no answer to this question.

Q4. Corporate Debtors excess ITC in his credit ledger what will happen to this in case of new registration if he doesn't have any liability on date of admissions?

A4. Excess ITC whether it can be transferred to the new registration or not that issue is already raised before the GST council as of now they saying if any cash deposit has done by RP in old GST registration then he can apply only for refund or not allowed to transfer to new registration as of now not contemplated in a law.

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