

All Hands on Deck - What Taxman Should do to Ease COVID-19 Distress

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Introduction

The Central Government recently raised the threshold for default under Section 4 of the Insolvency and Bankruptcy Code, 2016 (**IBC**”) from INR 1 Lakh to INR 1 Crore^[1], as a relief-oriented measure amidst the economic disruption caused by the COVID-19 pandemic. This move appears to have been made to keep the struggling MSME sector out of the Corporate Insolvency Resolution Process (**CIRP**”), since the ongoing nation-wide lockdown has hit the sector the hardest. It should be remembered that once the CIRP is initiated, the management of the corporate debtor and its assets vests entirely with the Resolution Professional (**RP**”) who would run the operations of the entity till conclusion the CIRP proceedings.

A few days prior to the aforesaid announcement, the Central Board of Indirect Taxes and Customs (**CBIC**”) issued instructions prescribing a special procedure to be followed by corporate debtors undergoing CIRP under the provisions of the IBC. The aforesaid instructions have been issued in the form of Notification No. 11/2020-Central Tax and Circular No. 134/04/2020-GST laying down the modalities to be followed by the corporate debtor/RP. In this article, the authors aim to deconstruct the special procedure and trace a few precedents that led to this move.

Notification No. 11/2020 - Central Tax dated 21 March 2020

Certain procedures have been notified for corporate debtors to be followed from the date of the appointment of the RP. A gist of these special procedures is provided below:

1. Registration

The corporate debtor shall, with effect from the date of appointment of RP, be treated as a *distinct person of the corporate debtor* and be liable to take a new registration in each of the States or Union territories, in which the corporate debtor was previously registered.

1. First return

The said distinct persons shall file their first return declaring *inter alia* the supplies made or received in the period between the date on which such distinct person became liable to registration till the date on which registration is granted.

1. Input Tax Credit

- Input Tax Credit (**ITC**”) on invoices received since the appointment of RP, but bearing the GSTIN of the erstwhile corporate debtor, shall be available to the said distinct person, notwithstanding the restrictions contained in section 16(4) of the Central Goods and Services Tax Act, 2017 or in

rule 36(4) of the Central Goods and Services Tax Rules, 2017.

To recap, section 16(4) prescribes the time limit for availing ITC (until September of the next financial year) and rule 36(4) restricts availment of ITC pertaining to such invoices which do not feature in an entity's Form GSTR-2A.

However, it is not clear whether the exception with respect to rule 36(4) is intended to merely bypass the procedural hurdles of availing ITC (since Form GSTR-2A of the new distinct person would not reflect invoices issued by suppliers using the GSTIN of the corporate debtor) or as a substantive relaxation. Accordingly, it is anybody's guess as to whether the revenue authorities, while not insisting that the invoices be reflected in Form GSTR-2A of the *distinct person*, would allow the ITC only if the invoices are reflected in the *corporate debtor's* Form GSTR-2A.

In any event, the CBIC has clarified that the aforesaid exception has been carved out only for the first return filed by the distinct person.

- Customers of such corporate debtor shall be allowed to avail ITC on invoices issued using the GSTIN of the erstwhile corporate debtor, during the period between the appointment of RP and the date of registration of such distinct person, notwithstanding the restriction contained in rule 36(4) *supra*.
- Any amount deposited in the cash ledger using the GSTIN of the erstwhile corporate debtor, for the period between the date of appointment of RP and the date of registration of the distinct person, shall be available for refund.

The CBIC has clarified that such refund would be allowed notwithstanding the fact that the corporate debtor may not have filed the relevant GST returns during such period.

Circular No. 134/04/2020-GST dated 23 March 2020

The Circular clarifies certain important issues, as under:

- No coercive action should be taken against the corporate debtor with respect to the dues pertaining to the pre-CIRP period. Such pre-CIRP dues shall be considered to be operational debt and claims may be filed before the National Company Law Tribunal (**NCLT**) in accordance with the provisions of IBC.
- The GST registration of the corporate debtor undergoing CIRP should not be cancelled. If such registration has already been cancelled, such order of cancellation must be revoked if the same is within the period of revocation. The officers have, however, been empowered to suspend the registration in appropriate cases.
- The RP is not under an obligation to file returns pertaining to the pre-CIRP period. However, the RP shall be liable to furnish returns, make payment of taxes and comply with all other provisions of the GST laws during the CIRP period.

Precedents

The special procedure for corporate debtors has been announced close on the heels of a few decisions, some of which are listed below:

In ***National Plywood Industries Limited v. Union of India and Ors.*** [2], the Gauhati High Court, while dealing with a writ petition challenging the adjudication of a show cause notice under the Central Excise Act, 1944 post initiation of the CIRP, observed that the moratorium prescribed under section 14 of the IBC not only applied to execution of an order or a judgement but also to institution or continuation of suits or proceedings.

In ***Abhijit Guhathakurta, R.P. (for Videocon Industries Limited and Ors.) v. Central Goods & Services Department*** [3], the Mumbai bench of the NCLT had observed that the *GST law* did not restrict

deposition of GST in a particular month if prior GST dues were not paid, though the *GSTN portal* restricted the same. The NCLT directed the revenue authorities to accept manual filing of returns, restore the E-Way bill facility of the corporate debtor, not cancel the GST registration or take any coercive steps for recovery of dues.

In ***T. R. Ravichandran, R.P. (for Kiran Global Chem. Limited) v. Assistant Commissioner (ST) & Others***^[4], the Chennai bench of the NCLT had directed the revenue authorities to permit the corporate debtor to file GST returns and discharge GST from the date of CIRP without insisting upon payment of past unpaid dues. Similar directions were issued by the Chandigarh bench of the NCLT in ***Deepak Thukral, R.P. (for M/s Lakshmi Precision Screws Limited) v. The Central Goods and Services Tax Division and Others***^[5].

Comments

Keeping in view the divergent and seemingly arbitrary practices being followed by various field formations of the CBIC while dealing with corporate debtors, the CBIC has done well to intervene and clarify certain open issues. The requirement of a fresh registration as a distinct person of the corporate debtor would ensure that compliances post initiation of the CIRP are carried out using the GSTIN of the said distinct person. This does away with the requirement to file returns sequentially, which is presently enforced by the GSTN portal.

The directions to submit pre-CIRP claims directly before the NCLT and not take any coercive action against the corporate debtor are also welcome. Due to lack of clarity regarding the status of past GST compliances post initiation of CIRP, the revenue authorities in certain cases had cancelled registrations and blocked access to the GST portal for companies in default.

Finally, while the CBIC has addressed certain procedural aspects, there is limited clarity as regards various substantive issues including the following:

- Potential disallowance of ITC in the hands of the corporate debtor on account of its suppliers, being operational creditors, having to take a haircut pursuant to the resolution plan;
- Potential disallowance of ITC in the hands of the corporate debtor's customers on account of non-payment of GST by the corporate debtor during the pre-CIRP period;
- Availability of refund of the balance standing to the credit of the corporate debtor's electronic cash and credit ledgers as on the date of initiation of CIRP;
- Availability of refund of GST, if any, paid by the corporate debtor post initiation of CIRP using balance available in the electronic cash/credit ledger which the online GST portal has appropriated towards dues of the pre-CIRP period, in light of the fact that claims towards pre-CIRP dues are required to be separately filed by the revenue authorities before the NCLT. The notification referred to above merely provides a clarification regarding amounts deposited in the electronic cash ledger but fails to clarify the status of amounts already paid by the corporate debtor using such ledger.

While the notification and circular referred to above have streamlined the procedures to some extent, thereby providing a much-needed breather to the corporate debtors, the CBIC still needs to issue suitable clarifications to accommodate the issues highlighted above.

^[1] <https://economictimes.indiatimes.com/news/economy/policy/govt-raises-default-threshold-to-rs-1-cr-for-invoking-insolvency-proceedings-against-firms/articleshow/74796076.cms?from=mdr>

^[2] WP(C) 1059/2020

^[3] MA-4048/2019 in CP No. 02/I&BC/NCLT/MB/MAH/2018

^[4] MA/1298/2019 in IBA/130/2019

^[5] CA No. 491 of 2018 in CP (IB) No.155/Chd/Hry/2018