For Private Circulation only

Vol. : 04 / 2020-21 • June 2021

An ISO 9001 : 2015 Certified Organisation

House Journal

ACAE

ASSOCIATION OF CORPORATE ADVISERS & EXECUTIVES

Highlights

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Editorial

Dear Members,

Greetings to all!!

Hope everyone is staying safe and hearty.

It gives me immense pleasure to share the fourth issue of our House Journal for the year 2020-2021 with all of you on the theme of Insolvency & Bankruptcy Code and Accounts & Audit. This issue has contribution from learned members and professionals from our fraternity providing us with their great insights in the topics covered.

The covid-19 pandemic has been creating a lot of operational and financial difficulties for the business environment, there are many businesses facing financial challenges as a result of the financial position/solvency of their customers. The Insolvency & Bankruptcy Code was formulated with the sole purpose to provide a fast and time bound resolution to people who are unable to realise money from their customers/ borrowers. Insolvency & Bankruptcy Code has come a long way since its enactment in the year 2016 and its evolution has been a great journey. However, there are many issues that still lack clarity and are subject to interpretation. We have addressed some of these issues like Insolvent subsidiaries, Limitation Act amongst others in respect of IBC in this journal. We have also collated articles on various decisions held by courts that help us understand the intent of law. We have also covered articles on the theme of Accounts & Audit covering forensic accounting, whistle blower, management services, etc. in our endeavour to help you all.

I request all the members of ACAE to kindly provide their comments and suggestions on how we can further elevate our House Journal. I request all to kindly contribute for future issues of our journal. Your contributions help in enriching our journal and achieve greater heights. We hope you will find this issue informative.

Thanking You,

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Speaks

My Dear Professional Colleagues,

Hope all of you are safe and healthy.

This is my fourth communication to you through this E Journal. We are in the midst of Second lockdown in our State and various physical activities which were started during the last couple of months were again disrupted resulting into slowing down in economic activities and loss of professional opportunities also.

We at ACAE are continuously striving for excellence and in the pursuit to achieve this we had organised two day Virtual Conclave on **Insolvency and Bankruptcy Code**.

We had also organised a two day **Accounting and Auditing Conclave** on 4th and 5th June through virtual mode on the theme "Hindsight to Insight to Foresight". Both the Conclaves were attended in large numbers and appreciated by our Members and participants.

We are also organising Refresher Courses on varied subject at ACAE. In order to achieve this, our Digital Transformation programme spread over three months is running very successfully. In continuity of this series of Refresher Courses, we have also successfully launched our GST Certificate Course during this month. We are pleased to announce that Refresher Courses on the subject of Income Tax and Corporate Laws are also in the pipeline.

These Refresher Courses are being organised so that we keep updating our knowledge as a professional and are better equipped to deliver services to our clients. **Dr. Sarvepalli Radhakrishnan had said *"The end-product of education should be a free creative man, who can battle against historical circumstances and adversities of nature."***

This journal brings to you articles on various facets of Insolvency and Bankruptcy Code. The Insolvency Laws are still under an evolving stage and are constantly changing with the passage of time either by the Government or Regulator or being guided by judicial decisions from time to time.

The journal also contains articles on auditing and accounting aspects.

ACAE is in the process of publication of the Member's Directory for which the process of updation of data is currently underway. The Member's Directory shall be published shortly.

I thank the entire team at ACAE for putting in their untiring efforts and making the programs successful. I also thank each one of you for your continued support.

"If you want to walk fast, walk alone. But if you want to walk far, walk together." — **Ratan Tata**

Stay safe and Stay healthy.

Best Wishes

CA Anup Kr Sanghai
President

Insolvent Subsidiaries and implications under Insolvency

Anil Kumar Sharma
Partner, AAA Insolvency Professionals LLP

Section 66 of the IBC Code 2016 of the IBC Code 2016 relates to Fraudulent Trading and Wrongful trading provisions, the substance of Sec 66(1) seems to be to deter any person including the Corporate Debtors directors, officers of the Corporate Debtor or creditors indulging in any business of the Corporate Debtor (CD) with an intent to defraud creditors, and any person determined to be knowingly a party to such act can be ordered by the Adjudicating Authority to pay by contributing to the Corporate Debtors assets.

Sec 66(2) of IBC Code 2016,a provision to deal with wrongful trading, holds the Directors of the Insolvent entity liable for any lack of diligence on their part that may have the effect of not minimizing any potential loss to the Creditors, if it is determined during the CIRP or Liquidation that there was no reasonable prospect for the CD to avoid Insolvency. As is obvious this has to get tested only in hind sight after the Corporate debt or has been admitted into an insolvency resolution processor when Corporate Debtor is put under Liquidation. Should the facts then lead to an inference that the Directors of the Corporate Debtor were lax in using diligence of an ordinary person as expected, leading to more losses to the Creditors, then the Liquidator or the IP can file an application under section 66(2) and ask the Adjudicating Authority (AA) to order that the Directors contribute to the assets of the Corporate Debtor by an amount so determined.

Section 66(2) IBC 2016 also indirectly implies that the Directors of the Corporate Debtor should actresponsibly according to their duties specific towards Creditors when a Corporate Debtor is in the Insolvency zone drawing its spirit from the duties of reasonable care prescribed for the Directors under Section 166(3) of the Companies Act 2013 which reads as follows:

"A Director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment "however section 66(2) of IBC Code 2016 specifically invokes the Directors duties towards the creditors of the company in the insolvency zone to prevent reckless behavior.

The text of Sec 66(1) however reads that " if during the CIRP or Liquidation process, it is found that **any business of the Corporate debtor has been carried out** with an intent to defraud creditors of the CD or for any fraudulent purpose the Adjudicating Authority may on an application of the Resolution Professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make contributions to the assets of the Corporate Debtor as it may deem fit".

The reading of the section 66(1) is similar to Section 339(1) of the Companies Act 2013 except the Companies Act 2013 also makes such person liable under Sec 447 of the Companies Act 2013.

However Sec 66 of the IBC code is silent in this regard and bringing any non civil proceeding in any case against the promoters are outside the powers of the RP or the Liquidator under IBC Code 2016.

The questionarises if the phrase" **that any business of the Corporate debtor**

has been carried out" in Sec 66(1) is implied or may be implied as being relevant to Section 66(2) as well. The phrase "any business of the corporate debtor" then begs a question whether the sales of a Corporate Debtor as a going concern by a simple transfer of shares can be construed as a business of the corporate debtor under any circumstances. This is yet to be tested in the courts. Clearly if the assets are stripped away at undervalued prices then there is a case for claw back under a preferential transaction, but let us assume the Owner sells 100% of its shareholding to a new owner. In this case the company changes hands to a new shareholder along with all its business, assets and liabilities.

Let us assume the assets of the CD were X and Liabilities Y where X is say Rs 10 Crores and Y is Rs 50 Crores at the time of share transfer to a new owner, and a clear gap between Assets and liabilities exists at this time. Say 100% of the shares of the going concern CD are sold at Re 1 to the new shareholder but despite the new owner assuming the ownership Insolvency kicks in rapidly and assume that no liabilities stand cleared thereafter but in the meanwhile there is some reduction in assets too say by Rs 5 Crores as Insolvency commences, leaving the Resolution professional at the start of the Insolvency with total creditors liabilities of Rs 50 Crores and assets of Rs 5 crores instead, causing creditors a potential loss of Rs 5 crores.

It is possible in this situation that Sec 66(2)of IBC Code 2016 can come to the rescue of the Creditors through the RP or Liquidator who should have a case against the Directors to recover the loss should it be clear that Insolvency was inevitable /unavoidable when the shares were transferred and it is made out that the transfer of ownership led to potential increase in losses to creditors. Liquidator or RP should also investigate the purchaser's credentials and proposals if it appears that the credentials were clearly unworthy and the new promoter unfit in its ability to recapitalize, and there was lack of diligence on the part of a CD Directors in handing over the company to some one unable to recapitalize. The RP/ Liquidator can chose to file an application against the Directors who were holding office in the period prior to share transfer and the phrase "business of the corporate debtor "even if construed as being relevant to the context of 66(2) could then have the expanded meaning to include sales of the company through transfer of shares. Since the substance of 66(2) is to minimize losses to creditors and hold Directors responsible towards Creditors in the insolvency zone for lack of diligence in handover to a company unworthy of capitalizing.

Now lets' assume that the CD is a limited liability entity A and a Wholly owned subsidiary of a listed entity B a large company with significant assets and other businesses and since A is wholly owned by B the Limited liability principle would protect B from any liabilities of A as a shareholder under this principle. It is also true that the liabilities of a wholly owned subsidiary are reflected in the consolidated financials' as stated in the Section 129(3) of the Companies Act 2013. The option is open to the holding entity to sell the subsidiary to a new owner by selling the shares of the subsidiary alone. The holding entity knows that the subsidiary needs additional capital investments but it may be shy of making any further investment in the subsidiary. The sales of the subsidiary may provide a cash return to the group, and once sold it does not need to continue funding the distressed company and transfers responsibility for the future operation of the company to its new owners.

The holding entity also deconsolidates the assets and liabilities of the subsidiary from the group financials once sold and liabilities of the subsidiary are extinguished and over all makes the Holding company financials look better without carrying the Liabilities of the subsidiary.

In many such cases, a sale of the subsidiary may be in the best interests of all parties, including stakeholders such as creditors, employees etc. A responsible owner, recognizing that there is value in a distressed subsidiary but unable or unwilling to continue to fund its operation can sell it to a new investor. This may return it to profitability and, prevent its collapse, saving jobs and paying its suppliers.

However if the subsidiary after coming under the control of the new owners fails to turn around and becomes insolvent in a short period causing losses to the creditors and if it is determined that the insolvency was inevitable or needed capitalisation and wasn't capitalized enough and the sale of the subsidiary contributed to the failure, there may be a case for the RP or the Liquidator to consider Section 66(2). Scrutiny of the sale of the company can throw up questions if the holding entity could have chosen voluntary insolvency of the subsidiary under Section 10 of the IBC

code 2016 or could have instead chosen recapitalization of the subsidiary under a joint venture. Existing IBC code 2016, Sec 66(2) has provisions that may apply against the Directors of the Insolvent CD if the conduct of the failed company's directors lacked diligence however it does not allow for the conduct or actions of holding entity to be investigated unless it be proven that the sale was a case of fraudulent trading under 66(1) but only if "business of the corporate debtor" under the circumstances is also seen by the Courts to include the sales of the going concern by means of ashare transfer.

This brings us to a question whether we need new provisions under IBC to look at the holding entity shareholders (or the holding company's Directors) conduct and whether aprovision is needed thatwill allow a review of diligence on the part of a seller (shareholder) or holding company's Directors to consider the impact on Corporate Debtor's creditors particularly when decision to sell is made by the holding company's directors or is based on the directions of the shareholder. On the face of it, Directors of a holding/ parent company or its shareholders cannot be held liable for the sale of an insolvent subsidiary, even if is damaging to the subsidiaries' creditors and stakeholders, under the existing 66(2) provisions or under an interpreted meaning of the phrase:" business of the corporate debtor unless fraud is involved. Existing Insolvency law in India tries to address the conduct of the directors of the failed company (a subsidiary in some cases) in the Insolvency zone and can challenge certain transactions which have unfairly harmed creditors but it does not readily allow for the conduct or actions of directors of another company (for example a parent company) to be addressed.

Governments like UK as an example have held a view at one point that holding company directors should be held to account if they conduct a sale (of a subsidiary) that harms the interests of the subsidiary's stakeholders (such as its employees or creditors), where that harm could have been reasonably foreseen at the time of the sale and intend to develop guidance on the steps that Directors should take when considering the sale of a subsidiary in the insolvency zone.[1]

Some believe that : A large subsidiary company within a group may have many employees and smaller businesses that may depend upon it for survival, and when such a company is in financial difficulty, any decision to sell it outside of formal insolvency proceedings should take into account the interests of its stakeholders this would include the impact of the withdrawal of the holding entity's financial support from the company when being sold and the ability of the purchasing party to provide such support in the future. And believe that penalties should be considered for directors who cause loss or harm included is qualification and personal liability.

Some others feel that the concern that shareholders will gamble with the creditors' money is the principal argument for imposing a duty on the board towards creditors when the company is in the vicinity of insolvency. This argument seems unpersuasive according to them. It is director's and manager's opportunism, rather than strategic behaviour by shareholders that is the real concern. Because secured creditors and other creditors are betterable to protect themselves against that risk than are shareholders, there is no justification for imposing such a duty on the shareholders. We will have to wait and see how our law evolves through the Courts in India as instances of this kind unfold in the Insolvency courts.

[1](Ref Insolvency and Corporate Governance published by Department of Business, Energy and Industrial Strategy Government Response dated 26th Aug 2018)

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IBC survived the test of constitutional validity, when the Supreme Court upheld IBC in its entirety in the case of ***Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.*** The judgment inter alia laid down the reasoning behind the differential treatment of financial creditors (FCs) and operational creditors (OCs); clarified the role of a Resolution Professional who acts as the facilitator to the resolution process; and stated that IBC is not a mere recovery legislation for creditors but actually provides an opportunity for a debt-ridden organization (legally known as the 'Corporate Debtor') to be back on its feet.

Liquidation Process in Insolvency and Bankruptcy Code, 2016

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There is an adage "Insolvency is the best proxy for assessing going concern since filing for Insolvency is not synonymous with the invalidity of the Going Concern Assumption".

The Globe today is divided in two halves in-between the Debtor Oriented Economies & the Creditor- Oriented Economies while counties like India are yet to find its feet as stress and distress assets continue to challenge the policy paradox. Research suggests that in contrast to debtor-oriented countries such as the USA, liquidation is the most likely outcome of corporate insolvency in creditor-oriented countries such as the UK, Germany, Australia and New Zealand. It suggests that Insolvency & Bankruptcy prediction models have very limited use for assessing going concern in creditor-oriented countries. The White Paper on research of Bankruptcy in different economies throws very interesting pattern basis the approach to Liquidation Prediction Model. Amongst the most important finding are that liquidation prediction model are significantly lower in the Debtor Oriented Market whereas the Bankruptcy prediction model for assessing going concern in Creditor Driven market is surprisingly inconsequential.

The triggers to Insolvency & Bankruptcy include Negative Cash flows from Operating activities, recurring operating losses, working capital deficiencies, adverse key financial ratios, defaulting on loans or similar agreements, suppliers denying the entity from buying inventory on credit, restructuring of debt, non-compliance with statutory capital requirements, the inability to finance operations, expensive legal proceedings and litigation, which may put pressure on the company to liquidate assets to meet obligations.

On 15th December, 2016, the Central Government notified the rules by which the companies can go through Liquidation under the Insolvency and Bankruptcy Code, 2016. These Regulations provide details of procedures to be reckoned to start with issue of Liquidation Order under Section 33 of the Code till Dissolution under Section 54 (i.e., Chapter III of Part II of IBC). There has been several Amendments to the Liquidation Regulation such as on 2nd April, 2018, 22nd October, 2018 25th July, 2019, 6th January, 2020, 24th April, 2020, 5th August, 2020, 13th November, 2020 and 4th March, 2021.

The reason for such multitude amendments is to provide the Corporate Debtor with a last resort to revive as a Going Concern rather than die a Corporate Death through Liquidation by undergoing Dissolution under Section 54 of the Insolvency and Bankruptcy Code, 2016.

But the Code is still confronted with many challenges to retain the value of stress Assets and keep the Corporate Debtor as Going Concern.

It has been around four years since the provisions relating to Corporate Insolvency Resolution Process (CIRP) came into force on 1st December, 2016. As per the data provided by the Insolvency and Bankruptcy Board

of India Quarterly Newsletter for the period October-December, 2020, about 4139 CIRPs have commenced by the end of December 2020. Of these, 601 cases have been closed on appeal or review or settled; 378 have been withdrawn; 1126 have ended in liquidation and 317 have found Resolution under the Code.

Till September 2020, a total of 1025 CIRPs had yielded orders for liquidation, as presented in the previous newsletters. 19 more CIRPs were later reported as yielding orders for Liquidation during that period. During the quarter October-December, 2020, 82 CIRPs ended in Liquidation, taking the total CIRPs ending in liquidation to 1126 (excluding 10 cases where liquidation orders have been set aside by NCLT/NCLAT/SC).

While Liquidation presumably kneels the final blow technically pronouncing the end of the tunnel for a corporate debtor, the thought leaders andthe legislatures continue to strive to evolve different matrix to maximize the value of distress assets, which empowers the Liquidator to sell the Corporate Debtor as a going concern.

A liquidator today is confronted with multiple vagaries and grey areas while running the course to liquidate a Corporate Debtor, which can be enumerated herewith:

1. **The Concept of Going Concern in Liquidation**
2. **Treatment of Subordination Agreement within the Liquidation Waterfall Mechanism**
3. **Issue of Compliance in Liquidation**
4. **Custody of Assets of the Corporate Debtor**

1. **THE CONCEPT OF GOING CONCERN IN LIQUIDATION**

The Jurisprudence on the Sale of Corporate Debtor as a going concern is still nascent under the Code and suffers from a dearth of precedents. One such precedent available prior to the notification of the Code read with relevant regulation was of Allahabad Bank vs. ARC Holding Limited & Ors (Manu/SC/0602/2000). In the referred case, the Hon'ble The Supreme Court of Indiadated 26.09.2000 gave opportunity to the Liquidator by permitting the sale of the company as a 'going concern' however, with certain conditions only. The Official Liquidator for this purpose shall advertise the sale of the company in liquidation-judgment debtor as a 'going concern' as ordered by the High Court. Such publication shall indicate that the reserve price, shall be the amount equal to the total decree including interest which has accrued upto 31th December, 1999 in favour of the appellant-bank, and shall also has to pay the balance interest which accrues, till full payment is made. The publication shall also indicate that purchaser has also to pay the liabilities of other claimants in the proceeding for the liquidation of the company.

The National Company Law Tribunal, Kolkata Bench in the matter of Gujarat NRE Coke Ltd took a similar insight while approving the Sale of the Corporate Debtor as a Going Concern under Liquidation vide Order dated 05.05.2018 provided an insight for a Second Amendment to the Liquidation Regulation as on 22nd October, 2018. It was a landmark Judgement pronounced by Hon'ble NCLT Kolkata Bench presided over by Justice K.R. Jinan & Justice M.B. Gosavi being the first instances under the Code of Selling the Corporate Debtor under liquidation as a Going Concern. In the said case no resolution could be arrived at even during the extended period, the AA appointed the RP as liquidator & directed "The Liquidator shall try to dispose of the Corporate Debtor as a going concern with the reserve price which shall be equal to the total debt amount including interest and maximum period applicable for trying the sale of the Corporate Debtor as a going concern will be only three month from the date of the order.An application was filed under sections 230 to 232 of the Companies Act, 2013 for obtaining the sanction of the NCLT to a scheme of Compromise and Arrangement between the petitioner and the secured /unsecured creditors, foreign currency convertible bond (FCCB) holders and shareholders of Gujarat NRE Coke Ltd. The NCLT passed an order directing separate meetings of the shareholders, FCCB holders, secured creditors, unsecured creditors & the petition was allowed setting a new precedence under the Code.

Close on the heels of the aforesaid order, the IBBI introduced the Amendment to specifically provide legislative backing for the proposition of law laid down in Gujarat NRE Coke Limited Case.

The most apparent consequence of the same is that if the

company is sold off as a going concern, then there will be no need for the dissolution of the Company as laid down under Section 54 of the Code. Additionally, if the company is transferred as a going concern, there is no question of disposal of the assets of the company, either by way of a piecemeal sale or a slump sale. Therefore, it may be argued the liquidation waterfall as stipulated under Section 53 of the Code also does not apply.

It light of the aforesaid observations, introducing this Amendment provides a second chance for preservation of the legal identity of the company. Until the Amendment, the legal existence of the Corporate Debtor could only be preserved if the CIRP could be successfully completed with the statutorily mandated timelines. However, subsequent the expiry of the said timelines, the Corporate Debtor was forced to go into compulsory liquidation thereby getting stripped off its legal existence. However, post the Amendment, even if the CIRP cannot be completed within the statutorily mandated timelines, the legal existence of the Corporate Debtor can still be preserved by attempting to sell the Corporate Debtor as a going concern.

The Code does suggest a wind of change as in the case of Gujarat NRE to avert dissolution of the corporate debtor and preserve the identity of the Corporate Debtor as a going concern.

Section 35(1) read with section 60(5) vests powers to the Adjudicating Authority to allow Corporate Debtor to be sold off as a going concern whereby providing a Second Chance for the preservation of the Company as a going concern. Subsequent to the amendment, if the existence of the Corporate Debtor could not be preserved during the stage of CIRP, there is still some respite as the legal existence of the Corporate Debtor can still be preserved at the stage of liquidation.

Subsequent to the said amendments, the Hon'ble NCLT, Hyderabad Bench in Bank of India vs. Southern Online Bio-Technologies Limited in IA No. 1038/2019 in CP(IB)No. 343/7/HDB/2018, the Applicant prayed for certain reliefs after sale of the Corporate Debtor as a Going Concern. The Hon'ble Tribunal directed that the Sale of the Corporate Debtor as a Going Concern shall be approved and the liabilities that accrued prior to the E-Auction date shall be relieved.

Further, the subsequent amendments in Liquidation Regulations by the Insolvency and Bankruptcy Board of India provides a guide to the Liquidator to help the Corporate Debtor to be sold as a Going Concern. Such amendment being introduction of Regulation 32A with regard to Sale as a Going Concern inserted on 25.07.2019. The provisions allows the Liquidator to first endeavor to first sell as a Going Concern under Regulation 32 clause (e) or (f) and then under the clause (a) to (d).

On a plain reading, it is clear that the Regulation provides a further period of ninety days to the Liquidator from the Liquidation Commencement Date to initiate sale of the corporate debtor as going concern if the same not approved during Corporate Insolvency Resolution Process.

Similarly, it has been the decision of the Courts before the advent of Insolvency and Bankruptcy Code, 2016 to sale the Company as a Going Concern rather than Liquidation of the Corporate Debtor. Such cases are:

- Jayaprakash Shyamsundar Mandare v. Laxminarayan Murlidhar AIR 1983 Bom 364, it held that a company could be sold off as a going concern only when the company in question is still in operation.
- In InreIndorRama Textiles Ltd, 2013, the Delhi High Court examined the concept of transferring a company as a 'going concern'. The Hon'ble Delhi High Court held that a company is said to be transferred as a going concern when the assets and liabilities being transferred constitute a business activity capable of being run independently for a foreseeable future.

2. **TREATMENT OF SUBORDINATION AGREEMENT WITHIN THE LIQUIDATION WATERFALL MECHANISM**

The Report of the Insolvency Law Committee as on March, 2018 has deliberated on status of subordination of the financial creditors in distribution of the proceeds from the sale of assets under Liquidation. A brief of the Report is as follows:

Section 53 of the Code provides the order of priority to be followed for payment of dues pursuant to liquidation of a corporate debtor under the Code. It was stated to the Committee that it was not clear whether inter-creditor or subordination agreements entered into between creditors will be respected in the payment waterfall provided in section 53 of the Code in the event a secured creditor relinquishes its security and chooses to receive proceeds from sale of assets under liquidation. Section 53(1)(b) states as follows:

"(b) the following debts which shall rank equally between and among the following: -

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c)...."

was suggested that the possibility of the phrase "shall rank equally between and among" in section 53(1)(b) to be interpreted to mean that debts inter-se secured creditors in clause (ii) of section 53(1)(b) would also rank equally cannot be excluded. Such an interpretation would imply that priority of charges agreed upon between creditors in inter-creditor or subordination agreements would lose meaning once a creditor relinquished its security and came within the liquidation waterfall in section 53.

However, it was stated to the Committee that in practice, subordination agreements inter-se creditors were respected in winding up proceedings

Specifically, it was also brought to the Committee's attention that in USA, the Bankruptcy Code states that in case of liquidation, "a subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable non bankruptcy law."108 Further, the Committee was appraised of the case of ICICI Bank Limited v. SIDCO Leathers Limited & Ors.109 wherein the Hon'ble Supreme Court interpreted sections 529 and 529A of the CA 1956 which deal with ranking of claims on liquidation.

It was held in this case that, "Only because the dues of workmen and debts due to the secured creditors are treated pari passu with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go-by. Certain other relevant principles that emerge from this case are as follows:

- ✓ Right to property was a constitutional right and right to recover money lent by enforcing a mortgage was also a right to enforce an interest in the property. Had the Parliament intended to take away such a valuable right of the first-charge holder, there was no reason for it to not state so explicitly
- ✓ Section 48 of the Transfer of Property Act, 1882 ("**TOPA**") clearly provides that claim of a first charge holder shall prevail over the claim of a second charge holder.
- ✓ Merely because the relevant section did not specifically provide for the rights of priorities over mortgaged assets, it would not mean that the provisions of section 48 of TOPA shall stand obliterated in relation to a company that has undergone liquidation
- ✓ Deprivation of a legal right existing in favour of a person cannot be presumed in construing a statute and it is in fact the other way round and thus, a contrary presumption shall have to be raised
- ✓ Companies Act may be a special statute but if the special statute does not contain any provisions dealing with contractual and other statutory rights between different secured creditors, the specific provisions contained in the general statute shall prevail
- ✓ Section 529(1)(c) used the phrase "the respective rights of secured and unsecured creditors." This was to be interpreted as rights of secured creditors *vis-à-vis* unsecured creditors. It does not envisage respective rights amongst secured creditors.

The Committee felt that the principles stated above that emerge from the *ICICI* case are also applicable to the issue at hand under section 53 of the Code. Moreover, although this was a case where creditors had not relinquished their security, the principles hold good under the Code even when creditors have relinquished their security as the Code unlike the CA 1956 expressly recognises secured creditors who have relinquished their security as a separate category in section 53(1)(b)(ii) and distinguishes them from unsecured creditors. The Code in a bid to encourage relinquishment, also specifically places secured creditors who have relinquished security higher than unsecured creditors.

To conclude, the Committee was of the opinion that it is sufficiently clear from a plain reading of section 53(1)(b) that it intended to rank workmen's dues equally with debts owed to secured creditors who have relinquished their security. Section 53(1)(b) does not talk about priority inter-se secured creditors. Thus, valid inter-creditor/ subordination agreements would continue to govern their relationship. Further sub-section (2) of section 53 must also be interpreted accordingly. For instance, applying section 53(2) in the context of section 53(1)(b), any agreements between workmen and secured creditors which disrupts their pari passu rights will be disregarded by the liquidator. However, agreements inter-se secured creditors do not disturb the equal ranking sought to be provided by section 53(1)(b) and therefore do not fall within the ambit of section 53(2). **The Committee felt that there was no requirement for an amendment to the Code required since a plain reading of section 53 was sufficient to establish that valid inter-creditor and subordination provisions are required**

to be respected in the liquidation waterfall under section 53 of the Code.

3. **ISSUE OF COMPLIANCE IN LIQUIDATION**

The Insolvency and Bankruptcy Board of India vide its Circular No. IP/002/2018 dated 3rd of January, 2018 directs that while acting as an interim resolution professional, a resolution professional, or a liquidator for a corporate debtor under the Code, 2016 shall exercise reasonable care and diligence and take all necessary steps to ensure that the Corporate Person undergoing any process under the Code complies with applicable laws. For Example, a corporate person undergoing Insolvency Resolution Process, if listed on a stock exchange, needs to comply with every provision of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 unless the provision is specifically exempted by the competent authority or becomes inapplicable by operation of law for the corporate person.

The Circular also clarifies that:

- ✓ If a corporate debtor during any of the aforesaid processes under the Code suffers any loss, including penalty, if any, on account of non-compliance of any provision of the applicable laws, such loss shall not form part of insolvency resolution process cost or liquidation process cost under the Code, 2016;
- ✓ The Insolvency Professional will be responsible for the non-compliance of the provisions of the applicable laws if it is on account of his conduct

The aforementioned circular reinstates the duty of the resolution professional to ensure that the provisions of all applicable laws are complied with during the corporate insolvency resolution process. The aforesaid provisions are also mentioned in Section 353 of the Companies Act, 2013 which was later made part of the IBC, 2016.

Further, there is dilemma pertaining to maintenance of Books of Accounts of the Corporate Debtor during the continuation of Liquidation Proceedings. Whether the Books of Accounts of the Corporate Debtor shall be maintained on going concern basis and properly audited. There is no clarity regarding filing of statutory returns with the various statutory authorities i.e. ROC, Income Tax Authority etc. during the continuation of Liquidation Process.

The compliances related to filing of Income Tax returns and Listing Regulations are an add-on to the existing powers & duties of the Liquidator and the same shall only be complied with if the Liquidator has in possession the relevant documents for filing the same.

4. **CUSTODY OF ASSETS OF THE CORPORATE DEBTOR**

The Insolvency and Bankruptcy Code, 2016 under Section 35(1)(b) allows the Liquidator to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor

Where the Corporate Debtor is a Declared Fraud Account, various investigation Agencies have custody of Assets. Its create impediment in valuation process as the assets as the Assets invariably are in possession of ED, DRI amongst other Investigation Agencies.

Section 238 of the Insolvency and Bankruptcy Code, 2016, states that "*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.*" However, in practical scenarios the Investigating Agencies does not comply with the provisions of the Code, 2016 and the Liquidator is still engaged for the custody of the assets of the Corporate Debtor to initiate distribution of proceeds from the sale of the assets of the Corporate Debtor to the secured creditor.

The Custody of Assets of the Corporate Debtor is essential for completion of the Liquidation Process. Possession of the Assets of the Corporate Debtor is also important for the Dissolution of the same.

However, the Insolvency and Bankruptcy Board of India had introduced Regulation 37A vide its Notification dated 13th November, 2020 wherein the amendment allows the Liquidator to transfer a not readily saleable asset through a transparent process, in consultation with the stakeholders consultation committee in accordance with Regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the Corporate Debtor.

It is pertinent to consider the explanation as provided in the said regulation that "Not Readily Realisable Asset" mean any asset included in the Liquidation estate which could not be sold through available options and includes in the liquidation estate assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions referred to in Sections 43 to 51 and Section 66 of the Code.

However, the same may result in severe reduction of the Liquidation Value of the assets of the Corporate Debtor.

* * * * *

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The Ever-Changing Landscape of NCLT's jurisdiction under IBC:

An Analysis of the judgment of Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited [1]

INTRODUCTION

The RECENT judgement delivered by the Hon'ble Supreme Court in the matter of **Gujarat Urja Vikas Nigam Limited vs. Mr. Amit Gupta & Ors.**[2] has incited a debate on the scope of jurisdiction to be exercisable by National Company Law Tribunal (hereinafter **'NCLT'**) under the Insolvency and Bankruptcy Code, 2016 (hereinafter **'the Code/IBC'**). The judgment has opened a pandora's box having massive economic-legal consequences, specifically the question that what all disputes can be adjudicated by the NCLT under **Section 60 Sub-Section (5)** of the Code. It is a settled principle of law that where a court has no jurisdiction over the subject-matter of a suit, there is inherent lack of jurisdiction and a decree passed, judgment rendered or order made is a nullity.[3]

The jurisdiction to NCLT to entertain disputes pertaining to and in relation to the Code has been conferred by virtue of **Section 60 Sub-Section (5)** of the Code. However, it raises a reasonable question as to the extent of jurisdiction exercisable by the NCLT. The Hon'ble Supreme Court in the **Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta & Ors** in a not so explicit manner has determined the contours within which NCLT is to exercise jurisdiction. However, it is not for the first time that the Hon'ble Supreme Court has addressed the question of jurisdiction exercisable by NCLT under the Code.

FACTUAL MATRIX

The case arose out of an appeal preferred by Gujarat Urja Vikas Nigam Limited (hereinafter **'Appellant'**) which is a government of Gujarat undertaking against the Order dated 15th October, 2019 delivered by the Hon'ble National Company Law Appellate Tribunal (hereinafter 'NCLAT'). The appellant in their appeal prayed that the Order dated 15th October, 2019 be set aside on ground that NCLT and NCLAT did not possess jurisdiction to adjudicate the subject matter of dispute.

The subject matter of the dispute was cancellation of a Power Purchase Agreement (hereinafter **'PPA'**) entered into between Astonfield Solar (Gujarat) Private Limited (hereinafter **'Corporate Debtor'**) and the Appellant. Article 9.1 of the PPA states that it would remain in force for 25 years and would only be terminated in the event of default as stipulated under Article 9.2.1(e) of the PPA.

The corporate insolvency resolution process (hereinafter **'CIRP'**) of the Corporate Debtor was initiated vide Order dated 20.11.2018 of the NCLT, New Delhi Bench. Thereafter, the Appellant issued notice of default to the Corporate Debtor as undergoing CIRP under the IBC constituted an event of default in terms of Article 9.2.1(e) of the PPA. The notices called upon the Corporate Debtor to remedy this default within 30 days. Accordingly, the Resolution Professional (hereinafter **'RP'**) of the Corporate Debtor replied to the notice stating that in case the Appellant terminates the PPA, prospective resolution applicants who had submitted the expression of interest for the Corporate Debtor might not submit a resolution plan, which

would eventually lead to liquidation of the Corporate Debtor, defeating the main object of the IBC.

The RP thereafter filed an application before the NCLT **Section 60, Sub-Section (5)** of the Code seeking an injunction restraining the appellant from terminating the PPA. The NCLT allowed the application and vide its Order dated 29.08.2019 set aside the notice.

The Appellant approached the NCLAT against the Order dated 29.08.2019 passed by NCLT. However, the NCLAT dismissed the Appeal on similar line of reasoning as adopted by the NCLT that the appellant attempted to terminate the PPA on the sole ground that the CIRP has been initiated for the Corporate Debtor would render the Corporate Debtor defunct. Accordingly, the Appellant preferred appeal against the Order dated 15th October 2019 passed by NCLAT.

ISSUES OF LAW AND FACTS

The Hon'ble Supreme Court after having heard all the parties to the dispute formulated the following issues of law and facts for its determination, the same being:

(i) Whether the NCLT/NCLAT can exercise jurisdiction under the IBC over disputes arising from contracts such as the PPA; and

(ii) Whether Ipso facto clauses under a contract is valid or not.

OBSERVATIONS MADE BY THE HON'BLE SUPREME COURT

The Hon'ble Supreme in a categorical manner observed as follows:

A. Exercise of Jurisdiction by NCLT/NCLAT under the IBC over disputes arising from contracts

The Hon'ble Supreme Court observed that NCLT enjoys residuary jurisdiction under Section 60 Sub-Section (5) of the Code. This section confers wide discretion upon NCLT to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings.

B. Validity of Ipso Facto Clauses

The Hon'ble Supreme Court in this regard observed that Ipso facto clauses are contractual provisions which allow a party to terminate the contract with its counter party due to the occurrence of an event of default (For Example – Insolvency). **The current IBC contains no clear-cut provision which invalidates ipso facto clauses**. A clear-cut legislative intent must be reflected for the ipso facto clauses to be held invalid.

JUDGEMENT OF THE HON'BLE SUPREME COURT

It was held by the Hon'ble Supreme Court that –

a. The NCLT/NCLAT could have exercised jurisdiction under section 60(5)(c) of the IBC to stay the termination of the PPA by the appellant, since the appellant sought to terminate the PPA under Article 9.2.1(e) only account of the CIRP being initiated against the Corporate Debtor;

b. The NCLT/NCLAT correctly stayed the termination of the PPA by the appellant, since allowing it to terminate the PPA would certainly result in the corporate death of the Corporate Debtor due to the PPA being its sole contract;

ANALYSIS

The Hon'ble Supreme Court through this judgment has in a very peculiar fashion drawn a fine line over which the NCLT/NCLAT have to cautiously tread while exercising jurisdiction under **Section 60 Sub-Section (5)** of the Code. The Apex Court, taking things up from where it left in the matter of *M/s Embassy Property vs The State of Karnataka* [5] firstly clarified upon the position that NCLT does not enjoys jurisdiction on matters of public law. However, in the instant case the decision to terminate the PPA was not taken by any governmental or statutory authority acting within the domain of its public law functions. The decision emanated from a clause in a contract which provides subject-matter jurisdiction to the NCLT under **Section 60 Sub-Section (5)** of the IBC.

The Court also elucidated the point that the words "arising out of" and "in relation to" appearing under **Section 60 Sub-Section (5) Clause (c)** must be interpreted and read out in its context. Accordingly, while construing of Section 60(5), a starting point for the analysis must be to decipher legislative intent. The Hon'ble Apex Court then went on to place reliance upon observation made by it in *Arcelor Mittal (India) (Private) Limited. vs Satish Kumar Gupta*[6] held that NCLT alone has jurisdiction when it comes to applications and proceedings by or against corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.

More importantly the Apex Court cautioned NCLT and NCLAT that to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and for a when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor.

Furthermore, in regard to the validity of Ipso Facto clause, the Apex Court drew a comparative analysis over the validity of Ipso Facto clause in different countries. Thereafter while referring to the Report of the Expert Committee on Company Law headed by J.J. Irani[7] concluded that the Committee noted the need to invalidate ipso facto clauses so as to prevent the value of a Corporate Debtor's assets from becoming diluted during the insolvency process. However, in absence of any clear-cut provision which invalidates ipso facto clauses, the same cannot be held invalid as that would mean violation of the principle of separation of power[8].

CONCLUSION

The Hon'ble Apex Court has in a best possible manner endeavored towards achieving a middle ground as one hand it emphasized that Section 60(5)(c) of the IBC provides NCLT a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. It even went on to observe that Section 60(5)(c) would be rendered otiose if Section 14 is held to be the exhaustive of the grounds of judicial intervention contemplated under the IBC in matters of preserving the value of the corporate debtor and its status as a going concern. While on the other it held that the NCLT cannot exercise its jurisdiction over matters dehors the insolvency proceedings.

This certainly leaves several questions still unanswered. Attention must be drawn to the fact that certain disputes involve mixed questions of law. Therefore, a methodology is yet to be devised which can help in identifying the jurisdiction. Also, if during insolvency one has to approach several forums at once, wouldn't it be against the very essence of the Code which is to provide resolution in a time bound manner.

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[1] Gujarat Urja Vikas Nigam Limited vs. Mr. Amit Gupta & Ors, (2021) SCC OnLine SC 194

[2] (2021) SCC OnLine SC 194, Decided by Dr. D.Y Chandrachud. J. and M.R Shah J. on 8th March, 2021

[3] Hira Lal v. Kali Nath, AIR 1962 SC 199

[4] In C.P I.B No. 940 (ND)/ 2018

[5] 2019 SCC On Line SC 1542

[6] (2019) 2 SCC 1

[7] 2005

[8] Rai Sahib Ram Jawaya Kapur vs State of Punjab, (1955) 2 SCR 225

* * * * *

In the matter of ***M/s I. A. Dhasvs Hemant Sharma Liquidator Vishwa Infrastructures Finance and Services Private Limited*** the applicant came to know about the status of the liquidation on 16/11/2020 and immediately filed the claim Form C on 05/12/2020 for the claim amount of Rs.1,66,77,139/-. However, the Liquidator rejected his claim on the reason that, claims filed by the applicant is time barred as regulation 16 and 30 of IBC 2016 provides that, the person claiming to be stakeholder has to file its claim on or before the last date mentioned in the public announcement or within 30 days from the date of commencement of the liquidation process.

Aggrieved by the decision of the liquidator the Applicant filed the Interim application under section 42 of the Code praying admission of his claim. After hearing both sides the Adjudicating Authority observed that, there was an abnormal delay in filing the claim before the liquidator. The applicant has not furnished any justifiable reasons for the delay. It is not convincing to believe thatthe person who is to get the substantial amount is not keeping track of happening in the Corporate Debtor.

Due to the aforesaid reasons the Interim Application is dismissed accordingly.

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Supreme Court uphold commercial wisdom of COC

In the matter of Kalpraj Dharmshi & Anr Vs Kotak Investment Advisors Ltd & Anr Hon'ble Supreme Court passed order on 10th March, 2021 whereby apex court ruled the commercial and financial wisdom of COC will prevail.

Gist of the case

CIRP started for Ricoh India Limited on 14th May, 2018. RP issued four nos of form G for EOI but no response to EOI was received from any prospective resolution applicant, the fifth EOI was issued on 11th December, 2018 for which the last date of submission of resolution plan was 8th January, 2019 and on the last of submission of resolution plan, Kotak Investment Advisors Limited(KIAL) submitted the resolution plan. One another applicant WeP Solutions Ltd submitted its resolution plan jointly with Sattva Real Estate Pvt Ltd (WeP) on 13.1.19. Thereafter Kalpraj Dharmshi and Rekha Jhunjhunwala (Kalpraj) submitted resolution plan on 27th January, 2019.

On 29th January, 2019 KIAL raised objection permitting Kalpraj to submit resolution plan as the last date of submission was 8th January, 2019.

On the next day i.e., 30.1.2019 COC resolved to direct all the applicants to submit revised resolution plan. In view of this, KIAL submitted revised plan on 1.2.19 and again on 10.2.2019 raised objection for plan of Kalpraj. KIAL again submitted the second revised resolution plan on 12.2.19. Kalpraj also submitted revised resolution plan on 12.2.2019.

COC approved resolution plan of Kalpraj on 13/14.2.2019 with thumping majority of 84.36 % and submitted application for approval of resolution plan before NCLT, Mumbai bench on 18.2.2019. KIAL filed objection with NCLT on 14.3.2019.

NCLT, Mumbai bench approved resolution plan passed by COC of Kalpraj and rejected objection filed by KIAL on 28.11.2019. KIAL filed writ petition with Bombay High Court on 11.12.2019 on the ground that there was breach in principle of natural justice by NCLT. The High court dismissed the writ petition filed by KIAL on 28.1.2020 on the ground that KIAL had an alternate and effacious remedy of filing an appeal before NCLAT.

KIAL filed appeal before NCLAT on 18.2.2020. Kalpraj and RP objected the appeal on the ground that the appeal was filed beyond the limitation period of I & B Code. NCLAT dismissed the objection and further found the procedure adopted by RP and COC in breach of I & B Code and allowed the appeal of KIAL on 5.8.2020. NCLAT directed COC to decide afresh on resolution plan within 10 days and COC approved resolution plan of KIAL on 13.8.2020.

Four appeals were filed with Hon'ble Supreme Court against the order passed by NCLAT, the appeals were filed by Successful resolution applicant KIAL, Financial Creditors, Erstwhile RP and Largest OC.

It was argued by Kalpraj that KIAL submitted the resolution plan twice after submission of plan by Kalpraj and therefore estopped for challenge on acceptance of plan approved with 84.36 % votes. Only one creditor Kotak Mahindra Bank which is holding company of KIAL having 0.97 % votes voted in favour of KIAL.

It was argued that according to section 61(2) of I & B Code the decision of NCLT can be challenged before NCLAT within 30 days. Further an appeal would be tenable within a further period of 15 days only when NCLAT comes to a satisfaction for delay. Since I & B Code is a complete code it was crystal clear that appeal should have been filed with NCLAT. It was further stated that though the appeal was filed later on with NCLAT but there was no stay on implementation of resolution plan and finally NCLAT passed order on 5.8.2020.

It was stated that Kalpraj has expanded more than 300 crores to fulfil the resolution plan. Amount expanded was towards buy back of shares from thousands of share-holders, issue of debentures, One company Minosha Digital Solutions limited was merged with CD on 28.11.2019, Bankers Cheque were replaced, CIRP Cost was paid, and on 03.02.2020 RP who was acting as Monitoring Agent of Monitoring Committee, issued communication that approved resolution plan is implemented.

Matter before Hon'ble Supreme Court

In view of above following questions arise before apex court

(i) Whether the appeals filed by KIAL before NCLAT were within limitation?

(ii) Whether there was waiver and acquiescence by KIAL, so as to estop it from challenging the participation of Kalpraj?

(iii) Whether NCLAT was right in law in interfering with the decision of CoC of accepting the resolution plan of Kalpraj?

(i) Whether the appeals filed by KIAL before NCLAT were within limitation?

Apex court considered limitation act, I & B code, wherein the time limit was mentioned for filing appeal before NCLAT, KIAL filed writ petition before Bombay High Court on 11.12.2019 and Hon'ble high court order was passed on 28.1.2020. Section 14 of Limitation act provides a relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. It has been observed that legislature has enacted section 14 to exempt a certain period covered by a bona fide litigious activity.

Supreme Court mentioned "We have no hesitation to hold that KIAL was entitled to extension of the period during which it was bonafide prosecuting a remedy before the high court with due diligence".

(ii) Whether there was waiver and acquiescence by KIAL, so as to estop it from challenging the participation of Kalpraj?

It is strenuously urged on behalf of the appellants, that under clause 10.4 of the Process memorandum if any resolution plan is received by RP from any eligible applicant(s) at any stage of Resolution Plan Process, RP is free to examine any resolution plan with the approval of COC and the applicant will not have any right to object the submission or consideration of such plan. It is further submitted, that even under clause 11.2 of the Process Memorandum, RP or COC, at their sole discretion, may request for additional information/documents and/or seek clarification from the resolution applicant after the due date for submission of the plan. The delay in submission of additional information and/or documents sought by RP, COC or the process manager would entitle RP, COC or the process manager to reject the resolution plan.

Paragraph 5(b) of the covering letter for submission of resolution plan by KIAL.

"5. We further represent and confirm as follows:

(a) .....

(b) **Acceptance**

We hereby unconditionally and irrevocably agree and accept the terms of the Process Memorandum and that the decision made by the CoC, Resolution professional and/or the Adjudicating Authority in respect of any matter with respect to, or arising out of, the Process Memorandum and the Resolution Plan Process shall be binding on us. We hereby expressly waive any and all claims in respect of the Resolution Plan Process."

Taking into consideration that KIAL had objected to participation of any other applicant after the time limit mentioned in form G, KIAL is not estopped from challenging the process. At times, there is no option given to party and here too KIAL had no option in view of clause 11.2 of Process Memorandum and it had to run the risk of rejection of plan. As such, it cannot be said that KIAL had waived or acquiesced its right to challenge the decision of RP or COC.

(iii) Whether NCLAT was right in law in interfering with the decision of CoC of accepting the resolution plan of Kalpraj?

The court held that it is the majority decision of COC about feasibility and viability of a resolution plan considering various aspect about the resolution plan including the manner of distribution of funds among the various classes of creditors. COC may ask to modify the resolution plan considering any practical issues. It was held that what is important is, the commercial wisdom of the majority of creditors, who is to determine through negotiation with

the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.

It has been held, that in an enquiry under section 31, the limited enquiry that the adjudicating authority is permitted is, as to whether the resolution planprovides:

(i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor,

(ii) the repayment of the debts of operational creditorsin prescribed manner,

(iii) the management of the affairs of the corporate debtor,

(iv) the implementation and supervision of the resolution plan,

(v) the plan does not contravene any of the provisions of the law for the time being in force,

(vi) conforms to such other requirements as may be specified by the Board.

It will therefore be clear, that this Court, in unequivocal terms, held that the appeal is creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.

Conclusion of Hon'ble Supreme Court

The court held that No doubt, it is sought to be urged, that since there has been a material irregularity in exercise of the powers by RP, NCLAT was justified in view of the provisions of clause (ii) of sub¬section (3) of Section 61 of the I&B Code to interfere with the exercise of power by RP, However, it could be seen, that all actions of RP have the seal of approval of CoC. No doubt, it was possible for RP to have issued another Form 'G', in the event he found, that the proposals received by it prior to the date specified in last form G could not be accepted. However, it has been the consistent stand of RP as well as CoC, that all actions of RP, including acceptance of resolution plans of Kalpraj after the due date, albeit before the expiry of timeline specified by the I&B Code for completion of the process, have been consciously approved by CoC. It is to be noted, that the decision of CoC is taken by a thumping majority of 84.36%. The only creditor voted in favour of KIAL is Kotak Bank, which is a holding company of KIAL, having voting rights of 0.97%. We are of the considered view, that in view of the paramount importance given to the decision of CoC, which is to be taken on the basis of 'commercial wisdom', NCLAT was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%.

It was mentioned that resolution plan of KIAL was passed by COC on 13.8.2020 in view of direction from NCLAT but since it was already clarified that decision of NCLAT does not stand scrutiny of law, subsequent approval of KIAL Plan becomes non- est in law. As such the decision taken by COC for approval of resolution plan of Kalpraj which was taken considering commercial wisdom of COC will prevail.

* * * * *

In ***Kundan Care Products Ltd. v. Amit Gupta,*** the NCLAT held that once a Resolution Plan has been approved by the Committee of Creditors by required majority, the Resolution Applicant cannot be allowed to withdraw the Resolution Plan even if the said Resolution Plan is pending approval from NCLT. Referring to the reliance placed by the Appellant on the case of ***Committee of Creditors of Metalyst Forging Ltd. v. Deccan Value Investors LP and Ors,*** wherein the NCLAT did not compel the performance of a plan by an unwilling Resolution Applicant because the plan was held in violation of Section 30(2)(e) of the Code. Such observations cannot be treated as a ratio to be followed as a precedent. Same has no resemblance or comparison with the facts of the instant case where the Resolution Plan approved by the Committee of Creditors is still awaiting approval of the Adjudicating Authority. The Appeal being devoid of merit is dismissed. If such finding was absent, the applicant would have been bound to adhere to the Resolution Plan.

Recent cases on GST/ Custom Duty passed w.r.t. IBC Law

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Some important cases and advance rulings under GST which are for companied under IBC are listed below.

1. **The Resolution Plan approved by the Adjudicating Authority shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan. Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited ([Civil Appeal No. 8129 of 2019 with WP (Civil) No. 1177 of 2020 and Civil Appeals No. 1550-1554 of 2021])**

   The Hon'ble Supreme Court has said that (1) Provisions of section 238 of the IBC Code, will have an overriding effect, if there is any inconsistency with any of the provisions of the law for the time being in force or any instrument having effect by virtue of any such law; (2) That once a resolution plan is duly approved by the AA under sub-section (1) of section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Company and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders; (3) All the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority (AA) grants its approval under section 31 could be continued; and (4) The 2019 amendment of the IBC is declaratory and clarificatory in nature. Even if 2019 amendment was not effected, still the Central Government, any State Government or any local authority would be bound by the resolution plan, once it is approved by the AA. The amendment to section 31, being clarificatory and declaratory in nature, is effective from the date on which Code came into effect. Thus it was held that the claims of the parties, which are not included in the resolution plan could be agitated by them before the other fora, as observed by the Appellate Authority, is not permissible.

   In effect it is advisable that any dues of the Central Government w.r.t. GST, Service Tax or Central Excise or any other tax dues or of the State Government w.r.t. GST, State VAT, Sales Tax or any other tax dues, should be submitted to the Resolution Professional and ensured that it is made a part of the Resolution Plan. If the claims are made as a part of the Resolution Plan then there is a probability that some/ all dues can be recovered, subject to the approved Resolution Plan. However, if in any case, no claim is submitted then the Central/ State Government has no recourse and as held in the Hon'ble Supreme Court's Order, is not permissible to agitate the claims which are not included in the resolution plan.

2. **No customs duty recovery from Corporate Resolution Applicant if Corporate Resolution plan included customs duty (Ruchi Soya Industries Ltd. v. Union of India. In view of order in**

Ghanashyam Mishra & Sons (P.) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. [2021] 126 taxmann.com 132 (SC) that all dues including statutory dues owed to Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished, assessee was directed to seek clarification from NCLT whether Corporate Resolution plan included customs duty to be paid by assessee on import under subject bill of entry - [2021] 127 taxmann.com 160 (Madras)

The petitioner filed the Bill of Entry in advance to clear the consignment of crude palm oil of edible grade in bulk. In the Bill of Entry, the petitioner had proposed to pay Basic Customs Duty (BCD) at 7.5%. The department completed reassessment and imposed the higher rate of Customs Duty. It challenged the reassessment of the Bill of Entry by filing writ petition. It submitted that Customs Department had lost all its rights over the differential duty demanded in view of the corporate resolution plan approved by the National Company Law Board, Mumbai under the provisions of the Insolvency and Bankruptcy Code, 2016.

The High Court observed that the Honorable Supreme Court in Ghanashym Mishra and Sons Vs. Edelweiss Asset Construction [2021] 126 taxmann.com 132 (SC), in its recent decision dated 13.04.2021 held that once a resolution plan is duly approved by the Adjudicating Authority, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.

Therefore, the contention of petitioner was accepted and it was directed that the petitioner shall file an appropriate application before the National Company Law Board and get the issue clarified from the National Company Law Board that the indeed crown debts like the differential "customs duty" payable to the department was treated as "operational debt" before it by the "corporate applicant.

3. **Where GST Authority passed assessment order on assessee and imposed tax and penalty; whereas an order of moratorium had already been passed against assessee, matter required to be remanded back to GST Authority for a fresh consideration by examining aspect as to whether order of moratorium also covered proceeding pending before GST Authority ([2020] 116 taxmann.com 3 (Gauhati), HIGH COURT OF GAUHATI, National Plywood Industries Ltd. v. Union of India)**

Section 61 of the Central Goods and Services Tax Act, 2017 /Section 61 of the Assam Goods and Services Tax Act, 2017 read with section 14 of the Insolvency And Bankruptcy Code, 2016. In the matter of assessment and scrutiny of returns, the GST Authority passed assessment order on assessee and imposed tax and penalty. The Assessee filed writ petition stating that an order of moratorium had already been passed against it by National Company Law Tribunal under provisions of Insolvency and Bankruptcy Code, 2016 and GST Authority without examining aspect as to whether order of moratorium also covered proceeding pending before GST Authority had passed impugned order. The question asked was whether matter was to be remanded back to GST Authority for a fresh consideration by examining aspect as to whether order of moratorium also covered proceeding pending before GST Authority under GST Act. It was held, yes, and the matter was remanded back.

4. **Sale of assets of a corporate debtor by NCLT appointed liquidator is a supply of goods by said liquidator, who is required to take registration under section 24 ([2020] 117 taxmann.com 446 (AAR-WEST BENGAL), AUTHORITY FOR ADVANCE RULINGS, WEST BENGAL, Mansi Oils and Grains (P.) Ltd.)**

Section 24, read with section 29, of the Central Goods and Services Tax Act, 2017/Section 24, read with section 29 of the West Bengal Goods and Services Tax Act, 2017, requires Compulsory registration in certain case. The question is whether sale of assets of a corporate debtor by NCLT appointed liquidator is a supply of goods by said liquidator, who is required to take registration under section 24. It was held, yes. Further whether in case, liquidator is already registered as a distinct person of corporate debtor in terms of Notification No. 11/2020- CT (Rate) dated 21-03-2020, he should continue to remain registered till his liability ceases under section 29(1)(c), it was held, yes.

5. **Power to summon persons to give evidence and produce documents in inquiry is a statutory function,**

hence, summons issued to petitioners / petitioner No.2, only for purpose of completing investigation into evasion of GST were valid and no interference was called upon ([2021] 124 taxmann.com 483 (Bombay), HIGH COURT OF BOMBAY, JSK Marketing Ltd. v. Union of India)

The Petitioner, had been engaged in business of trading in consumer goods, FMCG products, cameras, batteries, etc. for last 34 years. The Directorate General of GST Intelligence, Mumbai conducted a raid on premises of petitioner, and respondent authority seized several documents, books of account, hard disks, etc. for purpose of GST investigation into alleged tax evasion. Respondent, Directorate General of GST Intelligence, Mumbai Zonal Unit issued summons to Director of petitioner company (petitioner No.2) seeking his attendance for giving evidence and/or producing documents or things from his possession and under his control.

In the meanwhile respondent No. 3 i.e. Bombay Sales Agency, a financial creditor of petitioner No. 1 invoked section 7 of the Insolvency and Bankruptcy Code, 2016 by filing application in the National Company Law Tribunal, Mumbai. ("NCLT" in short). By order dated 23-9-2019 NCLT admitted the application of respondent No. 3 and declared a moratorium in terms of section 14 of the said Code and appointed respondent No. 5 i.e. Ms. Palak Swapnil Desai as Interim Resolution Professional ("IRP" for short), further directing that the assets of petitioner No. 1 should not be liquidated until the insolvency process was completed.

The Petitioners challenged issuance of summons and sought stay of proceedings or inquiry. It was held that Power to summon persons to give evidence and produce documents in inquiry is a statutory function. Sub-sections (1) and (2) of section 14 of the Central Excise Act state that summons to produce documents or other things in possession of or under control of person summoned can be issued by an officer duly empowered by Central Government and all persons so summoned shall be bound to attend and state truth upon any subject respecting which they are examined or make statements or to produce such documents and other things as may be called upon. Sub-section (3) of section 14 states that every such inquiry as aforesaid shall be deemed to be a judicial proceedings within meaning of section 193 and section 228 of Indian Penal Code, 1860. In view of aforementioned legal position, summons issued to petitioners / petitioner No.2 were valid and no interference was called upon.

6. **Where applicant after taking a property on lease for 99 years, is entitled to sub-lease said property to others after expiry of five years for rest of lease period, in view of fact that transaction in question does not create fresh benefit from land other than leasehold right and it is like a compensation for agreeing to transfer of applicant's right in favour of assignee, same can be regarded as service classifiable under 'other miscellaneous service' in terms of Heading No. 999792 ([2020] 118 taxmann.com 339 (AAR-WEST BENGAL), AUTHORITY FOR ADVANCE RULINGS, WEST BENGAL, Enfield Apparels Ltd.)**

The National Company Law Tribunal (hereinafter NCLT), Kolkata Bench, passed an order on 06/08/2018, initiating the corporate insolvency resolution process (hereinafter CIRP), admitting the applicant as the corporate debtor, and appointed Sri Kanchan Dutta as Interim Resolution Professional (IRP). The Committee of Creditors (hereinafter CoC) subsequently confirmed Sri Dutta as the Resolution Professional (RP). During the CIRP, the RP and the CoC did not receive any resolution plan. The NCLT, therefore, passed another order on 04/04/2019 under section 33 of the Insolvency & Bankruptcy Code, 2016 (hereinafter the IBC) to start the process of liquidating the corporate debtor and appointed Sri Dutta as the Liquidator. He has obtained separate registration as a distinct person (GSTIN 19AABCE8762F4ZC) in terms of Notification No. 11/2020 - Central Tax dated 21/03/2020). The Liquidator wants to know whether GST is payable on the consideration receivable on such assignment. If so, what should be the SAC and the rate applicable? He also seeks clarity on whether he can claim input tax credit for the GST paid on the transfer fee. Both the questions are admissible under section 97 (2) (*a*), (*b*), (*d*) & (*e*) of the GST Act. It was held that The activity of assignment is in the nature of agreeing to transfer one's leasehold rights. It does not amount to further sub-leasing, as the applicant's rights as per the Deed of sub-lease stands extinguished after assignment. Neither does it create fresh benefit from the land. It is in the nature of compensation for agreeing to do the transfer of the applicant's rights in favour of the assignee. It is a service classifiable under 'Other miscellaneous service' (SAC 999792) and taxable @ 18% under Sl No. 35 of Notification No. 11/2017 - CT (Rate) dated 28/06/2017 (State Notification No. 1135-FT dated 28/06/2017), as amended from time to time.

The transfer fee charged by the Sub-lessor is the consideration payable to the Sublessor for providing a service in the course or furtherance of business, more specifically because business includes supply or acquisition of goods or services in connection with the closure of a business in terms of section 2 (17) (*d*) of the GST Act. The GST to be paid on such transfer fee is, therefore, admissible as input tax credit.

(Source: Taxmann.com)

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Approval of Resolution Plan – Clarification on certain key and significant issues

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Introduction

The legal framework and the judicial pronouncements by the appropriate court of law under the Insolvency and Bankruptcy Code ("**IBC**" or "**the Code**") thrive on a single mantra "**The objective of the Insolvency and Bankruptcy Code is resolution and the purpose of the resolution is for maximization of the value of assets of the corporate debtor**."

IBC aims to resolve and stabilize stressed yet viable businesses ("**Corporate Debtors**") by putting them through a corporate insolvency resolution process ("**CIRP**") and transferring them as 'going concerns' to persons/entities ("**Resolution Applicants**") willing to take over their management and assets, and resolve their debts. Interested resolution applicants can participate in the CIRP and submit 'resolution plans'. These plans are placed for consideration before the Committee of Creditors ("**CoC**"), which may examine, negotiate and approve any one of them by a vote of 66% or higher. The CoC approved resolution plan is ultimately examined and approved / rejected by the National Company Law Tribunal ("**NCLT**"), marking the conclusion of the CIRP.

Resolution Plan

As per **Section 5(26) of IBC, 2016 -*"Resolution plan** means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II"*.

As such, a resolution plan is basically an instrument for taking over the corporate debtor, paying the dues of its creditors and undertaking its revival and turn-around. It is a report prepared based on the Information Memorandum (**IM**) and the Request for Resolution Plan (**RFRP**) document provided by the Resolution Professional targeting – Legal, Financial, Management and Technical strategies in order to bring the corporate debtor back on its feet at the earnest.

The Code mandates certain provisions in a resolution plan, such as payment of CIRP cost in priority over other debts, payment to operational creditors and dissenting financial creditors, etc. It does not, however, specify, or in any manner regulate how the corporate debtor is to be taken over, revived and/or turned around by the resolution applicant. This is left to the 'commercial wisdom' of the CoC, which is ultimately reflected in the approved resolution plan. The NCLT has limited powers while examining an approved plan and cannot sit in appeal over the CoC's commercial decision. Once approved by the NCLT, the plan must be fully and effectively implemented.

Clarification on certain key issues regarding Resolution Plan and its approval

1. **Withdrawal of the Resolution Plan post approval by CoC**

The decision of two-member bench of National Company Law Appellate Tribunal (**NCLAT**) in ***Educomp Solutions Ltd. Vs. Ebic Singapore Pte. Ltd. & Anr.*** (***Educomp Solutions***) and the decision of National Company Law Tribunal (**NCLT**), New Delhi in ***Astonfield Solar (Gujarat) Pvt. Ltd. (Astonfield Solar)*** effectively lay down

that a resolution plan, once approved by the CoC, cannot be withdrawn or modified under any circumstance, no matter the extent of impossibility or unviability that may have arisen subsequently.

'Viability' is at the core of a resolution plan and has also been given paramount importance under the Code.

- Section 30(2)(d) of the Code mandates that a plan 'must' contain provisions for its implementation and enforcement.
- Section 30(4) of the Code mandates the CoC to satisfy itself of the plan's 'viability' before approving it.
- Section 31(1)of the Code mandates the NCLT to ensure that the plan is capable of 'effective implementation' before according its approval.

Thus, far from prohibiting the withdrawal/modification of a plan, the Code imposes a duty on the NCLT to reject a plan that has subsequently become unfeasible or unviable post CoC's approval.

Unlike the Educomp Solutions and Astonfield Solar decisions, the importance of 'viability' of the plan was weighed by NCLT, Mumbai in ***Deccan Value Investors L.P. &Anr. V. Deustche Bank AG & Ors. (Deccan Value)*** while permitting withdrawal of the resolution plan post CoC's approval.

It was held that the Code neither confers the power or jurisdiction on the NCLT to compel specific performance of a plan by an unwilling resolution applicant; the letter and spirit of the Code mandate the acceptance of only a viable and lawful resolution plan being implemented at the hands of a willing resolution applicant; and the fact that a resolution plan is to be approved by the CoC only after being satisfied that it is feasible and viable, clearly implies that if a plan is not viable or fit for implementation, or is based on incorrect assumptions, which would lead to its failure and the eventual death of the corporate debtor, it cannot be approved by the NCLT in exercise of its power under section 31 of the Code, and hence, can be allowed to be withdrawn.

The aforesaid decision was confirmed by a three member bench in NCLAT in ***Metalyst Forging Ltd. v. Deccan Value Investors L.P. (Metalyst Forging),*** which continues to be good law till date. Until this judgment is set aside by a larger bench of the Tribunal or by the Supreme Court, it constitutes a binding precedent. Besides, there are other such precedents; for instance ***Tarini Steel Company Pvt. Ltd. V. Trinity Auto Components Ltd.*** where the NCLAT had permitted the withdrawal of a plan post approval from the NCLT, and **Sunil Kumar Agarwal (RP of *DIGJAM Ltd.) V. Suspended Board of Directors of DIGJAM Ltd. & Ors.*** where NCLT, Ahmedabad has permitted modifications in the resolution plan post CoC's approval, at the resolution applicant's request, on account of the COVID-19 crisis.

The NCLAT surprisingly in the matter of ***Kundan Care Products Limited v. Amit Gupta***, contrary to its own view taken in the ***Metalyst Forging*** matter had held that a successful resolution applicant whose resolution plan has been approved by the CoC could not be allowed to withdraw the plan while it is pending approval from the NCLT under sec 31 of the Code. Although the operation and effect of the said order has been stayed by the Hon'ble Supreme Court (**Supreme Court**), it would be interesting to see how the Apex Court settles the inconsistency in the position of law with respect to withdrawal of resolution plan post CoC's approval and prior to NCLT approval.

It is important that the position of law is clarified at the earliest, as the regulatory uncertainty created by these decisions will severely affect pending resolution processes where plans are yet to be submitted.

2. **The Resolution Plans need not match the Liquidation Value**

The term "Liquidation value" has been defined in the Regulation 35 of the CIRP Regulations. The Regulation defines the "liquidation value" as the estimated realizable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date. The cursory reading of the regulation shows that estimated value of the assets of the corporate debtor at the time of the liquidation on the commencement date of the insolvency will be considered as the liquidation value for the purpose of the Insolvency process. As a matter of practice and general thumb rule, the liquidation value is considered by the CoC as the base price for negotiation with the Resolution Applicants in the CIRP for the purpose of resolution of a Corporate Debtor.

However, the **Supreme Court** in a recent judgment in the matter of ***Maharashtra Seamless Steel Ltd. v. Padmanabhan Venkatesh & Ors***. upheld the primacy of commercial wisdom of the Committee of Creditors and held that the approved resolution plan can provide for payment of amounts lower than the liquidation value of the Corporate Debtor if it complies with the provisions of Section 30 (2) of the IBC.

The matter arose out of the corporate insolvency resolution process of United Seamless Tabulaar Private Limited (**United Seamless / Corporate Debtor**), where NCLT,

Hyderabad Bench by its order approved the resolution plan of Maharashtra Seamless Ltd. (**MSL / Resolution Applicant**), stating that the **CoC** in its commercial wisdom has approved the resolution plan despite the value offered under the resolution plan being lower than the liquidation value. The NCLT held that the resolution plan was in conformity with provisions of Section 30 (2) of the **IBC**, which lays down the mandatory contents of a resolution plan. This order of the NCLT was appealed before the NCLAT which overturned the said order.

The matter was further appealed before Hon'ble Supreme Courton the question of law whether the scheme of the IBC contemplates whether the sum forming part of the resolution plan should match the liquidation value or not.

The Supreme Court referred its **Essar Steel** judgment and observed that maximization of value of assets of the corporate debtors so as to run them efficiently as going concerns, is an important objective of the IBC. When the committee of creditors exercises its commercial wisdom to arrive at business decisions, it must take into account key features of the IBC. So long as the provisions of the IBC and its regulations have been met, it is the commercial wisdom of the requisite majority of the committee of creditors which holds good.

It further observed that there is no provision in the IBC or its regulations requiring the bid of any resolution applicant to match the liquidation value arrived at in the manner provided under Clause 53 of the CIRP Regulations. The object of these regulations is to assist the CoC and once a plan is approved by the CoC, the adjudicating authority's mandate is to ascertain if the plan meets the requirement under Section 30(2) and (4).

Earlier, it was a general understanding that resolution plans should offer an amount more than the liquidation value. However, it seems that the intent is to only grant a negotiating power to the CoC by keeping the liquidation value in mind.

It is now settled that the resolution plans need not match the liquidation value and the CoC is fully within its rights to accept such a resolution plan in its commercial wisdom as long as the provisions of the Section 30 (2) (b) are complied with.

3. **COC decision treated as final on Resolution Plan**

While interpreting the preamble of the IBC in ***Swiss Ribbons Pvt. Ltd. v. Union of India***, the Supreme Court observed that the IBC was enacted with the primary objective of reviving and keeping a corporate debtor as a going concern by maximization of the value of assets and balancing the interests of all the stakeholders. The Court thus observed that the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests**.**

The aforementioned objectives of the IBC were considered again by the Supreme Court In the case of ***K. Shashidhar v. Indian Overseas Bank & Ors. (K. Shashidhar)***, wherein the Apex Court in its judgment dated 5th February 2019 stated, "*As aforesaid, upon receipt of a "rejected plan" the adjudicating authority (NCLT) is not expected to do anything more, but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyze or evaluate the commercial decision of the COC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors*."

The Hon'ble Supreme Court further held that "*the legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority".*

In the judgment dated 15th November 2019 of ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors*** delivered by the Hon'ble Supreme Court, it was strongly opined by the Hon'ble Apex Court that the NCLT / NCLAT can exercise only a limited judicial review in respect of any COC decision. NCLT / NCLAT does not have jurisdiction under the provisions of the Code to interfere in the merits of a business decision taken by the majority of COC.

The Hon'ble Supreme Court held that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the CoC and that the CoC is the final authority in this regard. The Hon'ble Supreme Court restricted the role of NCLT to only adjudicate whether the CoC has complied with the objects of the Code i.e. the corporate debtor needs to keep going as a going concern during CIRP, it needs to maximize the value of the assets of the corporate debtor, and interests of all stakeholders have to be taken care of.

In a recent judgment passed by three judge bench of the Hon'ble Supreme Court in the matter of **Kalparaj Dharamshi v. Kotak Investment Advisors Ltd**, dated 10th March, 2021, it was held that the commercial wisdom of Committee of Creditors (CoC) is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the Insolvency and Bankruptcy Code, 2016 (IBC).

Taking note of various decision of the Supreme Court, the

Court held that the legislative scheme is unambiguous. The legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the Adjudicating Authority and that the decision of CoC's 'commercial wisdom' is made non-justiciable. However, it is not open to the Adjudicating Authority or Appellate Authority to reckon any other factor other than specified in Sections 30(2)or 61(3) of IBC.

It may be safely concluded based on the various judgments referred above, that NCLT / NCLAT has no authority to go into the merits of the Resolution Plan, but only adjudicate in respect of compliance with Section 30 of the Code. The courts have time and again clarified that the jurisdiction of NCLT / NCLAT is restricted only to ensure the compliance of Section 30 of the Code and Regulation 38 of the CIRP Regulations and in supersession of that ensure the satisfaction of the objectives of the Code. The Code has intended to leave the commercial aspects in the hands of the COC consisting of the financial creditors, relying on their commercial and technical wisdom.

4. **Swiss Challenge Method of Bidding in IBC**

Swiss challenge is a methodology which is gaining popularity in the resolution process and is most commonly adopted by CoC for deciding the highest (H1) bidder. The Swiss Challenge Method is expected to maximize the value of assets and thus improve the value of CIRP of the Corporate Debtor.

Under the 'Swiss Challenge' method, H1 bid in the first round of bidding becomes the base price for bidders, including the H1 bidder, to place counter-bids in the second round of bidding. The stressed asset will go to the highest bidder in the second round. If no other bidder is able to better the H1 bid, the top bidder in the first round is declared the successful bidder.

The Swiss Challenge Method of bidding was adopted by the CoC in one of the landmark case of Ruchi Soya Industries Limited (Ruchi Soya) which is an edible oil manufacturing company that was declared insolvent. Baba Ramdev promoted – Patanjali and Adani Group company – AdaniWilmar have been competing against each other for the acquisition of Ruchi Soya under IBC.

The committee of creditors of Ruchi Soya had decided to conduct the Swiss challenge method to maximize the asset value of the bankruptcy-hit firm. In the first round of bidding, AdaniWilmar emerged as the highest bidder. In the second round of bids Patanjali had the opportunity to either better their bid such that it beats the highest bid or back out from the process and let Adani Group acquire Ruchi Soya.

While AdaniWilmar emerged as the highest bidder with a INR 6,000 crore offer, Patanjali group came second with a INR 5,700 crore bid as media reports. The CoC had asked Patanjali to submit a revised bid to match or better the highest offer of INR 6,000 crore by AdaniWilmar as per media reports.

However, Patanjali litigated the matter seeking clarifications instead of submitting a fresh bid. AdaniWilmar was selected by the CoC after two-rounds of bidding. Later, Adani Wilmar withdrew from the race citing significant delays in resolution process that led to deterioration of assets and Patanjali won the bid to acquire Ruchi Soya.

On 12th March, 2020,contrary to above, an order was passed by Hon'ble NCLT, Mumbai Bench in the matter of **Yogesh Wrapper Agency V. New Empire Textile Processor Private Limited** wherein the Tribunal was of the view that the Swiss Challenge method does not find any place in the CIRP Regulations, as the CIRP Regulations provide the manner in which the Resolution Plan has to be approved. The Swiss Challenge method, as observed by the Tribunal, is nothing but an auction sale of the Corporate Debtor, where the commercial wisdom of the CoC has to take a back seat. If this contention is accepted, the CIRP Regulations framed by the IBBI will virtually become otiose. Hence, the Tribunal rejected the contention that Swiss Challenge method has to be mandatorily followed for approval of resolution by CoC.

While the Swiss Challenge method of bidding is yet to find anyplace in IBC, being one of the successful bidding method for maximization of value the corporate debtor, it is understood from media reports that the banks have made representations before the Ministry of Corporate Affairs to include bidding under the 'Swiss Challenge Method' in the insolvency code.

5. **All resolution plans under IBC to be put to vote simultaneously**

The Insolvency and Bankruptcy Board of India (IBBI) has on 7th August 2020 amended the CIRP Regulations making it mandatory for the Committee of Creditors (CoC) of insolvent companies to put all compliant resolution plans to vote simultaneously after evaluation as per the evaluation matrix.

As per the amendment:

– The resolution plan, which receives the highest votes, but not less than 66 per cent of voting share, shall be considered as approved.

- Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes.
- In cases where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes, shall be considered as approved.
- If two or more resolution plans receive equal votes, but not less than requisite votes, the committee shall approve any one of them, as per the tie-breaker formula announced before voting.
- If none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Insolvency and Bankruptcy Code.

So far, CoC isn't required to vote on all resolution plans at the same time. They've to identify the best resolution plan and approve it with or without modifications. However, as per the amended regulations the CoC after evaluation of all compliant resolution plans as per evaluation matrix, shall vote on all compliant resolution plans simultaneously.

Conclusion

While much stress has been put on how to make things easy for a business to enter, it must be noted that ease of exit is also equally crucial. As of today, IBC has become the single law that deals with insolvency, bankruptcy, and reorganization of failed business, and has somehow reduced the importance of previous legislations. With the enactment of IBC, a major legislative gap in the resolution of NPAs was removed. The law aims at insolvency resolution in a time-bound manner undertaken by insolvency professionals. The law ensures the separation of judicial and commercial aspects of the resolution process, thereby correcting the mistakes of past legislations. The primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its management and from a corporate death by liquidation. The Code is thus a beneficial legislation which seeks to revive the distressed companies. While the enactment of IBC in itself is viewed as a watershed moment in the resolution of stressed assets in India, it has undergone several amendments, and the judiciary has also played a significant role in fine-tuning the various loopholes in the framework.

Disclaimer- The above article is based on the personal interpretation of the related orders and laws. The readers are expected to take expert opinion before relying upon the article

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In the case of ***Bhaskar v. Sai Precious Traexim Pvt. Ltd.,*** NCLAT focused on the important ingredients to 'Service of notices and processes' to be followed by Adjudicating Authority as per Rule 38 of the NCLT Rules, 2016. If a notice was not duly served upon the concerned party or the party was prevented by any sufficient cause from appearing for the hearing, the Tribunal has the authority to pass an order to set aside the ex-parte hearing against such party on conditions as he thinks fit. The order passed by the Adjudicating Authority in admitting application under section 7 was set aside and the matter was remitted back to the Adjudicating Authority for fresh consideration and appreciation of the entire gamut of the controversies centering around the Application in an objective and dispassionate manner, on merits, of course after issuing due notice to the parties as per 'NCLT' Rules 2016 and also adhering to the principles of 'natural justice'. Corporate Debtor is released from the rigour of the CIRP. All actions taken by the Interim Resolution Professional / Resolution Professional and the Committee of Creditors, if any, are declared illegal and set aside.

Pre-Packs: An Alternative Insolvency Resolution Process for MSMEs

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A. Introduction

The Insolvency and Bankruptcy Code (Amendment) Ordinance 2021 **(Ordinance)** has recently been promulgated on April 4, 2021 and it seeks to provide an efficient alternative insolvency resolution process for corporate persons classified as micro, small and medium enterprises **(MSMEs)** under the Insolvency and Bankruptcy Code, 2016 **(Code)**. The process is expected to ensure a quicker, cost-effective and value maximising outcomefor all the stakeholders, in a manner which is least disruptive to the continuity of their businesses and which preserves jobs. This alternative is in the form of a Pre-Pack Insolvency Resolution Process framework which will be supplementing the present Corporate Insolvency Resolution Process **(CIRP)**, as an additional tool for the insolvency resolution of entities which have been classified as MSMEs. This Article seek to discussthe impact of Covid-19 pandemic on MSMEs and the subsequent mitigation measures taken by the Government of India specifically the Ordinance introducing a Pre-Pack framework for insolvency resolution of MSMEs.

B. Impact of Covid-19 and Mitigation Measures

The importance of MSMEs in country's economic development cannot be stressed enough considering that they play a critical role in employment and income generation, resource utilisation and business innovation. India's 63.4 million MSMEs contribute significantly to the country's economy,[1] so much that in 2018-2019, MSMEs contributed to 30.27% of India's GDP.[2] Furthermore, the sector accounts for 45 per cent of manufacturing output, more than 40 per cent of exports and employs about 120 million people thereby evidencing that MSMEs are widening their domain across sectors of the economy, producing a diverse range of products and services to meet demands of domestic as well as global markets.[3]

The advent of the Covid-19 pandemic and the consequent nation-wide lockdown, a much-required measure to arrest the initial spread of Covid-19, resulted in supply disruptions, external demand decline and as such severely impacted the various businesses, specifically MSMEs. The Reserve Bank of India in its Report themed on *"Covid-19 and its Spatial Dimensions in India"* notes that MSMEs employ a large share of informal labourers and consequently, the lockdown and reverse migration impacted MSME productivity, with severe implications for the states with MSME concentration. The RBI further notes basis a Systemic Risk Survey conducted in October-November 2020, that the continuing adverse impact on MSMEs due to lack of cash flows, low demand, lack of man power and lack of capital could lead to prolonged stress in the sector and large-scale permanent closure of units with associated implications for employment.

The Indian government being alive to the stress faced by the MSMEs proceeded with introducing various measures so as to mitigate the impact of the ongoing pandemic. Vide Notification dated June 1, 2020 the criteria for classification of MSMEs was revised to the effect that the definition of Micro enterprise was increased to INR 1 Crore of investment and INR 5 Crore of turnover. The limit of small enterprise was increased to INR 10 Crore of investment and INR 50 Crore of turnover. Similarly, the limit of a medium enterprise was increased to

INR 50 Crore of investment and INR 250 Crore of turnover.

Under the Atmanirbhar Bharat Abhiyan, it was proposed that ₹3 lakh crore collateral free loans with 100 per cent credit guarantee cover would be extended to standard businesses/MSMEs, ₹20,000 crore subordinate debt with partial credit guarantee support would be extended to non-performing asset (NPA)/stressed MSMEs, Fund of funds with corpus of ₹10,000 crore would be created for equity funding of MSMEs with growth potential and viability and MSME receivables from government/central public sector enterprises (CPSEs) will be released in 45 days. The Government also introduced "Distressed Assets Fund – Subordinate Debt for Stressed MSMEs". A credit guarantee scheme for subordinate debt (CGSSD) was also launched so as to facilitate loans through banks to the promoters of stressed MSMEs for infusion as equity/quasi equity in the business.The Reserve Bank further extended the existing restructuring framework for MSMEs up-to March 31, 2021 covering borrowers whose aggregate exposure, including non-fund exposures, does not exceed `25 crore and which are classified as 'standard' as on March 1,2020, without a downgrade in the asset classification, subject to certain conditions.[4]

Moreover, the threshold of default under Section 4 of the Code IBC was also raised from ₹1 lakh to ₹1 crore so as to protect financially distressed MSMEs from the initiation of the CIRP. Additionally, Section 10A was also inserted in the Code for suspension of initiation of CIRP of a corporate debtor for any default arising on or after March 25, 2020 for a period of six months, which was further extended up to March 24, 2021.[5]

The government, while considering the efficacy of out-of-court workouts in delivering a speedier insolvency resolutions constituted a sub-committee of the Insolvency Law Committee vide Order dated June 24, 2020 to prepare a detailed scheme for implementing pre-pack and prearranged insolvency resolution process and accordingly a Report of the Pre-Packaged Insolvency Resolution Process was released on January 8, 2021 for public comments, pursuant to which an Ordinance was promulgated laying down a quicker and cost-effective framework for insolvency resolution of MSMEs.

C. Pre-Pack Insolvency Resolution Process (PIRP) Framework

The PIRP is a departure from the existing CIRP to the effect that the process adopts a largely informal and consensual approach for insolvency resolution of stressed entities. The PIRP allows the existing promoters of a Corporate Debtor to submit a base resolution plan to the financial creditors before the formal initiation of the process by the National Company Law Tribunal **(Adjudicating Authority)**. This framework allows for a debtor-in-possession model as opposed to creditor-in-control which can lead to time-bound resolutions, avoid extensive CIRP Costs and at the same time cause minimal disruptions to the ongoing operations of the Corporate Debtor thereby maintaining a sense of continuity. The framework as laid down by the Ordinance aims to provideamiddle route by adopting the privileges of a CIRP and a hybrid model of a 'debtor-in-possession with creditor-in-control' so as to achieve the objectives of the Code.

I. Pre-Initiation

An application for initiating PIRP may be filed by an eligible corporate debtor which has been classified as an MSME.[6] This application can be made in respect of a corporate debtor who commits a default and the Central Government may specify the minimum amount of default of higher value, which shall not be more than one crore rupeesfor matters relating to PIRP. Furthermore, the said MSME (a) must not have undergone a PIRP / CIRP or completed a CIRP during a period of three years preceding the initiation date;[7] (b) there is no order requiring it to be liquidated;[8] and (c) is eligible to submit a Resolution Plan under Section 29A of the Code.[9]

The application further entails that

a. The financial creditors, not being its related parties, propose the name of the insolvency professional for conducting the PIRP and such proposal if approved by the Financial Creditors representing not less than sixty-six per cent. in value of the financial debt.[10]

b. The majority of the directors/partners of the Corporate Debtor are also required to make a declaration stating (a) that an application for initiation of PIRP shall be filed within 90 days; (b) that the process is not being initiated to defraud any person; and (c) the name of the insolvency professional propose and approved to be appointed as the resolution professional.[11]

c. The members of the corporate debtor have passed a special resolution, or at least three-fourth of the total number of partners, of the corporate debtor have passed a resolution, approving the filing of an application for initiating prepackaged insolvency resolution process.[12]

d. Prior to seeking approval from the financial creditors for filing of an application to initiate PIRP, the Corporate Debtor is required to submit to the financial creditors the declaration, special resolution along with a base resolution plan.[13]

A Corporate Debtor which meets the aforesaid requirements may file an application before the Adjudicating Authority and such an application is required to be accompanied with certain documents which also include a declaration from the corporate debtor regarding the existence of any transactions of the corporate debtor that may be within the scope of provisions in respect of avoidance of transactions or fraudulent or wrongful trading.[14] The Adjudicating Authority may within 14 days of receipt of such application, admit the application and consequently declare a moratorium and appoint the resolution professional as proposed in the application.[15] This process once initiated is required to be completed within a period of 120 days from the date of its commencement date.[16]

II. Post-Initiation

With the initiation of the PIRP, the management of the affairs of the Corporate Debtor continue to vest in the Board of Directors or the partners and they are obligated to make every endeavor to protect and preserve the value of the property of the corporate debtor, and manage its operations as a going concern.[17]

The Corporate Debtor is required to submit to the resolution professional within two days of the PIRP commencement date, the updated list of claims along with details of the respective creditors, their security interests and guarantees,[18] a preliminary information memorandum containing information relevant for formulating a resolution plan[19] and the base resolution plan.[20]

The resolution professional shall within seven days of the commencement date constitute a committee of creditors (CoC) basis the list of claims[21] and present the base resolution plan before such CoC.[22] The CoC may provide the corporate debtor an opportunity to revise the base resolution plan prior to its approval,[23] post which it may proceed with approving the base plan if it does not impair any claims owed to the operational creditors.[24] The claims shall be considered to be impaired where the resolution plan does not provide for the full payment of the confirmed claims. However, in the event that the CoC does not approve the base resolution plan or the base resolution impairs any claims owed to the operational creditors, the resolution professional shall be required to invite prospective resolution applicants to submit a resolution plan to compete with the base resolution plan.[25] The approval of the resolution plan by the CoC is by a vote of not less than sixty-six per cent. of the voting shares, after considering its feasibility and viability, the manner of distribution proposed, and taking into account the order of priority amongst creditors.[26] This resolution plan once approved by the CoC is then submitted to the Adjudicating Authority for its approval, subsequent to which the plan is binding on all stakeholders.

III. Safeguards and Termination of PIRP

The Ordinance apart from laying down the framework also takes into account certain eventualities. The CoC, at any time during the PIRP, by a vote of not less than sixty-six per cent. of the voting share, can resolve to vest the management of the corporate debtor with the resolution professional pursuant to which an application can be filed before the Adjudicating Authority.[27] Henceforth, if the Adjudicating Authority is of the opinion that the affairs of the corporate debtor have been conducted in a fraudulent manner; or that there has been gross mismanagement of the affairs of the corporate debtor, it shall pass an order vesting the management of the corporate debtor with the resolution professional.[28]

Following the above, in the event that the management of the corporate debtor vests with the Resolution Professional and (a) the Resolution approved by CoC does not result in the change in the management or control of the CD to a person who was not a promoter or in the management or control of the CD; (b) Resolution plan selected for approval after competing with base resolution plan is not approved by the CoC; or (c) No resolution plan is approved by the CoC within a period of 90 days from the PIRP commencement date, the liquidation of the Corporate Debtor shall be initiated by the Adjudicating Authority. However, in a situation where such vesting of management does not take place and the Resolution Plan is not approved by the CoC or no resolution plan is received by the CoC within 90 days of the PIRP commencement date, only the PIRP process can be terminated by the Adjudicating Authority.

The CoC has also been empowered to the effect that, at any time after the PIRP commencement date, but before the approval of resolution plan, the CoC may by a vote of sixty-six per cent. of the voting shares, resolve to initiate a CIRP in respect of the corporate debtor.[29] Accordingly, the Adjudicating Authority on being intimated of such decision shall within thirty days, pass an order to terminate the PIRP and initiate CIRP in respect of the Corporate Debtor.[30]

IV. Powers of a Resolution Professional:

With the commencement of the PIRP, the Resolution Professional is obligated to confirm the list of claims submitted by the corporate debtor, maintain an

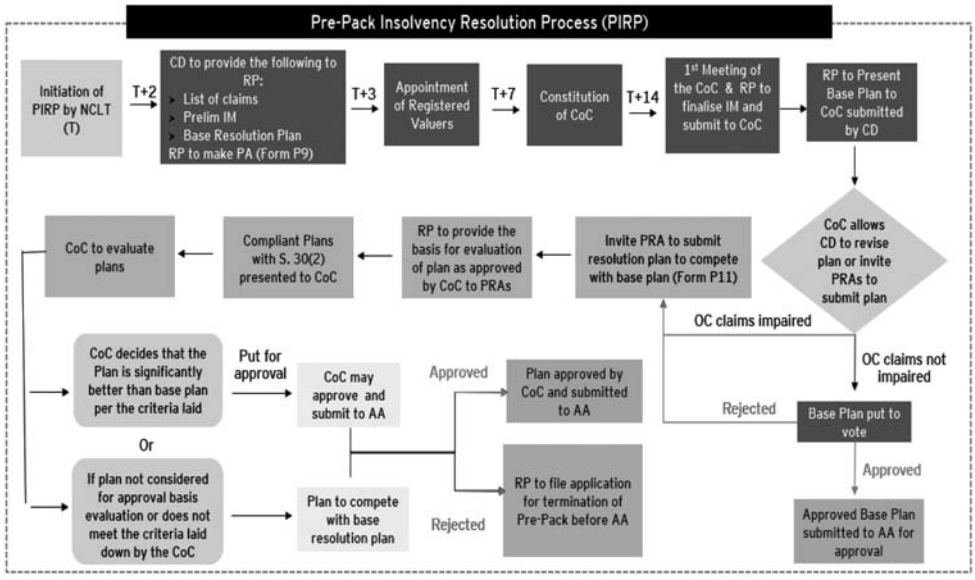
updated list of claims,monitor management of the affairs of the corporate debtor;inform the committee of creditors in the event of breach of any of the obligations of the Board of Directors or partners under the provisions of the Code.

The RP is also required to constitute the committee of creditors and convene and attend all its meetings, prepare the information memorandum on the basis of the preliminary information memorandum submitted by the Corporate Debtor and also file applications for avoidance of transactions.[31] The Resolution Professional is also empowered to access all its books of accounts, records and information available with the corporate debtor or information / relevant documents of the corporate debtor available with Government authorities, statutory auditors and accountants. Furthermore, from the date of appointment of the resolution professional, the financial institutions maintaining accounts of the corporate debtor are obligated to furnish all information relating to the corporate debtor available with them,[32] and also the personnel of the corporate debtor, its promoters and any other person associated with the management are required to extend all assistance and cooperation to the resolution professional in order to enable him to perform his duties and exercise his powers.[33]

D. Conclusion

The introduction of a pre-pack framework for resolution of insolvency for MSMEs would be beneficial for the various stakeholders particularly the promoters and the creditors. The eligible promoters of the corporate debtor will have an opportunity right at the outset to submit a base plan for the corporate debtor. This base plan can be mutually negotiated, and a consensus can be arrived at before such process is initiated by the promoter and the financial creditors. This would be particularly beneficial for MSMEs operating in sectors in which there may not be many prospective resolution applicants thereby risking the liquidation of the company on account of little or no investor interest. The availability of a cost and time effective insolvency resolution process specifically catering to approx. 63.4 million MSMEs in India would go a long way in insolvency resolution specially in a post Covid-19 scenario.

A summary representation of the pre-pack insolvency resolution processis as under :



[1] Reserve Bank of India, State Finances: A study of Budgets of 2020-21, October 27, 2020
[2] Government of India, Ministry of Micro, Small and Medium Enterprises, Annual Report 2020-21
[3] Reserve Bank of India, State Finances: A study of Budgets of 2020-21, October 27, 2020
[4] Reserve Bank of India, Financial Stability Report, Issue No. 22, January 2021
[5] Inserted by Act No. 17 of 2020, Section. 2 (w.e.f. 05-06-2020).
[6] Section 54A(1) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[7] Section 54A 2(a) & (b) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[8] Section 54A 2(c) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[9] Section 54A 2(d) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[10] Section 54A 2(e) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[11] Section 54A 2(f) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[12] Section 54A 2(g) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[13] Section 54A (3) read with (4) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[14] Section 54C of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[15] Section 54E of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[16] Section 54D of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[17] Section 54H of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[18] Section 54G(1)(a) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[19] Section 54G(1)(b) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[20] Section 54K(1) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[21] Section 54I(1) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[22] Section 54K(1) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[23] Section 54K(2) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[24] Section 54K(4) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[25] Section 54K(5) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[26] Section 54K(13) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[27] Section 54J(1) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[28] Section 54J(2) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[29] Section 54-0(1) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[30] Section 54-0(2) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[31] Section 54F(2) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[32] Section 54F(4) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021
[33] Section 54F(5) of the Insolvency and Bankruptcy (Amendment) Ordinance 2021

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Limitation Act, 1963 vis-à-vis IBC, 2016

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Introduction:

The law relating to limitation is based on the public policy that **" Law helps those who helps themselves"**i.e. no one should take benefit of their own laches and delays. The law relating to limitation is incorporated in the Limitation Act of 1963, as amended from time to time, which prescribes different periods of limitation for suits, petitions or applications.The Limitation Act 1963, has been enacted to consolidate and amend the law of limitation of suits and other proceedings and for purposes connected therewith. The Limitation Act applies to *"suits and other proceedings and for purposes connected therewith"* as stated in its preamble. The expression "other proceedings" are necessarily proceedings arising out of and/or related to suits.

The Limitation Act applies to all civil proceedings and some special criminal proceedings which can be taken in a Court of law unless its application is excluded by anyenactment. Law of limitation bars the remedy in a Court of law only when the period of limitation has expired, but it does not extinguish the right that it cannot be enforced by judicial process. Thus if a claim is satisfied outside the Court of law after the expiry of period of limitation, that is not illegal. It is the duty of the Court/ Tribunal not to proceed with any suits irrespective of the fact whether the plea of limitation has been set up in defence or not. The Court can suo-motu take note of question of limitation. It is to be noted that the question of limitation is not purely a question of law or purely a question of fact. Limitation is mixed question of law and fact. This Article aims to explore the applicability of Limitation Act, 1963 in the context of the Insolvency & Bankruptcy Code, 2016 (IBC).

Initially, IBC did not contain any provision regarding the applicability of the Limitation Act, 1963 for the proceedings under the IBC. The question of applicability of the Limitation Act, 1963 ("Limitation Act") to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The issue whether applications to initiate corporate insolvency under sections 7, 8, 9 and 10 of the IBC is barred limitation was first considered by National Company Law Appellate Tribunal (NCLAT) in the matter of **Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.** The Hon'ble NCLAT held that that provisions of the IBC cannot be shackled by the Limitation Act. It observed that:

"There is nothing on the record that Limitation Act, 2013 is applicable to I&B Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of I&B Code to suggest that the Law of Limitation Act, 1963 is applicable. The I&B Code, 2016 is not an Act for recovery of money claim, it relates to the initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and having a continuous course of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted."

The NCLAT observed that even if it is considered that the Limitation Act does apply to the IBC, then also the period of limitation will start from 1st December 2016, i.e., from the date the rights conferred by the enactment accrued. The Hon'ble NCLAT has thereby bestowed a second opportunity on

those creditors who had lost all hopes of recovering their debts due to vaporization of their rights over time. This might lead to a filing of numerous insolvency applications, which otherwise had been barred by limitation, thereby opening of pandora box of cases.

However, when the parties appealed before the Hon'ble Supreme Court, it dismissed the appealand opted not to give its view regarding the applicability of the Limitation Act.Subsequently, this issue once again popped up before the NCLAT in the matter of **Black Pearl Hotels Pvt. Ltd. v. Planet M Retail Ltd.** In this matter, the Hon'ble NCLT bench of Mumbai had rejected to admit an application by an operational creditor to initiate insolvency proceedings onthe ground that the claim is barred by limitation. These controversies regarding the applicability of the Limitation Act, 1963 for proceedings under the IBC, 2016 was considered by the Insolvency Law Committee (ILC) and recommended as follows:

"Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor's remedy."

Recommendation of the ILC led to the insertion of section 238A in the IBC through the Insolvency and Bankruptcy (Amendment) Ordinance 2018 (later replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018) w.e.f. 6th June, 2018 to make the provisions of the Limitation Act, 1963, apply to proceedings or appeals before the NCLT, the NCLAT, the Debt Recovery Tribunal, and the Debt Recovery Appellate Tribunal. Section 238A of the IBC reads as follow:

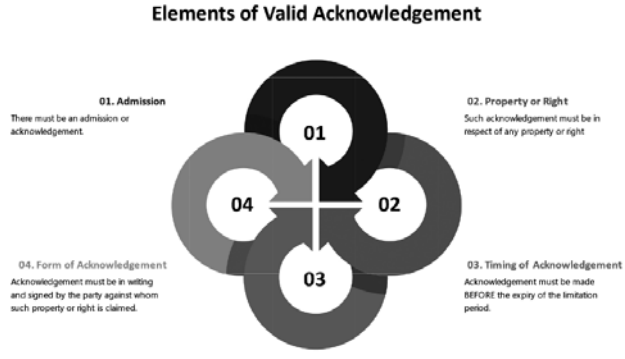
"The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

The language and tenor of Section 238A is significant. The Section reads that the provisions of the Limitation Act, 1963 shall, ***as far as may be***, apply to proceedings or appeals inter alia before the NCLT/NCLAT. Hon'ble Supreme Court in the case of **Babulal VardharjiGurjar Vs. Veer Gurjar Aluminium Industries Private Limited & Another** [Civil Appeal No. 6347 of 2019] examined the limitation period for filing section 7 applications and observed that the period of limitation for an application to initiate a CIRP under section 7 of the IBC is governed by article 137 of the Limitation Act and is, therefore, three years from the date when the right to apply accrues. The right to apply under the IBC accrues on the date when the default occurs. If the default had occurred over three years prior to the date of filing the application, the application would be time barred, save and except in those cases where, on facts, the delay in filing may be condoned.

After the enactment of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, there were controversy regarding whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018? This question was answered by Hon'ble Supreme Court in the case of **B.K. Educational Services Private Limited Vs. Parag Gupta and Associates [(2019) 11 SCC 633]** and held that this amendment is clarificatory in nature and hence applicable retrospectively given that the intent of the Code is not to revive time-barred debts. In nutshell period of limitation for filing applications for initiation of insolvency proceedings would be three years from the date of default, with Article 137 of the Limitation Act being applicable. Article 137, which is applicable to matters for which no period of limitation is specifically provided, the period of limitation is three years from the date when the right to apply accrues.

Saga of Acknowledgement of Debt & IBC

Before dwelling in to the controversy of acknowledgement of debt and its implication under the IBC, it will be pertinent to discuss the provision of section 18 of the Limitation Act, 1963 which deals with the effect of acknowledgement of liability in respect of property or right on the period of limitation. The following requirements should be present for a valid acknowledgement as per Section 18 of the Limitation Act, 1963:



Meaning of Acknowledgement:

In case of **Khan Bahadur Shapoor Fredoom Mazda v. Durga Prasad** [1962) 1 SCR 140], it was held that *acknowledgement* merely renews debt; it does not create a new right of action. It is a mere acknowledgement of the liability in respect of the right in question. it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgement is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgement must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. Generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Acknowledgement by an Assistant Vice-President of the debtor company was sufficient for computing a fresh period of limitation from the date of such acknowledgement. **[Fortis Healthcare Services Limited vs. KHSL Industries Limited].**

Acknowledgement of Debt & IBC

The question that arose before NCLT & NCLAT was whether an application under Section 7 of the Code filed after three years from the date of declaration of the loan account as Non-performing Asset, being the date of default, is not barred by limitation? This question was considered by Hon'ble Supreme Court in the case of **Laxmi Pat Surana vs. Union Bank of India & Anr.** [Civil Appeal No. 2734 of 2020 dated 26.03.2021]. The Apex Court has held that Section 18 of the Limitation Act ("**Section 18**") applies to extend the period of limitation for filing an application under Section 7 of the IBC.

Brief facts of Laxmi Pat Surana Case:

The brief facts in the Laxmi Pat case are that, in 2007 and 2008, Union Bank of India ("**UBI**") extended credit facilities to Mahaveer Construction, a proprietary firm which was guaranteed by one Surana Metals Limited. The date of default was January 30, 2010, whereas, UBI filed an application under Section 7 of the IBC against Surana Metals Limited (as the corporate debtor in respect of the corporate guarantee given by it) before the NCLT on February 13, 2019. The application was admitted by the NCLT and the appeal against the order of admission was dismissed by the NCLAT. The order of the NCLAT was thereafter challenged in appeal before the Supreme Court.

While the Supreme Court reiterated and held that the intent of the IBC was not to reopen or revive time-barred debts, it clarified that accrual of fresh period of limitation in terms of Section 18 is under the Limitation Act itself and it will not be a case of giving new lease to time-barred debts. Accordingly, the Court held that there is no reason to exclude the effect of Section 18 to the proceedings initiated under the IBC. The Court also clarified that its decision in the **Babulal VardharjiGurjar Vs. Veer Gurjar Aluminium Industries Private Limited & Another** [Civil Appeal No. 6347 of 2019] did not rule out the application of Section 18 and observed that . *"this Court had not ruled out the application of Section 18 of the Limitation Act to the proceedings under the Code, if the fact situation of the case so* warrants." The Supreme Court held that when the principal borrower and/or the corporate guarantor (as the case may be) admits and acknowledges the liability, a fresh period of limitation is required to be computed from the time when the acknowledgment was so signed by the principal borrower or the corporate guarantor, provided the acknowledgment is before expiration of the prescribed period of limitation.

Entry in Balance Sheet whether amounts an Acknowledgement?

Whether entry in Balance Sheet amounts to acknowledgement under section 18 of the Limitation Act, 1963 is very long controversy beginning from 1936. The Calcutta High Court in **Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff, [AIR 1962 Cal 115]** ["Bengal Silk Mills"] held that an acknowledgement of liability that is made in a balance sheet can amount to an acknowledgement of debt. Further in case of **Mahabir Cold Storage vs. CIT,** it was held that the entries in the books of accounts of the appellant would amount to an acknowledgement of the liability within the meaning of Section 18 of the Limitation Act, 1963 and extend the period of limitation for the discharge of the liability as debt. However, National Company Law Appellate Tribunal **(NCLAT)** in its full bench judgment in **V. Padmakumar v. Stressed Assets Stabilisation Fund**, *[Company Appeal (AT) (Insolvency) No. 57 of 2020 (decided on 12.03.2020)* ***["V. Padmakumar"]***, in which a majority of four members [Justice (Retd.) A.I.S. Cheema, Member (Judicial), dissenting] held that entries in balance sheets would not amount to acknowledgement of debt for the purpose of extending limitation under Section 18 of the

Limitation Act. However, another 3 Member Bench of the NCLAT, after a preliminary hearing, passed an order on 25.09.2020 doubting the correctness of the majority judgment of the Full Bench and referred the matter to the Acting Chairman of the NCLAT to constitute a Bench of coordinate strength to reconsider the judgment in V. Padmakumar (supra). However, A five-Member Bench of the NCLAT, vide the impugned judgment dated 22.12.2020, refused to adjudicate the question referred, stating thatthe reference to the Bench was itself incompetent. Therefore, this controversy came before the Hon'ble Supreme Court in the case of **Asset Reconstruction Company (India) Limited vs. Bishal Jaiswal & Anr.** [Civil Appeal No. 323 of 2021 delivered on 15th April, 2021]. Hon'ble Supreme Court finally rested the controversy by holding that Entry in balance sheet amounts an acknowledgements under section 18 of the Limitation Act, 1963 and thus enhancing the period of limitation.

Whether Limitation Period can be condoned under IBC?

The question whether the limitation period can be condoned under Section 7 application of the IBC was considered by Hon'ble Supreme Court in case of **Sesh Nath Singh & Anr. Vs. Baidyabati Sheraphuli Co-Operative Bank Limited & Anr.** [Civil Appeal No. 9198 of 2019 delivered on 22nd March, 2021] **[Sesh Nath Singh]**. The questions involved in this case was following;

i. whether delay beyond three years in filing an application under Section 7 of IBC can be condoned, in the absence of an application for condonation of delay made by the applicant under Section 5 of the Limitation Act, 1963?

ii. whether Section 14 of the Limitation Act, 1963 applies to applications under Section 7 of the IBC? If so, is the exclusion of time under Section 14 is available, only after the proceedings before the wrong forum terminate?

Section 5 of the Limitation Act, 1963 talks about the condonation of delay on the basis of *"sufficient cause"* shown. The condition precedent for condonation of the delay in filing an application or appeal, is the existence of sufficient cause. Whether the explanation furnished for the delay would constitute 'sufficient cause' or not would dependent upon facts of each case. There cannot be any straight jacket formula for accepting or rejecting the explanation furnished by the applicant/appellant for the delay in taking steps. Acceptance of explanation furnished should be the rule and refusal an exception. The courts are required to strike a balance between the legitimate rights and interests of the respective parties.

Now coming to the **first** question as raised in the **Sesh Nath Singh (supra)**, Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/ Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application. No applicant or appellant can claim condonation of delay under Section 5 of the Limitation Act as of right, without making anapplication.

Now coming to the **second** question as raised in the **Sesh Nath Singh (supra)**

As observed above, Section 238A makes the provisions of the Limitation Act applicable to proceedings under the IBC before the Adjudicating authority and the Appellate Authority (NCLAT) ***'as far as may be'***. Legislature has in its wisdom chosen not to make the provisions of the Limitation Act verbatim applicable to proceedings in NCLT/NCLAT, but consciously used the words 'as far as may be'. The words 'as far as may be' are not meant to be otiose. Those words are to be understood in the sense in which they best harmonise with the subject matter of the legislation and the object which the Legislature has in view. The Courts would not give an interpretation to those words which would frustrate the purposes of making the Limitation Act applicable to proceedings in the NCLT/NCLAT ***'as far as may be.*** The expression ***'as far as may be'*** is indicative of the fact that all or any of the provisions of the Limitation Act may not apply to proceedings before the Adjudicating Authority (NCLT) or the Appellate authority (NCLAT) if they are patently inconsistent with some provisions of the IBC.

Section 14(2) of the Limitation Act which provides for exclusion of time in computing the period of limitation in certain circumstances. The IBC does not exclude the application of 14 or any other provision of the Limitation Act to proceedings under the IBC in the NCLT/NCLAT. All the provisions of the Limitation Act are applicable to proceedings in the NCLT/NCLAT, to the extent feasible. Section 14 (2) of the Limitation Act provides that in computing the period of limitation for any application, the time during which the petitioner had been prosecuting,

with due diligence, another civil proceeding, whether in a court of first instance, or of appeal or revision, against the same party, for the same relief, shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it. The conditions for exclusion are that the earlier proceedings should have been for the same relief, the proceedings should have been prosecuted diligently and in good faith and the proceedings should have been prosecuted in a forum which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. Hon'ble Supreme Court has held that keeping in mind the scope and ambit of proceedings under the IBC before the NCLT/NCLAT, the expression 'Court' in Section 14(2) would be deemed to be any forum for a civil proceeding including any Tribunal or any forum under the SARFAESI Act.

Conclusion:

Provisions of the Limitation Act will be applicable to IBC, including the applications filed under Section 7 and 9. It will have retrospective effect from 01.12. 2016. Where the default had occurred three years prior to the date of filing, the said application would attract the provisions of Article 137 of the Limitation Act and thus be barred. Limitation is mixed question of law and facts. This mixed question of law and facts make the question of limitation very subjective. It is important to remember that interpretation is the art of matching the text with the context. Therefore, it is not expected that the question of limitation will not come again for the IBC proceedings despite plethora of judgements given by Hon'ble Supreme Court and NCLAT. It is expected that with the recent judgements of the Hon'ble Supreme Court the question of limitation regarding the IBC proceedings are put to rest for the time being.

* * * * *

In ***Anshul Vashishtha v. Jayhind Steel Traders and Anr.,*** NCLAT allowed the Appeal filed against the impugned order passed by the Adjudicating Authority (NCLT) under section 9 of the Insolvency & Bankruptcy Code, 2016 and declared it illegal and set aside. The NCLAT held that the object of the Code is maximizing the value of assets of the corporate debtor and to bring it out of insolvency, not recovery of money. It is further clear that if there is a dispute as per relevant provisions of the Code, it is incumbent on the Adjudication Authority to reject the petition/application as per provisions under Section 9 of the Code. The IBC also debars application of the code for recovery of money and if there is a dispute, the present petition/ application shall have to be rejected.

In the case of ***Ascot Realty Private Limited v. Ajay Kumar Agarwal,*** the NCLAT held that even if Corporate Debtor issued guarantee in recovery proceeding for the financial debt of the third party and in case of default, the said guarantee(s) have been invoked by the Financial Creditor, the Corporate Debtor shall be liable to pay the amount as it is amount of liability in respect of guarantee issued as per the definition of Section 5(8)(i) of Insolvency & Bankruptcy Code, 2016. The Appeal was dismissed.

Voluntary Liquidation under IBC, 2016 V/s Strike Off under Companies Act, 2013

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The economy of our country was just recuperating from the bruises of the pandemic of 2020 when the second wave of Covid-19 hit us hard. Many businesses have bounced back with better performances adapting to the innovations and technological changes in the corporate world. However, there are some who are still struggling and hanging in there by a thread and their revival is not only difficult but uncertain. These tough times have bought many businesses to a halt with rising costs and low revenues and are now left with no option but to shut down their operations.

Companies who want to shut their operations have the following two options:

- Voluntary Liquidation u/s 59 of the Insolvency and Bankruptcy Code, 2016
- Strike off under section 248(2) of the Companies Act, 2013

In this article we shall discuss the above two options and the differences between them.

VOLUNTARY LIQUIDATION U/S 59 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

One can note that the term voluntary means by ones' own wish. Therefore, a company can opt for voluntary liquidation not only in case of losses but due to other reasons too, such as:

- when the entity has been formed for a particular purpose and the purpose has been fulfilled;
- or where the articles provide that the entity shall be liquidated on the happening of an event and the event has happened.

In order to carry out voluntary liquidation u/s 59 of the Insolvency and Bankruptcy Code, 2016 (*hereinafter referred to as* "the Code"), the company must follow the below given procedure:

- appoint a registered valuer
- The Directors, on the basis of the valuation report and financial statements and report on business operations of previous two years, shall form an opinion as to whether the company has sufficient assets to pay off the liabilities.
- A Declaration from majority of the directors along with an affidavit shall be prepared stating that-
  i. they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full, from the proceeds of assets to be sold in the voluntary liquidation; and
  ii. The company is not being liquidated to defraud any person;
- Within 4 weeks of declaration, shareholders' approval shall be obtained by ordinary or special resolution, as the case may. The date of passing the shareholders' resolution, subject to the creditors' approval shall be considered as the liquidation commencement date shall be.
- Where the company owes debt to any person, creditors' approval is also required. The approval shall be obtained from creditors representing at least 2/3rd in value of the debt of the company.
- The company shall notify

the Registrar of Companies and the IBBI of such resolution(s).

- Once the affairs of the company are fully wound up, an application shall be made to the adjudicating authority (i.e. the NCLT) for the dissolution of the corporate person. The corporate person shall be deemed to be dissolved from the date of the order of the adjudicating authority.

STRIKE OFF UNDER SECTION 248(2) OF THE COMPANIES ACT, 2013

Companies Act, 2013 (*herein after referred to as* "the Act") allows companies to strike off their name from the Register of Companies. A company can strike off its name only after extinguishing all its liabilities and after passing special resolution or by taking consent from at-least 75% of members in terms of paid-up share capital and can file for striking off its name from the Register of Companies suo-motto on the following grounds:

- A company has failed to commence its business within one year of incorporation.
- The company is not carrying out any business or Activity for preceding 2 financial years and has not sought the status of Dormant Company under Section 455 of the Act.
- the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation.

In order to proceed with strike off u/s 248(2) one shall have to file e-Form STK-2 with the Registrar of Companies (ROC) along with the relevant attachments.

The following are the differences between Voluntary Liquidation and Strike Off:

Sl No.	Basis	Voluntary Liquidation	Strike-Off
1.	Governed under section	Section 59 of the Insolvency and Bankruptcy Code, 2016	Section 248(2) of the Companies Act, 2013
2.	Adjudicating Authority	National Company law Tribunal (NCLT) is the adjudicating authority	ROC is the adjudicating authority
3.	Pre-requisite	Any company can go for voluntary liquidation after filing Declaration of solvency wherein they state that • The company has sufficient assets to pay off its liabilities and • It does not intend to defraud any person or persons	A company must extinguish all its liabilities and only then it can opt for striking off its name.
4.	Applicability	Any company can go for voluntary liquidation	The following companies cannot go for strike off: • Listed companies. • Companies delisted on account of non-compliance of listing regulations, listing agreement or any other statutory laws. • Vanishing companies. • Companies which have been listed for inspection or investigation – if such directive is being carried out/pending/completed but the prosecutions concerning such inspection or investigation are pending in the Court of law. • Companies which have not yet responded to notices of select provisions. • Companies which have not furnished the follow-up instructions on any report under section 208 of the Act. • If the prosecutions related to the above two provisions are pending in a Court of law. • Companies against which any case for prosecution is pending in a Court of law.

Sl No.	Basis	Voluntary Liquidation	Strike-Off
			• Companies, whose application for compounding is pending before the competent authority for compounding the offences committed by it or any of its officers in default. • Companies accepting any public deposits which are outstanding. • Companies having any charges which remain to be satisfied. • Companies registered under Section 25 of the Companies Act, 1956 or Section 8 of the Act.
5.	Restrictions	As such there are no restrictions as to when a company can opt for voluntary liquidation. Under normal circumstances a company usually opts for voluntary liquidation in the following cases: • when the entity has been formed for a particular purpose and the purpose has been fulfilled or; • where the articles provide that the entity shall be liquidated on the happening of an event and the event has happened or • when the company is incurring losses.	In the following cases a company cannot opt for strike off under section 248(2): • Changed its name or relocated its registered office to another state. • Made a disposal for the value of property or rights held by it (subject to conditions). • Engaged in any other activity other than what is necessary or expedient for making an application under the concerned provision, and so and so forth. • Filed an application to the Tribunal for the granting of Compromise or Arrangement, and a consensus for the same hasn't yet been arrived at. • Been wound up under Chapter XX, whether voluntarily, by the Tribunal or under the Insolvency and Bankruptcy Code (IBC), 2016.
5.	Revival	A company cannot be revived after opting for voluntary liquidation, since it is dissolved after being liquidated.	A company can be revived upto a period of 20 years after being struck off.
6.	Cost incurred	Cost involved is higher in voluntary liquidation.	Cost involved is much less as compared to voluntary liquidation
7.	Time involved	Voluntary liquidation is more time taking as compared to Strike off u/s 248(2)	Strike off under section 248(2) takes less time as compared to voluntary liquidation
8.	Appointment of professional	For the purpose of voluntary liquidation, it is mandatory to appoint a liquidator for carrying out the liquidation process. The liquidator must be eligible for appointment as a liquidator under Regulation 6 of the Insolvency and Bankruptcy Board of India(Voluntary Liquidation Process) Regulations, 2017.	For the purpose of carrying out Strike off under section 248(2) one may appoint a company secretary for professional guidance, but it is not mandatory. However, Form STK-2 does require certification by a professional.
9.	Reports required to be submitted	The liquidator is required to make timely submission of the following documents: • Preliminary Report • Annual Status Report • Minutes of consultation with stakeholders	No such report is required to be submitted. Only e-form STK-2 is to be filed with the respective ROC.
10	Reporting	The liquidator has to report to the Insolvency and Bankruptcy Board of India (IBBI) as and when required.	In case of Strike off under section 248(2) company is not required to report as such, but shall have to reply to any query letter received from the ROC in pursuance to the Form STK-2 filed.

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Opportunities for Impairment Testing in the backdrop of COVID-19

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Background

The Covid-19 pandemic has shown that no amount of preparation is enough. As businesses struggle to stay afloat, business model changing, hundreds of thousands of people losing their lives and jobs across the world. There is colossal damage and negativity around. Most businesses are either negatively affected or must pivot their business models to adapt to the new normal. Most accounting requirements prescribe that if there is an indication that the assets may have experienced decline in their value, the assets should be tested for impairment. **This presents a silver lining amongst the dark clouds for the valuers.**

Applicable Standards:

Ind AS 36 – Impairment of Assets
AS 28 – Impairment of Assets
IFRS 36 – Impairment of Assets

> An impairment loss is the amount by which the carrying amount of an asset or a Cash Generating Unit (CGU) exceeds its recoverable amount. In simple terms, it is the decline in the value of the assets beyond its depreciated amount.

Here are some questions and answers that may be relevant.

Is Impairment Testing applicable to my business?

All enterprises have to apply and follow guidelines of Impairment Testing.

What is Impairment of Assets?

In layman's term, impairment is defined as the amount by which the carrying amount of an asset exceeds its recoverable amount. This is nothing but a reduction in value of asset over and above its Written down value.

Key Terms to remember:

An **impairment loss** is the amount by which the carrying amount of an asset or a cash-generating unit exceeds its recoverable amount.

Recoverable amount of an asset or a cash-generating unit is the higher of its fair value less costs to sell and its value in use.

- **Fair value less costs to sell** is the amount obtainable from the sale of an asset or cash-generating unit in an arm's length transaction between knowledgeable, willing parties, less the costs of disposal.
- **Value in use** is the present value of the future cash flows expected to be derived from an asset or cash-generating unit ["or a reasonable estimate thereof" – applicable for SMEs]. The cash flows consist of those expected to arise from the continued use of the asset or CGU in its current condition and those, if any, expected to result from its ultimate disposal. An appropriate discount rate is then applied to those cash flows to arrive at their present value.

Isn't the Fair Value calculated as per Income Approach same as Value in Use?

Fair value differs from value in use. Fair value reflects the assumptions market participants would use when pricing the asset. In contrast, value in use reflects the effects of factors that may be specific to the entity and not applicable to entities in general.

Is it an adjusting event?

For Financial Statements ending March

31, 2020 and 2021, the effects of the pandemic are required to be considered and included in the financial reports. Since the effect of COVID-19 was there before the year ending 2021, it should be considered as a current period event and appropriate adjustments and revaluations should be done. Even if quantitative analysis cannot be done the qualitative aspect on the business should be fully disclosed.

When should the assets be tested for impairment?

An entity should assess at the end of each reporting period whether there are any impairment indicators. If there are any indicators, the entity must estimate the recoverable amount of such assets.

Irrespective of impairment indicators, an entity needs to test the following assets for impairment annually.

- Intangible assets with indefinite useful life
- Intangible assets not yet available for use
- Goodwill in a business combination

Since Covid-19 represents a strong external indicator for impairment affecting most enterprises, entities may have to assess the recoverable amount for such assets.

What is the impact of assessment of recoverable amount?

If the recoverable amount of an asset is less than its carrying amount, the carrying amount of the asset shall be reduced to its recoverable amount. That reduction is an impairment loss. There is no impact if the recoverable amount is more than the carrying amount.

An impairment loss shall be recognised immediately in profit or loss, unless the asset is carried at revalued amount in accordance with another Standard (for example, revaluation model in Ind AS 16 – Property Plant & Equipment). Any impairment loss of a revalued asset shall be treated as a revaluation decrease in accordance with that other Standard.

An impairment loss on a non-revalued asset is recognised in profit or loss. However, an impairment loss on a revalued asset is recognised in other comprehensive income to the extent that the impairment loss does not exceed the amount in the revaluation surplus for that asset. Such an impairment loss on a revalued asset reduces the revaluation surplus for that asset.

When the amount estimated for an impairment loss is greater than the carrying amount of the asset to which it relates, an entity shall recognise a liability if, and only if, that is required by another Standard.

After the recognition of an impairment loss, the depreciation (amortisation) charge for the asset shall be adjusted in future periods to allocate the asset's revised carrying amount, less its residual value (if any), on a systematic basis over its remaining useful life.

Impairment Considerations

Due to COVID-19 it is evident that many businesses are affected and value of assets must be assessed thoroughly to determine the impairment losses.

When assessing the need to perform an impairment test, a company should consider the duration and the severity of the decline and the reasons for it. A decline related to an event that is expected to continue for an extensive period of time to adversely affect the company, combined with its market value below book value, will possibly trigger a test. Given the uncertainty many companies will likely assess current events to determine if a triggering event has occurred.

Various events such as inventory obsolescence, decline in value of cash generating unit or Market capitalization below book value can be an indicator of impairment. Probable decline in trade receivables would be another query to deal with under Ind AS 109. With respect to the duration and severity of COVID-19 and its related economic impacts, companies will need to employ even more careful considerations and judgment.

Assessing Going Concern Assumption

The management needs to constantly assess the company's ability to continue as a going concern. Material uncertainties that cast significant doubt on the company's ability to operate under the going concern basis need to be disclosed in the financial statements.In the wake of COVID-19,management should assess the existing and anticipated effects on the company's activities and the appropriateness of using the going concern assumption.

Valuation Considerations

Key inputs to valuation models, such as cash flow forecasts and discount rates, are likely to change, particularly in sectors where there is likely to be a shift in demand, disruptions in supply chain, etc. Management should work with experts and specialists to ensure that this uncertainty is addressed within the valuation model that is used.

Valuation models may need to be revised with a higher risk factor included in the discount rate. If a company has temporarily shut down some or all of their operations, management will be required to make estimates of when their business will begin to operate again, and if the scale of operations and cash flow generated will be equal to what it was before the pandemic, as well as what additional costs will be incurred during this period.

Investment Considerations

One will also have to carefully evaluate the impairment of carrying value of investments in the present scenario. Impairment will be prompted if the market value of such investments falls below the book value.

As per Accounting Standard 28:

While Ind AS 36 covers impairment of investments in other entities, AS 28 excludes Investments from the ambit of Impairment testing. An impairment loss is the amount by which the carrying amount of an asset exceeds its recoverable amount.

Recoverable amount is the higher of an asset's net selling price and its value in use.

Net selling price is the amount obtainable from the sale of an asset in an arm's length transaction between knowledgeable, willing parties, less the costs of disposal.

Value in use is the present value of estimated future cash flows expected to arise from the continuing use of an asset and from its disposal at the end of its useful life.

Do Small and Medium Enterprises (SMEs) also have to test assets for impairment?

Yes. However, certain relaxations were given to Small and Medium Enterprises (SMEs) where they don't have to calculate Value in Use using Present Value Techniques. Such entities are allowed to calculate Value in Use based on a reasonable estimate.

Since most SMEs don't fall under the Ind AS framework, they have to apply AS 28. For the purposes of applicability of AS 28, relaxations are for SMEs whose turnover for the immediately preceding accounting period on the basis of audited financial statements does not exceed Rs. 50 crore. Turnover does not include 'other income' or enterprises having borrowings, including public deposits, not in excess of Rs.10 crore at any time during the accounting period.

What about tax implications of impairment loss?

Impairment loss is usually not an allowable deduction for taxable purposes since the amount of loss is not sustained during the year. It is in the nature of unrealised loss and tax provisions usually don't allow deduction for impairment loss.

The decline in the value of the asset is only temporary, do I still need to book an impairment loss?

An impairment review involves estimating an asset's recoverable amount and comparing it with its carrying value. If the recoverable amount is lower than the carrying value, the asset is impaired and must be written down to the recoverable amount. Impairment cannot be avoided by arguing that the diminution in value is not permanent.

What if the value of the asset increases subsequently?

The entity should increase the carrying amount of the identifiable assets up to the lower of recoverable amount and the identifiable assets' depreciated historical cost. This increase is recognised immediately in profit or loss. However, the impairment loss on goodwill is not reversed.

What are possible sources of indicators when the recoverable amount need to be assessed?

The indicators could be external or internal.

External sources of information, including:

- Decline in asset's market value
- Adverse changes in technological, market, economic or legal environment
- Increase in interest rates that reduces the value of the entity or the asset.
- The carrying amount of the entity's net assets exceeds the entity's market capitalisation.

Internal sources of information, including:

- Obsolescence or physical damage affecting the asset.
- Significant adverse changes that have taken place or are expected in the near future in the extent to which, or in the way that, an asset is used or expected to be used. This includes the asset becoming idle, plans to discontinue or restructure the operation to which the asset belongs or the asset's disposal. It also includes reassessing the asset's useful life from indefinite to finite.
- Deterioration in the expected level of the asset's performance.
- Management's own forecasts of future net cash inflows or operating profits may show a significant decline from previous budgets and forecasts.

Other indicators of impairment that are not specifically mentioned in IAS 36 could be:

- The actual net cash outflows or operating profit or loss may be significantly worse than budgeted.
- Operating losses or net cash outflows are forecast.
- Cash flows for constructing the asset or for maintaining or operating it are significantly higher than those budgeted.

What is a Cash Generating Unit (CGU) and how should it be assessed?

Identifying CGUs is the first key step in carrying out impairment reviews. This establishes the level of aggregation at which impairment reviews would normally be carried out. A CGU is defined as "…the smallest identifiable group of assets that generates cash inflows

that are largely independent of the cash inflows from other assets or groups of assets". The higher the level of aggregation the greater is the risk that impairment losses on unprofitable assets might be masked by unrecognised increases in value of profitable ones. Hence, impairment reviews should be carried out at the lowest level that generates largely independent cash flows.

Illustrations of Impairment:

Example 1 – Impairment indicator – reduced selling price of recently acquired asset

Entity A bought (and capitalised) a computer system off the shelf for Rs 200,000. Shortly afterwards the manufacturer dropped the selling price to Rs 150,000. A change in the market value of an asset is an indicator of impairment. Since the depreciated value of the asset may not have gone below Rs 150,000 there is likely going to be an impairment loss.

Example 2 – Impairment indicator – global competitor starting business in an existing entity's territory

BBazar is the biggest local supermarket chain in the country. Recently, the global chain WMart, has decided to set up operations in the country. WMart is well known world-wide, intends to establish its shops close to BBazar and to offer BBazar's customers a wider range of products and international brands. However, management of BBazar expects to retain most of its customer base. In this example, entity WMart's market entry is an impairment indicator. Management should perform impairment tests, estimating the recoverable amount of its assets, based on the best available information.

Example 3 – Impairment indicator – change of asset's use

X Ltd uses asset M to manufacture product A. There has been a significant reduction in demand for product A as a result of a change in consumer taste. Management has not assessed asset M for impairment because it can, subject to minimal reconfiguration, be used in the manufacture of its new product T. Entity X should review asset M for impairment. The change in use is itself an indicator of impairment. Entity X's management will need to assess the impact of both the change in consumer tastes and the asset's proposed change of use on the asset's recoverable amount.

Examples of indicators when impairment assessment may be required:

A major customer announces plant closure post-year end

A decrease in market demand of the company's product

Conclusion

No one can predict the future, as the challenges related to Covid-19 keeps evolving. Impairments are expected to be all the time more common during this period. So, the more robust the estimations and disclosures are regarding these risks, the easier it will be for investors and users of the financial statements to understand the financial results.

Impairments are crucial for the financial reporting process. The process of assessing impairment during these testing times can be even more complex and time consuming. It is essential that the management, typically the finance department, plan early and have access to the right skills such as complex scenario planning and forecasting. Therefore, financial/valuation experts should be involved to seek professional guidance and to provide support, input and critically review the outcomes.

* * * * *

The NCLAT in ***Jamal Ahmad v. Reliance Nippon Life Asset Management,*** held that the appeal is hopelessly barred by limitation. There is a delay of 387 days. IBC prescribes a period of 30 days for filing appeal and the jurisdiction vested in this Appellate Tribunal to extend time by 15 days provided sufficient cause by the Appellant is assigned for the same. Argument for invoking inherent powers vested in NCLAT under NCLAT's Rules cannot be accepted. Further, it was held that Rule 11 of the NCLAT Rules, 2016, vesting inherent powers in the NCLAT, cannot be invoked against an express provision of the statute. In any case no appeal can be entertained after the maximum period of 45 days.

Forensic Accounting – Usage of Open-Source Intelligence (OSINT) in Investigation

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OSINT technologies are already available that will enable corporations to gather information on their competitors. The developments will also have a significant impact on the business environment, forcing corporations to be more open and transparent about their activities and products. The opportunities to leverage OSINT are therefore already there. In the future, OSINT technologies will become more advanced and will be capable of gathering more data on individuals and corporations. The opportunities for businesses will increase and those that miss out on the opportunities will lose out on valuable information. As we look forward to the future, we need to ask ourselves what open sources can be used for data gathering. The answer is, almost anything. With new technologies coming online daily, there is no telling where we will see OSINT in 2021 and beyond.

Definition and concepts

To define "open-source intelligence" (OSINT), it is first necessary to define "intelligence." Military intelligence is the collection, processing, and use of information to provide guidance and direction to assist commanders in their decisions. Business intelligence is essentially the same thing, with the commanders being the business leaders.

The U.S. Department of Defense (DoD) defines OSINT as "an intelligence that is produced from publicly available information and is collected, exploited, and disseminated in a timely manner to an appropriate audience for the purpose of addressing a specific intelligence requirement." Open-source intelligence differs from other types of intelligence because they are publicly available, which means they are accessible to the public without breaching any copyright or privacy laws. As a result, businesses can access open-source tools to exploit information for learning about their competitors.

There are four categories of open source information and intelligence:

- Open-source data (OSD): generic data from a primary source, such as satellite images, telephone call data and metadata, datasets, survey data, photographs, and audio and video recordings
- Open-source information (OSINF): generic data that has been screened based on a specific criterion, such as books about a specific subject, articles, dissertations, artworks, and interviews
- Open-source intelligence (OSINT): all the information that has been discovered and filtered to meet a specific need or purpose. OSINT can be used directly in any intelligence context – it is the output from open-source information material processing
- Validated open-source intelligence (OSINT-V): OSINT that can be relied upon with a high degree of certainty. This is essential because some "adversaries" may spread inaccurate OSINT to mislead OSINT analysis.

It is also important to distinguish between data, information, and

knowledge. Data is unvarnished facts: "the price of silver is $28 per ounce." Information is data interpreted within a specific context: "the price of silver per ounce has risen from $25 to $28 in one week." Lastly, knowledge is the insight learned or inferred from information and experience.

Uses Of OSINT

Corporations use OSINT tools mainly to discover opportunities for future growth and monitor competitors' activities. Given the ubiquity of the Internet, companies with a limited budget can benefit from using open-source intelligence tools in their business strategy.

Companies use OSINT tools for other reasons, including the following:

- To fight against data leakage, avoid the exposure of confidential information, and guard against cyber threats that prey on the security vulnerabilities of their networks
- To create threat intelligence strategies and develop policies related to cyber-risk management for protecting their finances, business reputation, and customer base

OSINT is specifically useful for companies working in the defense industry, as such; companies need to be fully aware of the surrounding circumstances of their customers to develop and target them with the appropriate equipment.

Penetration testers are often hired by companies to break into internal networks to show where weaknesses lie and how to keep outsiders out. Black hat hackers exploit these vulnerabilities to gain unauthorized access. Hackers and penetration tests commonly use open source information tools to learn information on targets to exploit. OSINT tools are also an effective tool to conduct social engineering attacks.

Private corporate security services employ OSINT tools as well. They conduct individual checks: with their own employees, top management and employees, and the executive officers and shareholders of their contractors. Questions asked include: "Is this an offshore company or not? Who is the real owner? Has there been any dark business? What is the source of funds?" Knowing the answers to those questions is crucial for legal compliance and performing due diligence before the execution of any major deal.

Many organizations are now using OSINT tools to investigate insurance fraud. OSINT helps in investigating insurance fraud by providing the investigator with background on the policyholder, such as whether the insured has made any claims previously. By gathering information on all the parties involved in an insurance claim, the investigator can determine whether or not the claims are valid.

Law enforcement agencies (LEAs) and Forensic Professionls use open-source intelligence to investigate, prosecute and, perhaps most significantly, predict and prevent crime and social unrest. Increasingly, LEAs use publicly available social media communications or social intelligence (SOCMINT) in those efforts. SOCMINT embraces a vast amount of material, including Facebook, tweets, videos hosted on YouTube, and comments on online public newspaper/TV news sites.

Potential Legal Risks

The use of SOCMINT by LEAs raises one of the main legal risks faced by users of OSINT tools, namely potential violation of privacy statutes. Much of OSINT will contain "personal data" as understood in the EU General Data Protection Regulation (GDPR) and will contribute to "personal life," within the meaning of the European Convention on Human Rights (EHCR). Those laws prohibit the collection, dissemination, and use of personal data and the failure to respect an individual's private life.

The general legal view is that SOCMINT should have no protection under these laws because someone who has chosen to voluntarily disclose their personal and private life to the public gaze has no reasonable expectation of privacy. The law is evolving, however, and privacy advocates argue that what can be gathered from SOCMINT is not just the obvious part (text, pictures, videos, and links) but also the network of friends of "social graph" that can be extracted from a social media profile. One U.S. legal commentator has expressed the view that social media surveillance is a covert device to evade the generally strong U.S. Fourth Amendment protections against the warrantless search of private material.

Challenges Faced by The OSINT User

All intelligence gathering methodologies have some limitations. OSINT faces the following challenges:

Data overload: Open-source information produces a massive amount of valuable data to analyze. Automated tools exist for this purpose, and many organizations including governments have developed AI tools for filtering and processing acquired data. Nevertheless, the sheer volume of data will continue to be a challenge.

Reliability of sources: Open-source intelligence sources require thorough verification from classified sources to be trusted. Governments may distribute inaccurate

information which misleads the OSINT-gathering process

Human efforts: Humans must vet the output generated by automated tools, including AI, to determine whether the open-source information is trustworthy. This process consumes time and human resources, given that the information must be compared to classified data (in cases with military and commercial information).

OSINT Techniques and Methods

It is important to identify the different classes of data because data collection (often called "data wrangling") is the first step in the open-source intelligence process. Structured data are data that are highly organized, such as data held in typical relational databases with an underlying data model that describes each table, field, and the relationships between them. Unstructured data have no data model defined upfront and no prerequisite organizational structure (this would include the content of web pages, books, audio, video, and other files not easily read or interpreted by machines.) Analyzing unstructured data relies heavily on natural language processing as well as image processing.

Between structured and unstructured data are semi-structured data, also sometimes called "self-describing data." This type of data is particularly representative of the type of information accessible through the web, such as the type of data available through RESTful APIs (e.g., Twitter).

Open-source data is obtained by:

- Manual searches (often time-consuming)
- Web crawlers and spiders (the automation of manual searches; teaming up a web crawler with a processor that tests pages for relevance reduces the result set)
- Web metadata (the HTML of a webpage contains tags that described the page)
- APIs (for example, the Bing search API provides automated access to results from a specific query)
- Open data (not open-source data but a subset thereof; published in a machine-readable format to enhance transparency)
- Social media
- Traditional media
- RSS (Really Simple Syndication, a machine-readable method, based on an XML format, of publishing information about which new articles, posts, etc., have been added to a website)
- Grey literature. (Articles, reports, white papers, and other literature that does not fall into the category of normal open sources nor into the consented data, but may still contain useful information for open-source intelligence investigations.)
- Paid data and consented data
- Data on the Deep and Dark Webs. (The deep web is all content on the Internet that is not indexable by Google or other search engines. The dark web is a specific part of the deep web that can only be accessed through the use of specific browsers such as Tor or even specific operating systems such as Tails.)

Information Extraction and Text Mining

If the data extracted is unstructured, it must be moved into a structured state—this process is called information extraction. The most common example of this process is the parsing of natural language text and the extraction of specific entities and events or the categorization of the text. A number of libraries and APIs exist to assist in natural language processing (NLP), such as Python's NLTK, Gate, and the Alchemy API.

Main body extraction is the process of making a web page's HTML structure and extracting from it only the text that makes up the article and not the surrounding images and links that you would see if you viewed the web page on a browser. Tools used include Flipboard, Evernote's WebClipper, Goose, the Alchemy API, and Aylien. Entity extraction is the process of obtaining the identity of entities found in date. Entities are real objects such as people (i.e., names), organizations, and places mentioned in text. They can also include objects such as dates and times, telephone numbers, email addresses, URLs, products, and even credit card numbers. Entity extraction, also called named entity recognition, can be performed using linguistic, pattern-based, or statistical machine learning methods. Tools used include AlchemyAPI, Aylien, and Rosette.

Data Analysis

Also important is the analysis of the context in which the data is placed. Entity relation modeling uses the idea that natural language follows a specific structure: Subject—Predicate—Object. The subject is the person who carries out the action, the predicate is the action itself, and the object is the who/what/where the action was carried out. Entity relation modeling allows one to identify not only the entity but the action that it is associated with. This information is far more valuable than simple entity extraction as it immediately gives information about the context the entity appears in and provides more options for the subsequent analysis.

Once the data is extracted and structured, it must be validated and analyzed. It has been said that "the major difference between basic and excellent OSINT 'operations' lies in the analytical process." The following are the main types of textual analysis or NLP:

- Text processing (the "bag of words" method, concordance, collocations, and the vector space model)
- Word sense disambiguation (the problem of identifying the true meaning of a word when it has multiple definitions, often resolved by machine learning techniques)
- Sentiment analysis (analyzes the language to determine underlying emotion, which was used by London's Metropolitan Police, who began using it after the 2011 London Riots)

Aggregation and Other Analytical Concepts

Documents can also be analyzed among themselves in a process known as aggregation. Aggregation techniques include document clustering, which uses the mathematical tools of dimension reduction, singular value decomposition, and multi-dimensional scaling. The relatedness of the data is the focus of network analysis and social network analysis. There are a number of statistics and measures associated with network analysis that provide information that helps to understand how the positions of different entities in the network affect how it works, the simplest of which is degree centrality, which is simply the entity in the network with the most connections to other entities in the network, giving one measure of which entity is the most highly connected within the network.

Other analytical concepts include:

- Co-occurrence networks
- Location resolution
- Geocoding and reverse geocoding

Finally, a complete analysis of OSINT requires the validation of open-source information. NATO's open-source information handbook suggests that one should assess:

- The authority of the source
- The accuracy of the source (by validating it against other sources)
- The objectivity of the source (which is where sentiment analysis may be able to assist)
- The currency (the provision of a timestamp for publication and the presence of an author)
- The coverage (the degree of relevancy)

Common OSINT Tools

Here is a list of some of the most popular OSINT tools, with a brief description of each:

- Maltego is an open-source intelligence application used to discover, classify, and link together information from different sources, including social media. The program is designed to help security professionals quickly correlate data from disparate sources and provides a graph-based visualization to show networks of relationships and associations between people, organizations, and other subjects. The full variety of OSINT tools applied in Maltego are being used together with the Social Links Pro product, including the functionality of more than 1000 research methods and resources
- SpiderFoot is an OSINT platform for security assessments. The tool tracks down information related to IP addresses, domain names, and email addresses. That platform is designed to allow for quick and easy collection of information on a target organization, host, or individual
- Gamayun is an OSINT tool that makes it easy to conduct internet investigations through data collection from public websites. The tool allows for the discovery of individuals based on specific parameters, such as emails or photos, and finds relevant social network profiles
- Spyse search engine scans the Internet for technical information and is common among hackers in cyber reconnaissance. The user can retrieve information relevant to domains, such as IPs and DNS records. The database contains information on over 1.2 billion domains
- theHarvester is a simple tool that serves as an effective reconnaissance step prior to penetration testing, theHarvester is a reconnaissance tool designed for social engineers and security professionals. The tool functions by retrieving information from search engines including emails, names, sub-domains, and open ports
- Creepy is an OSINT tool for information on geolocation. The information is collected from various social networking platforms. The tool presents the search results on a map. The user can enter a Twitter or Flickr username, and the tool analyzes posts to determine the location and the time

- Recon-ng is a web reconnaissance framework that allows users to search through a variety of social media sites to collect various forms of publicly available data (e.g., usernames, domains, phone numbers, email addresses, and IP addresses). The framework can be used for social engineering, competitive intelligence, and general information gathering
- Search code is a search engine that scans API documentation, code snippets, and open source repositories. The database contains over 20 billion lines of indexed open-source code. Users can search for terms included in lines of code, such as usernames, security flaws, and special characters used for launching code injection attacks
- Shodan is a search engine that provides results on information related to assets that are connected to the network. Shodan, which is also available on SL Pro, can also be used by security professionals to find companies that are collecting and using large amounts of sensitive data, or to find insecure home devices
- Metagoofil is a tool that has been used to collect metadata from hundreds of websites related to defense, technology, information warfare, terrorism, and others. It can find and download metadata from sites that have it available, and also retrieve the full HTML of sites that have been truncated.

Notable Investigations Made with OSINT Tools

The United States Department of Justice (DOJ) regularly uses OSINT methods to identify criminals. The DOJ used OSINT techniques in the 2015 "Operation Pacifier" campaign to obtain information on a child pornography website and identify the owners.

In 2015, a Darkweb investigation was conducted of an extremist online community called the Iron March. The website hosted discussions on topics such as terrorism, political instability, and torture. OSINT methods were used to determine the average profile of an Iron March user, and how effective the platform was at connecting extremists.

Another investigation that utilized OSINT tools was in 2016 when the UK National Crime Agency (NCA) took down the Avalanche network, which was responsible for infecting over 4 million computers running mostly Microsoft Windows operating systems and generating roughly $5 million per month in fraudulent advertising revenue.

The Future of OSINT

The global market for open-source intelligence tools is expected to grow at a compound annual growth rate of 17%, reaching nearly $12 billion U.S. by 2026. The rise in open-source information coupled with increasing security threats seems likely to drive demand for OSINT. Ever more sophisticated and powerful AI should allow OSINT to become ever more insightful and valuable. Nevertheless, open-source intelligence tools, and particularly SOCMINT, face significant challenges, not the least of which is the growing pressure to protect privacy rights and the increase in bad and manipulated data strewn by bad actors throughout the Internet.

* * * * *

Hon'ble NCLAT in the matter of ***Om Prakash Agarwal v. Chief Commissioner of Income Tax*** held that Section 53(1)(e) of the Insolvency & Bankruptcy Code shall have an overriding effect on the provisions of Section 194 of the Income Tax Act (IT Act), thereby implying that purchasers of the property under liquidation are exempted from remitting TDS to the Income Tax Department. It was further observed that no provisions under IT Act or the Code suggests for Liquidators to file an Income Tax Return and consequently a Liquidator is not duty bound to prepare the financial statements. Since deduction of Tax at source under Section 194IA of IT Act is by nature an advance capital gain tax and liquidators are not required to file Income Tax Return, no question of claiming refund of TDS deducted under Section 194IA of the IT Act arises.

Auditors Role and Key Considerations in Whistle Blowing

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Whistle blowing is the raising of a concern, either by stakeholder including an employee or a third party, about suspected wrongdoing, using confidential reporting mechanisms. Most mechanisms involve a dedicated "hotline" but can include other mechanism such as print and social media. Whistle blowing is an important feature of good governance as it seeks to uncover failures within an organisation which could potentially cause serious damage to the organisation. Such failures include criminal activity (e.g. fraud or bribery and corruption), health and safety shortfalls, environmental damage, negligence and the mis-selling of financial products. By encouraging a whistle blowing, the organisation promotes transparent structure and effective, clear communication. When a whistle blowing complaint is made, the whistle-blowers also are at risk of being victimised. In order to promote a transparent structure, it is important that adequate protection is provided to these whistle-blowers.

While the ultimate responsibility rests with the board as a whole, audit committees are typically tasked with the oversight of fraud, misappropriation and whistle blowing systems, with the direct responsibility for antifraud efforts generally residing with management including internal audit.

Various regulators taking cognizance of these aspects have prescribed mechanisms such as in the Companies Act, 2013 ('2013 Act'), SEBI (Listing Obligations and Disclosure Requirements) Regulations. Further, the recently introduced Companies (Auditor's Report) Order, 2020 ('CARO 2020') is aimed at strengthening the corporate governance framework by way of increased due diligence and additional reporting requirements as a part of auditors of eligible companies. One of the new reporting requirements in CARO 2020 is in relation to the whistle-blower complaints received during the year by the company.

Legal framework

Establishment of Vigil Mechanism

Section 177 (9) and (10) of the Companies Act, 2013 requires that every listed company, companies which accept deposits from the public and companies which have borrowed money from banks and public financial institutions in excess of Rs50 crores shall establish a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed. The companies which are required to constitute an audit committee shall oversee the vigil mechanism through the committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee to deal with the matter on hand. Where the companies are not required to constitute an audit committee, the Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns.

The vigil mechanism shall provide for safeguards against victimisation of employees and directors who avail themselves of the vigil mechanism and in exceptional cases provide direct access to the Chairperson of the Audit Committee or a director who is a member of the Audit Committee and who has been so designated to deal

with the employees and directors who would want to have direct access to him in exceptional cases while operating under the vigil mechanism.

The details of establishment of such mechanism should also be disclosed by the company on its website, if any, and in the Board's report. Independent directors have a responsibility to ascertain and ensure that the company has an adequate and functional vigil mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use.

Requirement in SEBI Listing regulations

SEBI has mandated that every listed company should have a whistle-blower policy and make employees aware of such policy to enable employees to report instances of leakage of unpublished price sensitive information. With effect from December 2019, SEBI has also introduced a *reward mechanism* for incentivizing '*Informants*' to report violation of insider trading laws to SEBI.

Listed companies are required to make a disclosure of material events to the stock exchange(s) pursuant to Regulation 30 of the SEBI Listing regulations. Disclosure information regarding initiation of forensic audit was introduced as sub-clause 17 in Schedule III Part A Clause A vide SEBI (LODR) (Third Amendment) Regulations, 2020 w.e.f. 08 October 2020. As per the amendment, the following information is required to be disclosed:

- Fact of initiation of audit, name of entity that is initiating the audit and reasons for the same.
- Final report with management comments, if any - reports of audits initiated by regulatory/enforcement agencies need not be disclosed and personally identifiable information (names of individuals and commercially sensitive information) may be removed.

Safeguard against frivolous complaints

On the flip side, the attempt to create transparency, is also riddled with challenges. One major challenge with respect to the whistle blowing framework pertains to frivolous complaints. Many a time, employees in an organisation register baseless allegations and frivolous complaints which pose a great threat as they entail large scale speculation which often leads to a large amount of loss of goodwill for the company. In order to plug this challenge, the Companies and (Meetings of Board and its Powers) Rules, 2014 provides that in case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the director or the employee including reprimand.

Auditing considerations

Auditing whistle blowing complaints can be challenging for auditors as especially in case of anonymous whistle-blower compliant which often include vague information and the allegations without sufficient supports. The Standards of Auditing (SA) provides necessary guidance for the auditors in this regard and should be borne in mind while evaluating the implications. Summary of the key guidance is as follows:

SA 315, Identifying and Assessing the Risks of Material Misstatement Through Understanding the Entity and its Environment	**SA 550, Related Parties**	**SA 240,** The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements and **SRE 2410,** Review of Interim Financial Information Performed by the Independent Auditor of the Entity	**Guidance Note on CARO 2020**	**Guidance Note on Reporting on Fraud under Section 143(12) of the Companies Act, 2013**
Elements of control environment encompasses participation by those charged with governance. Responsibilities of those charged with governance include oversight of the design and effective operation of whistle blower procedures and the process for reviewing the effectiveness of the entity's internal control (Appendix 1)	Auditor to obtain understanding of control environment by: • Assessing existence of whistle-blowing policies and procedures, where applicable (A 17). • Review of employee whistle-blowing reports where these are retained (A 33).	Management to represent that they have disclosed to the auditor their knowledge of any allegations of fraud, or suspected fraud, affecting the entity's financial statements communicated by employees, former employees, analysts, regulators or others (Para 39, A57-58) (SRE 2410 – Para 21 requires enquiries on matters as stated above)	Provides detailed guidance e.g. Auditor to consider every complaint including anonymous complaints while deciding the nature, timing and extent of audit procedures. Also, the auditor should evaluate whether whistle blower complaints are investigated and resolved by the company in an appropriate and timely manner.	Auditor is required to consider matters reported through the whistle blower mechanism on an incidence of fraud. Illustrative Q&A for evaluation of fraud risk assessment of the company includes assessment of ethics/ whistle blower hotline and its ability to handle anonymous complaints, etc.

The assessment of audit approach should entail critical evaluation of the managements process including the following:

- *Management attitude*

  Whether the attitude of the management is serious or follows a casual attitude especially in case of anonymous whistleblower complaints is important. The complaints may be somewhat vague, and the allegations could, at first, appear baseless. However, it is important, to consider every complaint seriously because an allegation that seems baseless could actually be just the tip of the iceberg. Further, one should also determine whether the attitude of the management is retaliatory? Retaliation can take the form of an adverse employment action, e.g. termination or demotion. Often, whistleblowers will already be disgruntled employees who are more sensitive to any type of negative treatment. Retaliatory attitude might bring statutory claims against the company.

- *Investigation plan*

  Once a complaint is received and the decision is made to investigate, in-house team must lay out an end to end plan to ensure that the investigation will be thorough, efficient, objective and credible. The investigation's scope could be influenced by a multitude of factors, such as criminal or civil exposure to the company, seriousness and nature of the allegations, possibility of shareholder litigation. The investigation plan should include assessment of compliance with whistle blower mechanism with the applicable laws and regulations. An investigation team should have a diverse group of talent that is capable of handling each portion of the investigation in a professional and thorough manner. Further, in order to maintain independence, the person performing the investigation should be unrelated to these allegations else it would compromise the entire investigation process.

- *Involvement of external experts*

  Involving outside experts, brings greater confidence that the investigation will be independent. External experts bring depth of knowledge that can help guide the company through a wide spectrum of unknown risks. Regulatory agencies also look more positively on an investigation carried out by external experts.

- *Investigation goals*

  The nature of the allegations is likely to determine the desired outcome of the investigation. An investigation into a violation of internal company policy may be focussed towards gathering enough information to decide whether to terminate the subject's employment whereas allegations of financial mismanagement may generate multidimensional goals including determining connivance with other employees, criminal proceedings, internal control deficiencies, implications on financial statements.

- *Reaching a closure*

  An investigation should be actively monitored so that its implication can be reflected appropriately in the financial statements. **Financial implications might lead to restatement of financial statements or may lead to revision/ reopening of financial statements as per 2013 Act.** However, in some cases the investigation could not get concluded due to its complexity. In such cases, how is the management estimating the potential implications? Merely because the investigation is still ongoing it would not be correct not to recognise the impact. The management should assess the implications on the financial statements' basis the evidence on hand.

Impact on Auditor's Reporting

Whistle-blowing has a much greater significance and a disclosure by a whistle-blower could impact on a financial statement audit and may have reporting implications. If the auditor becomes aware that a client company is the subject of a protected disclosure then the auditor would need to find out the nature of this disclosure to assess the impact, if any, this would have on the financial statements and on the auditor's report.

For example, a disclosure might suggest that the company could have an unrecorded liability because, it might be subject to claims against it by individuals/entities who may feel aggrieved by the actions of the company and who may commence legal action against it. Similarly, it might find itself exposed to fines or penalties for breaches of laws or regulations. In an extreme case, it might even have implications for the going concern status of the company.

The auditor needs to consider what it is about the company that leaves the complainant feeling that he or she needs to resort to whistle-blowing to have his or her concerns addressed. For example, it might suggest that there is a dominant individual within the company who is, consciously or otherwise, creating an unapproachable atmosphere which makes it difficult for staff to voice their concerns. If this is the case, it may be that the auditor should reconsider the assessment of inherent risk and control risk for the company.

The auditor should assess whether sufficient appropriate evidence is available regarding the investigation and whether the implication (to the extent determinable) has been appropriately recognised in the financial statements. Where the auditor has obtained sufficient appropriate audit evidence regarding the investigation and has concluded that the implications have been presented appropriately presented in the financial statements, the auditor should issue an unmodified opinion. In such a case the auditor should assess whether the matter would be fundamental for the understanding of the user and hence would warrant an emphasis of matter in the audit report.

Where the auditor is unable to obtain evidence, the auditor would need to assess whether a modification in the audit report would be necessary. Auditor should issue a qualified opinion if the auditor is unable to obtain sufficient appropriate audit evidence on which to base the opinion, but the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be material but not pervasive. A disclaimer of opinion should be issued where the auditor concludes that the implications is material and pervasive to the financial statements.

Additional reporting requirement under CARO 2020

There is an increased focus on fraud reporting and auditor is required to report on any fraud by the company or any fraud on the company, i.e., reporting on fraud is not limited to frauds by the officers or employees of the company while reporting under this clause. It might also be noted that CARO 2020 provides specific reporting responsibilities relating to whistle blowing complaints. There have been several instances where companies have brushed aside whistle-blower complaints and refrained from disclosing them to the shareholders. The auditor will be required to consider all such whistle blower complaints now while determining his audit procedures and issuing opinion on the financial statements. ICAI's Guidance Note on CARO 2020 provides guidance on audit procedures and reporting aspects.

It might also be possible that during the course of audit, whistle-blower complaint is received/ identified about a fraud or suspected fraud. In such case the auditor should analyse the stages of fraud as per Guidance Note on Reporting on Fraud under Section 143(12) of the Companies Act, 2013 and comply with the reporting obligations.

Bottom line

The auditor should not be too quick to dismiss the credibility of the accusations. However as sceptical as the company may be about the whistle-blower's claims the auditor needs to be equally sceptical about the management approach and response to them. Auditors who understand the various types of fraud and their relative rates of occurrence will be more likely to recognize any red flags and be better prepared to fight the high organizational cost of fraud/corruption.

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The Supreme Court in the case of ***Pioneer Urban Land & Infrastructure Ltd. & Anr. vs. Union of India & Ors.*** upheld the constitutional validity of the introduction of homebuyers as "financial creditors" to the IBC, made by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, enabling homebuyers to trigger IBC against the real estate developer.

In the case of ***C. John v. Jitender Kumar Jain,*** NCLAT set aside the order of the NCLT quashing a civil suit against the Corporate Debtor and held that, though the filing of a civil suit is barred in terms of the Insolvency & Bankruptcy Code, 2016, the appropriate course for the liquidator is to approach the Court where the civil suit was pending and point out the relevant provisions of law and not for the NCLT to quash the proceedings pending before the Court.

Management Services Under Section 144 of the Companies Act, 2013

CA Mohit Bhuteria

&

CA Mahak Bhuteria

Independence of Auditors

Independence in Appearance and in Mind – IFAC[1]

Independence of the statutory auditors is of prime importance to ensure that the auditors today are able to work without fear or undue influence and hence lend credibility of the financial/ non financial information reaching the various stakeholders. Since an auditor's independence directly impacts public interest, upholding and maintaining it is a collective responsibility of the audit profession as well as the various stakeholders, including the Government and the regulators.

In so far as the audit profession is concerned, the principles required to ensure independence of the practitioners are promulgated in the Chartered Accountants Act 1949, supplemented by the Code of Ethics issued by the ICAI[2].

In so far as the stakeholders like Government and the other regulators are concerned, their measures to help maintain statutory auditors' independence usually come in the form of provisions relating to statutory auditors in the laws and regulations governing the audit client. For example, both the erstwhile Companies Act, 1956 as well as the currently in force, Companies Act, 2013 contain provisions relating to appointment, remuneration, oversight etc of the statutory auditors. In both the cases, the rules and regulations for preserving auditor independence are, normally, based on accepted practices – globally as well as nationally, academic thinking in the area, past experiences, etc.

Guidance Note on Independence of Auditors issued by the ICAI : Para 1.9 of the Guidance Note on Independence of Auditors states that the auditor should be straight-forward, honest and sincere in his approach to his professional work. He must be fair and must not allow any prejudice or bias to override his objectivity. He should maintain an impartial attitude and both be and appear to be free of any Interest which might be regarded, whatever its actual effect, as being incompatible with integrity and objectivity. This is not self evident in the exercise of the reporting function but also applies to all other professional work. In determining whether a member in practice is or is not seen to be free of any interest which is incompatible with objectivity, the criterion should be whether a reasonable person having knowledge of relevant facts and taking into account the conduct of the member and the member's behavior under the circumstances, could conclude that the member has placed himself in a position where his objectivity would or could be impaired.

Para 2.1 of this Guidance Note further states that the Code of Ethics for Professional Accountants, prepared by IFAC identifies five types of threats. These are:

(1) Self-interest threats

(2) Self-review threats

(3) Advocacy threats

(4) Familiarity threats

(5) Intimidation threats

One of the important areas of public scrutiny, nationally as well as globally, in relation to auditor independence has been rendering of ***non-audit services***. Recognizing the fact that rendering of certain non-audit services to an audit client may lead to impairment of the statutory auditor's independence, a number of important provisions in this regard have been built into almost all the leading jurisdictions in the world,

such as the USA's Sarbanes Oxley Act 2002, the IFAC's Code of Ethics, or ICAI's Code of Ethics, etc.

Non-Audit Services : Position of law in India

Section 144 of the Companies Act, 2013 provides that an auditor shall provide to the company only such services as are approved by the Board of Directors or the audit committee, as the case may be but shall not include the following services rendered "*directly or indirectly*" to the company or its holding company or subsidiary company, namely:—

(*a*) accounting and book keeping services;

(*b*) internal audit;

(*c*) design and implementation of any financial information system;

(*d*) actuarial services;

(*e*) investment advisory services;

(*f*) investment banking services;

(*g*) rendering of outsourced financial services;

(*h*) management services; and

(*i*) services as may be prescribed - till now, no such services has been prescribed

In terms of Explanation to Section 144, the term "Directly or Indirectly" shall include rendering of services by the auditor,—

Where auditor is an individual – Either himself or through his *relative* or any other person connected or associated with such individual or through any other entity, whatsoever, in which such individual has significant influence or control, or whose name or trade mark or brand is used by such individual.

Where auditor is a firm – Either itself or through any of its partners or through its parent, subsidiary or associate entity or through any other entity, whatsoever, in which the firm or any partner of the firm has significant influence or control, or whose name or trade mark or brand is used by the firm or any of its partners.

Section 144(h) of the Companies Act, 2013 has restricted the statutory auditors to provide ***"management services"*** but has not explained the meaning and scope of this expression even till date. Also, there are no materiality thresholds which have been prescribed for such services.

Legislative Intent

(1) The Standing Committee on Finance in its 57th report on the Companies Bill, 2011 suggested the Ministry that Management services should be defined and services such as valuations, due diligence, special audit/ investigation etc which could have bearing on the audit services may be prohibited. Scope of terms 'investment advisory services' and 'management services' should be clarified so that there is no doubt as to whether a service falls under these or not. AICPA Code of Professional Conduct defines the terms 'investment advisory services'; 'investment banking services' and 'management services' which can be used. Some mechanism may be considered through which certain non audit services which are being provided by auditors traditionally consistent with their skills and expertise may be continued with adequate safeguards. It may be necessary to evaluate the significance of any threat created by provisions of non audit services. Clause may be amended to exclude services where there are no self-review threats from scope of this clause.

It further stated that if at all the Bill needs to cover non-audit services, the Bill itself should contain only minimum restrictions and further restrictions may be prescribed through Code of Ethics.

(2) The Ministry was of the view that these provisions were included in the Companies Bill, 2009 as Clause 127 which were examined by Hon'ble Committee. Kind attention is drawn to recommendation at Para 34 and para 10.50 of report of Hon'ble Committee. The provisions proposed in the new Bill are in accordance with such recommendation. These provisions were included in the regulatory framework by various jurisdictions post 2002 scams of Enron/ WorldCom etc to ensure independence of auditors. Implementation of such provisions internationally has successfully enhanced the standards of accountable and transparent financial reporting and auditing requirements.

(3) Para 5(vi)(b) of the "Statement of Objects and Reasons" for the Companies Act, 2013, read as follows:

"Stricter and more accountable role for auditor being retained. Provisions relating to prohibiting auditor from performing non-audit services revised to ensure independence and accountability of auditor. Subject to the maximum prescribed number of companies, the members of a company may resolve that the auditor or audit firm of such company shall not become auditor in companies beyond the number as may be specified in such resolution"

(4) ***The Chartered Accountants Act,1949*** **:** As per Section 2(2) of the Chartered Accountants Act, 1949, a member of the Institute shall be *deemed to be in practice* when individually or in partnership with chartered accountant(s) in practice, he in consideration of remuneration received or to be received:

(i) engages himself in the practice of accountancy; or

(ii) offers to perform or performs services involving

(a) auditing; or

(b) verification of financial transactions, books, records; or preparation, verification or certification of financial accounting statements and related statements or holds himself out to the public as an accountant;

(iii) renders professional services or assistance in or about matters relating to accounting procedure or the recording, presentation, or certification of financial facts or data; or

(iv) renders such other services as in the opinion of the Council may be rendered by Chartered Accountant in practice.

The Chartered Accountants Regulations, 1988: Regulation 190A states that a chartered accountant in practice cannot engage in any business or occupation other than the profession of accountancy and such other services as may be prescribed by the Council of ICAI. In the opinion of the Council of ICAI, the "other services" that may be rendered by a chartered accountant as described in Section 2(2)(iv) will *include* the entire range of *management consultancy services defined therein.*

(5) ***Expert Advisory Committee of the ICAI*** **:** The Committee has opined that providing liaison services does not appear in the list of management consultancy and other services and therefore, statutory auditors cannot provide liaison services with export authorities unless such services are connected with certification or representation.

Stand taken by the Indian Regulators including NFRA[3]

In the case against Deloitte Haskins & Sells LLP ("DHS") and BSR & Associates LLP ("BSR"), Joint Statutory Auditors of IL&FS Financial Services Ltd for the F.Y.2017-18, BSR/ DHS were providing, directly or indirectly through related entities tax computation, tax representation, tax advisory, transfer pricing services, advice on Ind AS issues and other advisory services to the Company.

The NFRA, in the Audit Quality Review Report of BSR held these non-audit services to be management services and stated that, in absence of any definition, the words used in the statute must be understood in their normal or dictionary sense and be given their literal and direct meaning and has defined the term Management Services as under:

"Management Services" has to be taken as services (performed by the statutory auditor) for the management, either (a) in the form of doing actions/functions that would otherwise have to be done/undertaken by the management; or (b) providing any kind of support (inclusive of analysis, research, advice etc.) that is required by management for the performance of those actions/functions.

All activities carried out by a company are pursuant to actions / functions of the management of that company. As a result of the above definition, advising the management on any activity of a company would get classified as management services to that company. In other words, all services other than attestation services i.e. all non-audit services would get classified as Management Services.

The submissions made by DHS with respect to meaning of Management Services in response to inspection conducted by NFRA were as under:

a. The intent of the legislature was not to prohibit provision of "any other kind of consultancy services"; as a corollary, the intention of the legislature was that some management consultancy/similar services were permissible (which also aligns with ICAI guidelines on permissible services for auditors).

b. The suggestion to define "management services" using AICPA Code of Ethics of Professional Conduct was rejected by the Standing Committee Report of 2012 stating that the guidance on management services is internationally followed and therefore, there is no need for further explanation/guidance on "management services".

c. Based on the above, it is clear that the intention of the legislature for "management services was to follow internationally followed practices that were prevalent at the time of enacting the Companies Act, 2013. Accordingly, in the absence of any definition of "management services", DHS followed "management services" to mean as services that comprise or include management responsibilities as defined in IESBA Code of Ethics, 2010 and as amended from time to time".

NFRA didn't agree to any of the submissions made by DHS and concluded as under:

a. Admittedly, the term "management services" has not been defined in the Companies Act, 2013. In such situations, the settled principles of statutory construction require that the words used in the statute must be understood in their normal or dictionary sense and be given their literal and direct meaning. While doing so, the context in which the words are used will clearly be important. At the same time, the principles of interpretation would require that no extraneous matter should be brought in as part of the interpretation. Similarly, all the words used in the statute would have to be given their full meaning and

no part of the statute can be rendered otiose.

b. Using these principles, it is clear that the context, which is one of prohibition of provision of non-audit services by the auditor of a company, would mean that "management services" should be interpreted only as services that can be, or potentially can be, provided by the auditor to the management of the company. Given the context, it would be entirely repugnant thereto to interpret the term "management services" as "services performed or rendered by management". If this were to be the interpretation, the question would then arise as to the person/entity for whom management is performing or rendering any services. The argument of the Audit Firm that the term "management services" implies the equivalent of "management responsibilities" is unacceptable since "management responsibilities" would mean actions to be done/ functions to be undertaken BY management and not services rendered TO management, which is what is required by the context in which the term appears. "Management responsibilities" have to be discharged ONLY by management and cannot be done by others. All others, including auditors, can help management in discharging such responsibilities by providing them services of various kinds.

c. Hence, the definition of "management services", read in the context in which the term has been used in the statute, can be only understood to mean "services performed by the statutory auditor" for the management, either (a) in the form of doing actions/ functions that would otherwise have to be done/ undertaken by the management; or (b) providing any kind of support (inclusive of analysis, research, advice etc.) that is required by the management for the performance of those actions/functions.

d. As explained above, it is completely impermissible in all accepted norms of statutory construction to import concepts, meanings, and definitions from extraneous sources in a situation where a plain reading of the words of the statute does not indicate that this is either permissible or has necessarily to be done.

e. As far as the contention of the Audit Firm that the intention of the legislature was not to prohibit provision of "any other kind of consultancy services" and that, it was indeed, on the contrary, to permit such provision, it is seen that the Audit Firm has based this argument on the Report of the Parliamentary Standing Committee on Finance, 2012. On an examination of the source documents (namely the Parliamentary Standing Committee on Finance Report of 2010 on the Companies Bill, 2009, and the Report of 2012 on the Companies Bill, 2011), it is clear that not only is the understanding by the Audit Firm of the Committee's recommendations completely wrong, but that the Audit Firm has also seriously misrepresented the recommendations of the Committee.

f. The Standing Committee Report, 2012 [Para 84 of Chapter IV of Part I of the Report (Suggestions on the Companies Bill, 2011)], clearly shows that the suggestion regarding the AICPA definition was one of 7 suggestions relating to Section 144, all of which were clubbed together and considered. These suggestions were all intended to curb/restrict/relax the proposed prohibitions. In fact, the suggestion at Sl. No.(vii) of the list was that if at all the Bill needs to cover any non-audit services, the Bill itself should contain only minimum restrictions and further restrictions may be prescribed through the Code of Ethics.

g. It is seen that Para 34 of the Standing Committee's Report, 2010 listed out suggestions received by the Committee about the need to make provisions relating to audit and auditors more stringent. The suggestions included (a) prohibition of rendering of non-audit services both "directly as well as indirectly", and suitably defining the term "directly or indirectly" in the Bill itself; (b) the prohibition should apply not only to the audit client company but also for its holding company, subsidiary company, and associate company; and (c) through a residual clause, prohibit the provision of "any kind of consultancy services" to take care of any non-audit services not covered in already provided clauses. Para 10.50 of the Report recommended that the Ministry should consider extending the scope of Clause 127 to cover specified services rendered to subsidiary companies as well.

h. In its comments to the Standing Committee 2012, the Ministry had referred to all this background, and the fact that the recommendations of the Standing Committee 2010, had been accepted virtually in toto. It is in this context that the Ministry, drawing attention also to international practices, had emphasized the need for such prohibition for auditors in India as well and urged a rejection of any suggestions for curbing/ restricting/relaxing such prohibitions.

i. It is seen, therefore, that the conclusions drawn by the Audit Firm, ostensibly relying on the Report of the Parliamentary Committee, are completely unfounded and are an attempt at deliberate misrepresentation. Given the basic framework and principles governing statutory interpretation explained above, NFRA would have been fully within its right to ignore the extraneous matter such as statutes in other countries, Codes of

Ethics prescribed by International Bodies etc., as well as the Reports of the Committees quoted by the Audit Firm in a situation where the plain meaning of the words used in the statute is clear and does not require any such additional aids to interpretation. Nevertheless, NFRA has considered in detail the arguments of the Audit Firm in order to both demonstrate their complete lack of merit as well as to highlight their attempts at deliberate misrepresentation of the material relied upon.

After re-examining the matter in the light of the responses of the Audit Firm to the DAQRR, NFRA reiterates and confirms its stand, for the reasons explained above, on the scope of the term "management services".

The submissions of BSR with respect to meaning of Management Services are as under:

a. All the non-audit services provided by BSR or BSR & Co are in the nature of professional services which are permitted to be rendered by an auditor / Audit Firm under the Chartered Accountants Act, 1949 and the non-audit services provided by BSR or BSR & Co in the relevant period were provided to IFIN's Fellow subsidiaries or Associate Company of IFIN respectively and are not prohibited under Sec 144 of the Companies Act, 2013 as they do not come under the scope of Sec 144.

b. None of the services listed in Annexure of non-audit services of the Affidavit rendered by KPMG Entities in the Relevant Period to IFIN, or the holding or subsidiary companies of IFIN, falls within any category of "prohibited services" which are listed in Section 144. As per, the ICAI Code of Ethics 2019,

"A firm or a network firm shall not assume a management responsibility for an audit client. Further, under Section 144 of the Companies Act, 2013, where applicable, the restriction also applies to the holding company and subsidiary company of such audit client." "Providing advice and recommendations to assist the management of an audit client in discharging its responsibilities is not assuming a management responsibility."

BSR understands that the services which were provided by the KPMG Entities to IFIN or its holding company or its subsidiary company in the Relevant period are as follows:

1. Conducting pre-employment background checks on existing employees and applicants being considered for appointment.
2. Conducting a current state assessment of the IFIN's Business Continuity Management process and providing observations and recommendations basis leading practices.
3. Carrying out an independent post facto review to check compliance with the client's investment and divestments processes for certain transactions identified by the client.
4. Providing training to employees on key aspects of KYC Direction by RBI and applicable sections of Prevention of Money Laundering Act, 2002.

As is clear from the descriptions above, such services did not involve assumption of any management responsibility or exercise of any management function or decision-making on behalf of management. In each case, a deliverable or recommendation was provided to the client to enable management, within the client, to take any judgment or decisions that were the proper responsibility of management.

NFRA didn't agree to any of the submission by BSR and concluded as under:

a. Admittedly, the term "management services" has not been defined in the Companies Act, 2013. In such situations, the settled principles of statutory construction require that the words used in the statute must be understood in their normal or dictionary sense and be given their literal and direct meaning. While doing so, the context in which the words are used will clearly be important. At the same time, the principles of interpretation would require that no extraneous matter should be brought in as part of the interpretation. Similarly, all the words used in the statute would have to be given their full meaning and no part of the statute can be rendered otiose.

b. Using these principles, it is clear that the context, which is one of prohibition of provision of non-audit services by the auditor of a company, would mean that "management services" should be interpreted only as services that can be, or potentially can be, provided by the auditor to the management of the company. Hence, the definition of "management services", read in the context in which the term has been used in the statute, can be only understood to mean "services performed by the statutory auditor" for the management, either in the form of doing actions/functions that would otherwise have to be done/undertaken by the management; or (b) providing any kind of support (inclusive of analysis, research, advice etc.) that is required by the management for the performance of those actions/functions.

c. The Audit Firm's reference to the ICAI Code of Ethics 2019, is not in order, since it did not apply to the relevant period. Nevertheless, considering the facts detailed above, the understanding drawn by the Audit

Firm from this Code is clearly incorrect and inapplicable. The argument of the Audit Firm that the term "management services" is the same as "management responsibilities" is unacceptable. If it were indeed the intention of the legislature to prohibit the provision of "management responsibilities" by the statutory auditor, the term "management responsibilities" would have been directly used instead. It is not anybody's case that there was no widespread ongoing debate about the provision of non audit services, and that the concept of "management responsibilities" was not examined threadbare. If after all this debate, the legislature, in its wisdom, has chosen to use the term "management services", it must have done so for good reason.

d. This choice appears to have been made given the obvious absurdity that would accompany the use of "management responsibilities" because "management responsibilities" mean actions to be done/functions to be undertaken / responsibilities to be discharged by management, and not services rendered to management, which is what is required by the context in which the term appears. "Management responsibilities" have to be discharged only by management and cannot be done so by others. All others, including auditors, can only help management in discharging such responsibilities by providing them services of various kinds. The Audit Firm cannot derive any support by quoting the Code of Ethics 2019 to say that "Providing advice and recommendations to assist the management of an audit client in discharging its responsibilities is not assuming a management responsibility." That is not NFRA's argument either. However, "Providing advice and recommendations to assist the management of an audit client in discharging its responsibilities" is clearly provision of a "management service".

Therefore, NFRA's concludes that

- The KPMG entities would be covered by the categories of "parent" and "associate" entity as per explanation (ii) to Sec 144 of the Act;
- BSR entities make use of the KPMG Brand name/trade Mark for the audit and non-audit services provided by them;
- the non-audit services provided by BSR Entities and KPMG entities both come within the purview of the prohibited services, including management services, covered under Section 144 of the Companies Act, 2013.

Conclusion

Companies Act unlike the Income Tax Act, is not a fiscal statute and therefore, should not be construed strictly but purposively. As per general understanding, management services could mean any services as may be provided in relation to the management and/or administration of the company. Simply giving options/ setting out alternatives, without making a recommendation should be permitted so long as these recommendations / options do not in any way relate to any decisions pertaining to the way the business of Auditee Company is being run and does not constitute management consulting. It seems that financial due diligence and tax services does not fall within the scope of prohibited services to the extend these are not management services. The Act prohibits investment advisory and investment banking services but there is no prohibition for valuation services. However, if the valuation is for giving opinion on whether or not to invest in the company, to acquire the company, it may fall within management services. Accordingly, depending upon the purpose of valuation, merger valuation, RBI valuation, Business Valuation will not fall under the prohibited category, if the auditor does not provide any recommendation to management as to whether to proceed with a transaction and the Services are purely advisory in nature. In a scenario where the management of a company requires the services provider to undertake a complete review of a particular business which entails the service provider analyzing and specifically assessing the business and in pursuance thereto, the service provider provides recommendation to the management in relation to any restructuring which the management proposes to undertake, such a activity by the service provider may be considered as 'management services. Therefore, the judgment is very subjective and will depend upon facts & circumstances of each case. A practitioner, therefore, should, as required by the Standard on Quality Control (SQC) 1, *Quality Control for Firms the Perform Audits and Reviews of Historical Financial Information,* evaluate each non-audit service engagement before accepting/ continuing the same.

MCA and ICAI should conclude the process recommended by the Company Law Committee in its report to MCA in February, 2016 constituted pursuant to statement made by the Honorable Minister in the Rajya Sabha by providing guidance to the auditors and in turn to the entire corporate world. The outcome of the above process should be made applicable prospectively.

[1] International Federation of Accountants
[2] Institute of Chartered Accountants of India
[3] National Financial Reporting Authority

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New Definition of MSME - How it is Going to Benefit the Indian Indutry

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1. **What is MSME? – An Introduction**

   MSME stands for Micro, Small, and Medium Enterprises. Having created 11 crore job opportunities in India while contributing to the GDP by 29%, we can say that MSMEs are the heart of the Indian economy.

   In accordance with the Micro, Small, and Medium Enterprises Development (MSMED) Act in 2006, the enterprises are classified into two divisions.

   1. **Manufacturing enterprises** – engaged in the manufacturing or production of goods in any industry
   2. **Service enterprises** – engaged in providing or rendering services

2. **Old MSME definition based on investment, MSMED Act, 2006**

   Old definition of MSME was based only on Investment value as under. It was not in any way connected with the Turnover.

Manufacturing Sector	
Enterprises	Investment in plant and machinery
Micro enterprises	< or = Rs 25 lakh
Small enterprises	> Rs 25 lakh, < Rs 5 crore
Medium enterprises	> Rs 5 crore, < Rs 10 crore

Service Sector	
Enterprises	Investment in equipment
Micro enterprises	< or = Rs 10 lakh
Small enterprises	> Rs 10 lakh, < Rs 2 crore
Medium enterprises	> Rs 2 crore, < Rs 5 crore

3. **New MSME definition based on investment and turnover (June 2020)**

   On 1st June, Monday, the Union Cabinet headed by Prime Minister officially revised the MSME definition. The recent changes in the definition of micro, small, and medium-sized enterprises made as a part of the Atmanirbhar Bharat Abhiyaan relief package were approved.

   The investment and turnover figures were changed to larger values, thereby resulting in a larger number of medium-sized enterprises.

Updated MSME Definition		
Type of Enterprise	**Investment**	**Turnover**
Micro	**Rs. 1 Crore**	Rs. 5 Crore
Small	Rs. 10 Crore	Rs. 50 Crore
Medium	Rs. 50 Crore	Rs. 250 Crore

   As per the new definition, almost 99% of the organizations in India both under manufacturing and servicesectors would come under MSME definition.

4. **New MSME definition – Why the change**

   The new definition will bring about many benefits that will aid MSMEs to grow in size.

   This was made under **Atma-nirbhar Bharat Abhiyaan Economic Package** to assuage India's economic predicament amidst the pandemic. Combined with all previous economic stimulus efforts, the total amount of the relief package comes to a whopping Rs. 20 lakh crore.

5. **Key announcements of Atma-nirbhar Bharat Abhiyaan**

   - Rs 3 lakh crore collateral free automatic loans for MSMEs
   - Rs 50,000 crore equity infusion through MSME Fund of Funds
   - Rs 20 crore subordinate debt for MSMEs
   - Extension of registration and completion date of real estate projects under RERA
   - Immediate pending refunds issuance to all non charitable trusts
   - Extension of the due date for ITR for FY'19-20 to November 30, 2020.

* * * * *

CA Narasimhan Elangovan
B.Com, FCA, CS, DISA, DipIFR(UK), CISA(USA), LLB, CDPSE (USA)

Data Analytics Using Excel Tools

We often know so many tools. The big question is when and how do I use the tool?

What is Flash Fill in Excel?

Excel Flash Fill is a special tool that analyses the information you are entering and automatically fills data when it identifies a pattern.

The Flash Fill feature was introduced in Excel 2013 and is available in all later versions of Excel 2016, Excel 2019, and Excel for Office 365. Those of you who prefer working from a keyboard most of the time, can run Flash Fill with this key combination: **Ctrl + E**

How to use Flash Fill in Excel?

Usually Flash Fill starts automatically, and you only need to provide a pattern. Here's how:

1. Insert a new column next to the column with your data.
2. In the first cell of a newly added column, type the desired value.
3. Start typing in the next cell, and if Excel senses a pattern, it will show a preview of data to be auto-filled in the below cells.
4. Press the Enter key to accept the preview.

	A	B
1	**Place**	**City**
2	Bangalore, Karnataka	Bangalore
3	Mysore, Karnataka	Mysore
4	Chennai, Tamil Nadu	Chennai
5	Hyderabad, Telengana	Hyderabad
6	Coimbatore, Tamil Nadu	Coimbatore
7	Mumbai, Maharashtra	Mumbai
8		
9		
10		
11		

5. If the preview doesn't appear, press **Ctrl + E** or **Flash Fill** option from the Data Ribbon.

A few use cases:

1. Splitting any Text into columns based on a pattern (Name, Space, Symbol etc.)

	A	B	C
1	**Name**	**First Name**	**Last Name**
2	Ravi Sharma		
3	Luis Philpe		
4	Saran Jain		
5	Narendra Patel		
6	Mohamad Yusuf		
7	Christopher Nolan		
8	Vijay Singh		

	A	B	C	D
1	**Name**	**First Name**	**Last Name**	
2	Ravi Sharma	Ravi		
3	Luis Philpe	Luis		
4	Saran Jain	Saran		
5	Narendra Patel	Narendra		
6	Mohamad Yusuf	Mohamad		
7	Christopher Nolan	Christopher		
8	Vijay Singh	Vijay		
9				

Undo Flash Fill
Accept suggestions
Select all 0 blank cells
Select all 6 changed cells

2. Extracting specific content within a particular cell (Ex. Extracting PAN from GSTN, Invoice number from a cell containing number and text etc.)

	A	B	C	D
1	Invoice Number	Outlet No	City Code	Bill No
2	BLR-01-05946			
3	SLX-30-00089			
4	VSK-49-08791			
5	CHE-08-09325			
6	BOM-04-15873			
7	KOL-72- 04545			
8	AHM-60-07413			
9	CON-14-04785			

2nd Code denotes the Outlet Number

	A	B	C	D
1	Invoice Number	Outlet No	City Code	Bill No
2	BLR-01-05946	01		
3	SLX-30-00089	30		
4	VSK-49-08791	49		
5	CHE-08-09325	08		
6	BOM-04-15873	04		
7	KOL-72- 04545	72		
8	AHM-60-07413	60		
9	CON-14-04785	14		

3. Extracting specific data from the text which is not split into columns (Ex. In the case of bank audit, notepad file has all text in one column)

	A	B	C
1	Coloumn 1	Customer Code	Customer Name
2	104586RAVISHARMA		
3	114789VIJAYSINGH		
4	158972ASWINH		
5	201549MOHITPATEL		
6	174102RAMPILLAI		
7	100025NARENDRAN		
8	132415JACKOB		
9	199478MOHAMMEDYUSUF		
10	181852KOMALJAIN		
11	117523SRUTHIPRIYA		

Customer Code

Customer Name

	A	B	C
1	Coloumn 1	Customer Code	Customer Name
2	104586RAVISHARMA	104586	
3	114789VIJAYSINGH	114789	
4	158972ASWINH	158972	
5	201549MOHITPATEL	201549	
6	174102RAMPILLAI	174102	
7	100025NARENDRAN	100025	
8	132415JACKOB	132415	
9	199478MOHAMMEDYUSUF	199478	
10	181852KOMALJAIN	181852	
11	117523SRUTHIPRIYA	117523	

4. Combining data from several cells (Instead of a complex concatenate formula)

	A	B	C	
1	Date	Voucher Number	Branch	Reference
2	14-02-2012	74	04	
3	21-08-2014	45	01	
4	06-03-2015	63	11	
5	04-08-2017	10	02	
6	01-09-2017	15	05	
7	16-09-2017	114	03	
8	11-09-2017	98	07	
9	10-03-2017	14	09	
10				

	A	B	C	D
1	Date	Voucher Number	Branch	Reference
2	14-02-2012	74	04	TD-14-02-2012/V-74/B-04
3	21-08-2014	45	01	TD-21-08-2014/V-45/B-01
4	06-03-2015	63	11	TD-06-03-2015/V-63/B-11
5	04-08-2017	10	02	TD-04-08-2017/V-10/B-02
6	01-09-2017	15	05	TD-01-09-2017/V-15/B-05
7	16-09-2017	114	03	TD-16-09-2017/V-114/B-03
8	11-09-2017	98	07	TD-11-09-2017/V-98/B-07
9	10-03-2017	14	09	TD-10-03-2017/V-14/B-09
10				

5. Clean up Data (space, special characters can be removed)

	A	B	C	D
1	Column 1	Cleaned Data		
2	ravi sharma			
3	luis philpe.			
4	saran jain			
5	narendra patel.			
6	mohamad yusuf.			
7	christopher nolan			
8	vijay singh			
9				

Double Space in between names

Punctuation at end of names.

First Letters not capitalized

	A	B	C
1	Column 1	Cleaned Data	
2	ravi sharma	Ravi Sharma	
3	luis philpe.	Luis Philpe	
4	saran jain	Saran Jain	
5	narendra patel.	Narendra Patel	
6	mohamad yusuf.	Mohamad Yusuf	
7	christopher nolan	Christopher Nolan	
8	vijay singh	Vijay Singh	
9			

6. Format text, numbers, dates, phone numbers etc.

	A	B	C
1	Contact Number	New Format	
2	4856975203		
3	7893468971		
4	4879620152		
5	2574896201		
6	9658401515		
7	6363520254		
8	7410258963		
9	3579518426		
10	9532465790		
11	8723991465		

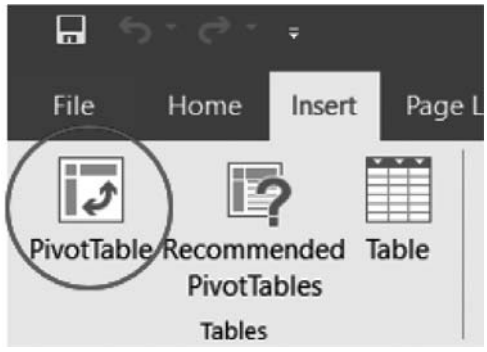
Required format in:
+91 XXXX-XXX-XXX

	A	B	C
1	Contact Number	New Format	
2	4856975203	+91 4856-975-203	
3	7893468971	+91 7893-468-971	
4	4879620152	+91 4879-620-152	
5	2574896201	+91 2574-896-201	
6	9658401515	+91 9658-401-515	
7	6363520254	+91 6363-520-254	
8	7410258963	+91 7410-258-963	
9	3579518426	+91 3579-518-426	
10	9532465790	+91 9532-465-790	
11	8723991465	+91 8723-991-465	

What is a Pivot table?

Table in Excel is a conventional form where we have the rows and columns of the data as in raw form with a little scope such as filter, sort, etc. There is no scope for turning down the data into meaningful insights and summary. 'Pivot' means to turn or change the direction of something. Meaning this Pivot Table is an extremely useful feature where Data can be presented in a more flexible manner and advanced features with easy handling.

Defining it is a statistics tool that summarizes and reorganizes selected columns and rows of data in a spreadsheet or database table to obtain a desired report. The tool does not actually change the spreadsheet or database itself, it simply "pivots" or turns the data to view it from different perspectives.

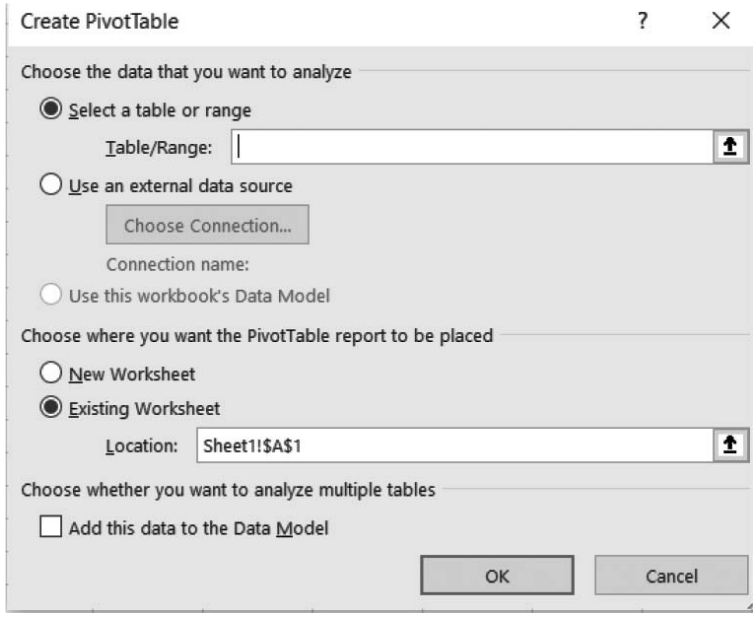


How to Insert Pivot Table?

i) Click on the Pivot Table From Insert Ribbon.

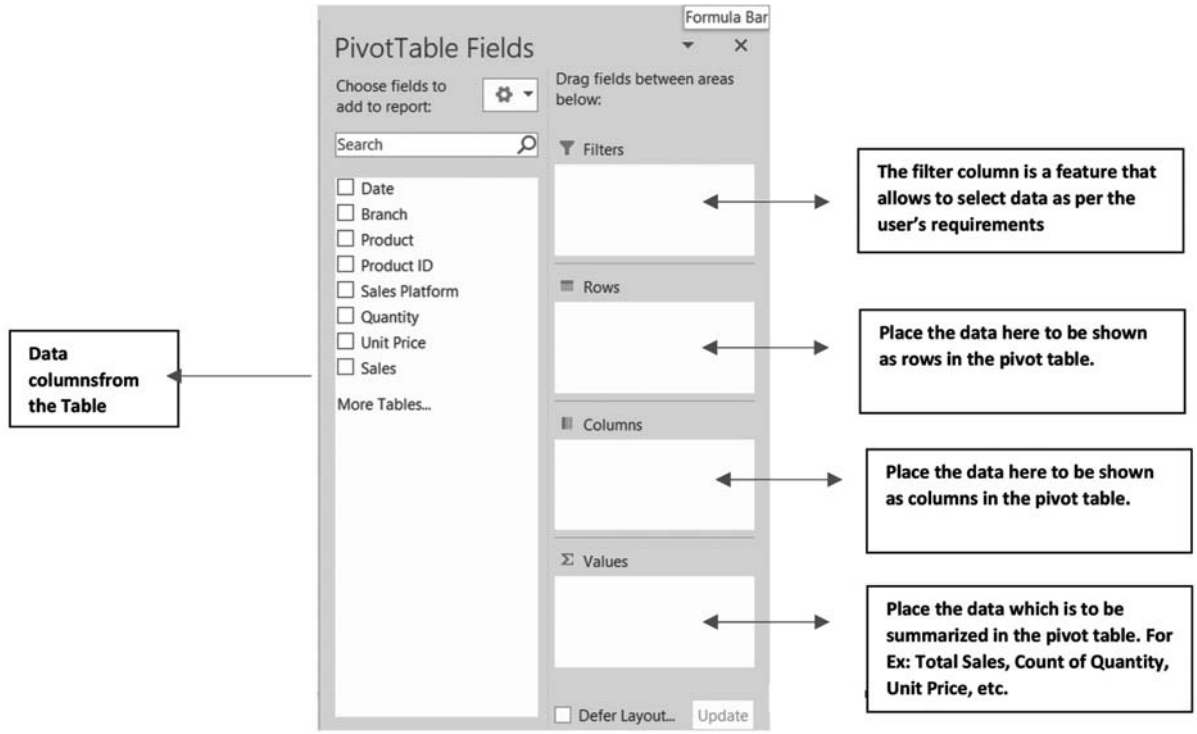
ii) Select the Data for which you want to use the Pivot Table Feature in th "Table/Range" box.

iii) Select also where the pivot Table to be located. Either in a new worksheet or a cell in the Existing Worksheet.



Trick: Select the data to which you want to insert a pivot table and try **Alt + N + V**

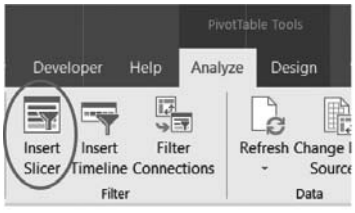
Nuts and Bolts of a Pivot Table- Pivot Table Fields:



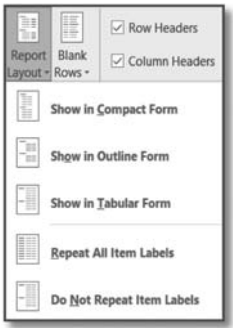
Salient Features of Pivot Table:

Slicers:

Under the *'Analyse tab of PivotTable tools'* we have slicer option. Slicers are a powerful new way to filter pivot table data.



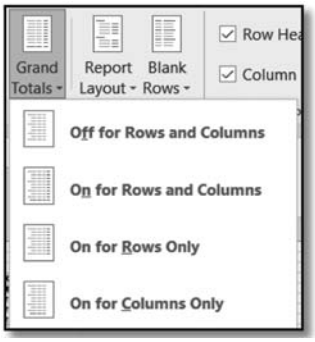
Report Layouts:



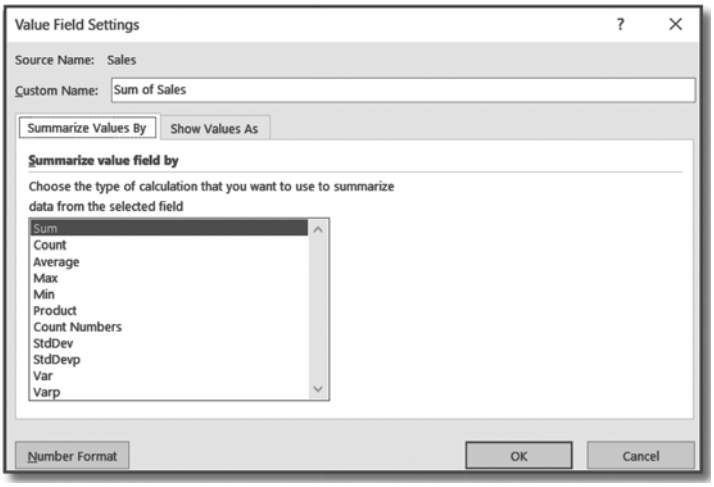
Pivot Table provides you the option of different types of Report Layout. It is found under the *'Design Tab of PivotTable Options'*. The **Compact Form layout** may be useful when you want to reduce the pivot table width, and aren't concerned about the Row field headings. The **Outline Form layout** may be useful when you want to show all the field names as heading labels and aren't concerned about the width of the pivot table. The **Tabular Form layout** may be useful when you want to show all the field names as heading labels and aren't concerned about the width of the pivot table but want to reduce the number of rows. Further there is a option of 'Repeat and Do Not Repeat Item Labels' where the user can opt whether the group Name to be repeated for all the sub-group rows.

Grand Totals and Sub-Totals:

These can be found under the Design Tab under the 'PivotTable Tools'. Grand Totals can be opted for the rows and columns as per the user requirements. Subtotals can be turned on or off and provides the option of whether to show at the top or bottom of the groups.



Value Field Settings:



The value field settings can be found in the drop down list of the Values Fields. This option provides the option of summarizing the values by number of calculations such as ***sum, count, average, max, product, etc*** as required. The column can be named and the appropriate format can be used.

In Addition the values can be shown as % ***of Grand Total, Row Total, Column Total, or any custom base*** as per the user's requirement.

Trick: When you are using a Pivot Table in Excel and want to know what data makes up a certain value, all you have to do is **double click on that cell**. This will open up a brand new Sheet with all the rows of data that make up that value.

Use Cases:

Pivot Table can be used for any data with proper titled column headings. The benefits can be harnessed by using the features of ***'PivotTable Tools'***.

From a basic table which contains the sales details of an organization which has branches in different cities, selling different product categories on different platforms the following various types of pivot table can be used. (The following examples are not exhaustive of the available features)

1. **Sales summary of Products Categories across Branches:**

Sum of Sales	Column Labels				
Row Labels	Chairs	Clocks	Desk Lamps	Tables	Grand Total
Chennai	₹ 3,96,000	₹ 2,77,200	₹ 10,69,200	₹ 37,91,700	₹ 55,34,100
Delhi	₹ 15,84,000	₹ 7,37,550	₹ 22,57,200	₹ 6,03,900	₹ 51,82,650
Mumbai	₹ 7,92,000	₹ 6,33,600	₹ 3,56,400	₹ 17,37,450	₹ 35,19,450
Grand Total	**₹ 27,72,000**	**₹ 16,48,350**	**₹ 36,82,800**	**₹ 61,33,050**	**₹ 1,42,36,200**

2. **Break Down of Different Product types sales across the branches:**

Sum of Sales	Column Labels			
Row Labels	Chennai	Delhi	Mumbai	Grand Total
⊟ Chairs	**₹ 3,96,000**	**₹ 15,84,000**	**₹ 7,92,000**	**₹ 27,72,000**
C-01		₹ 4,45,500	₹ 3,96,000	₹ 8,41,500
C-02		₹ 4,45,500	₹ 2,97,000	₹ 7,42,500
C-03	₹ 3,96,000	₹ 6,93,000	₹ 99,000	₹ 11,88,000
⊟ Clocks	**₹ 2,77,200**	**₹ 7,37,550**	**₹ 6,33,600**	**₹ 16,48,350**
CL-01		₹ 5,64,300	₹ 2,52,450	₹ 8,16,750
CL-02	₹ 2,77,200	₹ 1,73,250	₹ 3,81,150	₹ 8,31,600
⊟ Desk Lamps	**₹ 10,69,200**	**₹ 22,57,200**	**₹ 3,56,400**	**₹ 36,82,800**
DL-01	₹ 10,69,200	₹ 22,57,200	₹ 3,56,400	₹ 36,82,800
⊟ Tables	**₹ 37,91,700**	**₹ 6,03,900**	**₹ 17,37,450**	**₹ 61,33,050**
T-01	₹ 7,92,000	₹ 1,98,000	₹ 99,000	₹ 10,89,000
T-02	₹ 10,39,500	₹ 1,48,500		₹ 11,88,000
T-03	₹ 19,60,200		₹ 11,88,000	₹ 31,48,200
T-04		₹ 2,57,400	₹ 4,50,450	₹ 7,07,850
Grand Total	**₹ 55,34,100**	**₹ 51,82,650**	**₹ 35,19,450**	**₹ 1,42,36,200**

3. Using filters to summarize the sales via stores and E-Retail platforms:

Sales Platform: E- Retail

Sum of Sales	Column Labels			
Row Labels	Chennai	Delhi	Mumbai	Grand Total
Chairs		₹ 14,35,500	₹ 99,000	₹ 15,34,500
C-01		₹ 4,45,500		₹ 4,45,500
C-02		₹ 2,97,000		₹ 2,97,000
C-03		₹ 6,93,000	₹ 99,000	₹ 7,92,000
Clocks	₹ 2,77,200	₹ 5,64,300	₹ 6,33,600	₹ 14,75,100
CL-01		₹ 5,64,300	₹ 2,52,450	₹ 8,16,750
CL-02	₹ 2,77,200		₹ 3,81,150	₹ 6,58,350
Desk Lamps		₹ 22,57,200	₹ 3,56,400	₹ 26,13,600
DL-01		₹ 22,57,200	₹ 3,56,400	₹ 26,13,600
Tables	₹ 34,94,700	₹ 2,57,400	₹ 17,37,450	₹ 54,89,550
T-01	₹ 7,92,000		₹ 99,000	₹ 8,91,000
T-02	₹ 7,42,500			₹ 7,42,500
T-03	₹ 19,60,200		₹ 11,88,000	₹ 31,48,200
T-04		₹ 2,57,400	₹ 4,50,450	₹ 7,07,850
Grand Total	₹ 37,71,900	₹ 45,14,400	₹ 28,26,450	₹ 1,11,12,750

Sales Platform: Stores

Sum of Sales	Column Labels			
Row Labels	Chennai	Delhi	Mumbai	Grand Total
Chairs	₹ 3,96,000	₹ 1,48,500	₹ 6,93,000	₹ 12,37,500
C-01			₹ 3,96,000	₹ 3,96,000
C-02		₹ 1,48,500	₹ 2,97,000	₹ 4,45,500
C-03	₹ 3,96,000			₹ 3,96,000
Clocks		₹ 1,73,250		₹ 1,73,250
CL-02		₹ 1,73,250		₹ 1,73,250
Desk Lamps	₹ 10,69,200			₹ 10,69,200
DL-01	₹ 10,69,200			₹ 10,69,200
Tables	₹ 2,97,000	₹ 3,46,500		₹ 6,43,500
T-01		₹ 1,98,000		₹ 1,98,000
T-02	₹ 2,97,000	₹ 1,48,500		₹ 4,45,500
Grand Total	₹ 17,62,200	₹ 6,68,250	₹ 6,93,000	₹ 31,23,450

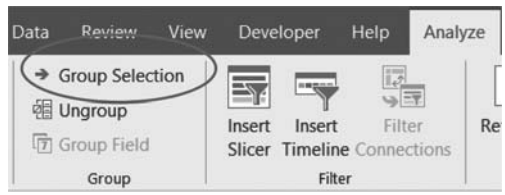
4. The complete summary of the data with conditional formatting for Total Sales:

Sum of Sales	Column Labels								
	E- Retail			E- Retail Total	Stores			Stores Total	Grand Total
Row Labels	Chennai	Delhi	Mumbai		Chennai	Delhi	Mumbai		
Chairs		₹ 14,35,500	₹ 99,000	₹ 15,34,500	₹ 3,96,000	₹ 1,48,500	₹ 6,93,000	₹ 12,37,500	₹ 27,72,000
C-01		₹ 4,45,500		₹ 4,45,500			₹ 3,96,000	₹ 3,96,000	₹ 8,41,500
C-02		₹ 2,97,000		₹ 2,97,000		₹ 1,48,500	₹ 2,97,000	₹ 4,45,500	₹ 7,42,500
C-03		₹ 6,93,000	₹ 99,000	₹ 7,92,000	₹ 3,96,000			₹ 3,96,000	₹ 11,88,000
Clocks	₹ 2,77,200	₹ 5,64,300	₹ 6,33,600	₹ 14,75,100		₹ 1,73,250		₹ 1,73,250	₹ 16,48,350
CL-01		₹ 5,64,300	₹ 2,52,450	₹ 8,16,750					₹ 8,16,750
CL-02	₹ 2,77,200		₹ 3,81,150	₹ 6,58,350		₹ 1,73,250		₹ 1,73,250	₹ 8,31,600
Desk Lamps		₹ 22,57,200	₹ 3,56,400	₹ 26,13,600	₹ 10,69,200			₹ 10,69,200	₹ 36,82,800
DL-01		₹ 22,57,200	₹ 3,56,400	₹ 26,13,600	₹ 10,69,200			₹ 10,69,200	₹ 36,82,800
Tables	₹ 34,94,700	₹ 2,57,400	₹ 17,37,450	₹ 54,89,550	₹ 2,97,000	₹ 3,46,500		₹ 6,43,500	₹ 61,33,050
T-01	₹ 7,92,000		₹ 99,000	₹ 8,91,000		₹ 1,98,000		₹ 1,98,000	₹ 10,89,000
T-02	₹ 7,42,500			₹ 7,42,500	₹ 2,97,000	₹ 1,48,500		₹ 4,45,500	₹ 11,88,000
T-03	₹ 19,60,200		₹ 11,88,000	₹ 31,48,200					₹ 31,48,200
T-04		₹ 2,57,400	₹ 4,50,450	₹ 7,07,850					₹ 7,07,850
Grand Total	₹ 37,71,900	₹ 45,14,400	₹ 28,26,450	₹ 1,11,12,750	₹ 17,62,200	₹ 6,68,250	₹ 6,93,000	₹ 31,23,450	₹ 1,42,36,200

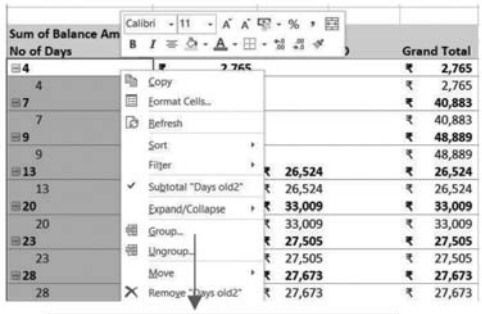
Stratification using Pivot Table:

Stratification means to sort data/people/objects into distinct groups or layers. We need to sort the data based on our needs in order to do stratification in a Pivot table. It can be done in two ways

1. By classifying directly in the data form or
2. By using the *'Grouping Selection'* feature in pivot table.



The below is a case of stratifying the loans receivable based on their no of days after the last payment.



Select the items to be grouped. **Right Click** and **select group**. The group can also be named.

Sum of Balance Amount	Column Labels			
Row Labels	AAD	ML	OD	Grand Total
< 30 Days	₹ 92,537	₹ 1,14,711		₹ 2,07,248
30-60 Days	₹ 2,12,548	₹ 36,235	₹ 1,02,547	₹ 3,51,330
60-90 Days	₹ 10,716	₹ 1,78,033	₹ 8,406	₹ 1,97,155
> 90 Days	₹ 24,489	₹ 2,32,644	₹ 1,15,936	₹ 3,73,069
Grand Total	₹ 3,40,290	₹ 5,61,623	₹ 2,26,889	₹ 11,28,802

All the items in the Row field can be grouped and named as per the user's requirement.

How to get a effective sample of the population?

1. Try to classify the population based on an effective category with the help of **grouping** option under the PivotTable Tools. It can be more than one category.

Sum of Sales	Column Labels								
	E- Retail			E- Retail Total	Stores			Stores Total	Grand Total
Row Labels	Chennai	Delhi	Mumbai		Chennai	Delhi	Mumbai		
Chairs		₹ 14,35,500	₹ 99,000	₹ 15,34,500	₹ 3,96,000	₹ 1,48,500	₹ 6,93,000	₹ 12,37,500	₹ 27,72,000
C-01		₹ 4,45,500		₹ 4,45,500			₹ 3,96,000	₹ 3,96,000	₹ 8,41,500
C-02		₹ 2,97,000		₹ 2,97,000		₹ 1,48,500	₹ 2,97,000	₹ 4,45,500	₹ 7,42,500
C-03		₹ 6,93,000	₹ 99,000	₹ 7,92,000	₹ 3,96,000			₹ 3,96,000	₹ 11,88,000
Clocks	₹ 2,77,200	₹ 5,64,300	₹ 6,33,600	₹ 14,75,100		₹ 1,73,250		₹ 1,73,250	₹ 16,48,350
CL-01		₹ 5,64,300	₹ 2,52,450	₹ 8,16,750					₹ 8,16,750
CL-02	₹ 2,77,200		₹ 3,81,150	₹ 6,58,350		₹ 1,73,250		₹ 1,73,250	₹ 8,31,600
Desk Lamps		₹ 22,57,200	₹ 3,56,400	₹ 26,13,600	₹ 10,69,200			₹ 10,69,200	₹ 36,82,800
DL-01		₹ 22,57,200	₹ 3,56,400	₹ 26,13,600	₹ 10,69,200			₹ 10,69,200	₹ 36,82,800
Tables	₹ 34,94,700	₹ 2,57,400	₹ 17,37,450	₹ 54,89,550	₹ 2,97,000	₹ 3,46,500		₹ 6,43,500	₹ 61,33,050
T-01	₹ 7,92,000		₹ 99,000	₹ 8,91,000		₹ 1,98,000		₹ 1,98,000	₹ 10,89,000
T-02	₹ 7,42,500			₹ 7,42,500	₹ 2,97,000	₹ 1,48,500		₹ 4,45,500	₹ 11,88,000
T-03	₹ 19,60,200		₹ 11,88,000	₹ 31,48,200					₹ 31,48,200
T-04		₹ 2,57,400	₹ 4,50,450	₹ 7,07,850					₹ 7,07,850
Grand Total	₹ 37,71,900	₹ 45,14,400	₹ 28,26,450	₹ 1,11,12,750	₹ 17,62,200	₹ 6,68,250	₹ 6,93,000	₹ 31,23,450	₹ 1,42,36,200

2. Using the **value field settings**, summarize the data with operations such as count, sum, product, etc and present the values as form of percentage under the 'show values as' option.

Gender	Count of Loans	% of Loans
Female	**22.0000**	**46.81%**
< 30 Days	5.0000	10.64%
30-60 Days	6.0000	12.77%
60-90 Days	5.0000	10.64%
> 90 Days	6.0000	12.77%
Male	**25.0000**	**53.19%**
< 30 Days	2.0000	4.26%
30-60 Days	7.0000	14.89%
60-90 Days	4.0000	8.51%
> 90 Days	12.0000	25.53%
Grand Total	**47.0000**	**100.00%**

3. In order to get the detailed data of selected sample **Double click** the cell in Pivot Table

Customer ID	Gender	Loan Type	Balance Amount	Last Payment Date	Days old
47	Male	OD	₹ 23,910	10-12-2020	121
43	Male	ML	₹ 23,654	03-12-2020	128
41	Male	OD	₹ 10,459	04-01-2021	96
40	Male	OD	₹ 21,866	04-12-2020	127
38	Male	ML	₹ 47,688	22-12-2020	109
37	Male	ML	₹ 25,445	11-11-2020	150
35	Male	ML	₹ 6,613	26-12-2020	105
32	Male	ML	₹ 21,402	06-01-2021	94
30	Male	OD	₹ 21,915	19-11-2020	142
27	Male	AAD	₹ 931	15-11-2020	146
19	Male	ML	₹ 10,938	04-12-2020	127
14	Male	ML	₹ 9,542	09-12-2020	122

*Selecting the **Male Category** with loans repayment date **> 90 days***

* * * * *

Hon'ble Supreme Court in the matter of ***Navinchandra Steels Pvt. Ltd. v. SREI Equipment Finance Ltd.*** held that Insolvency proceedings under Section 7 or 9 of the Insolvency and Bankruptcy Code, 2016 are maintainable even when a winding-up proceeding is pending against the corporate debtor under the Companies Act, 1956, or the Companies Act, 2013.

ASSOCIATION OF CORPORATE ADVISERS & EXECUTIVES

(Registered under the Societies Registration Act, 1860)

An ISO 9001 : 2015 Certified Organisation

6, Lyons Range 3rd Floor, Unit - 2, Kolkata - 700 001
Phone : +91-33-2210-7724 • Telefax : +91-33-4060-8353
E-mail : info@acaekolkata.org • Website : www.acaekolkata.org

GSTIN : 19AAATA7029F1ZV

2 pcs Pass Port Colour Photograph

APPLICATION FORM FOR MEMBERSHIP

To
The General Secretary,
Association of Corporate Advisers & Executives
6, Lyons Range, 3rd Floor, Unit - 2
Kolkata – 700 001

FOR OFFICE USE ONLY

Date of Receipt _____
Membership Approved on _____
Membership No. Allotted _____

Chairperson
Membership Development Sub-Committee ***General Secretary***

Dear Sir,

Please **ENROL** me/us as a **LIFE/GENERAL MEMBER** of the Association. I/We agree to abide by the Memorandum and Rules & Regulations of the Association.

1. Name in Full (IN BLOCK LETTERS) : _____
2. Father's Name : _____
3. Date of Birth : _____
4. Academic and/or Professional Qualifications : _____
5. Occupation : _____
6. Name of the Concern with which associated : _____
7. GSTIN : _____
8. Designation : _____
9. CA/CS/ICWAI Membership No. : _____
10. Blood Group : _____ (Self) _____ (Spouse)
11. Date of Marriage : _____ Name of Spouse _____
12. Office Address : _____
13. Resident Address : _____
14. Telephone (Nos.) : (Off.) : _____ (Resi.) : _____ Fax : _____
    Mobile : _____ E-mail : _____
15. Address where Circular etc. should be sent : ☐ Office ☐ Residence

I am/We are sending herewith Rs. _____ (Rupees _____)
by Cash/Cheque No. _____ Dated _____ Drawn on _____
towards ☐ Life Membership ☐ General Membership.

Place : _____
Date : _____

Signature of the Applicant

Proposed By : Name : _____
ACAE Membership No. : _____ Signature : _____

Seconded By : Name : _____
ACAE Membership No. : _____ Signature : _____

NOTES :
1. *Fee for Life Membership Rs. 11,800/- (for individuals only) (inclusive of GST)*
2. *Fee for General Membership :*
   a) *Annual Subscription Rs. 8850/- and Admission fees Rs. 8850/- (For Firm and Body Corporate) (inclusive of GST)*
   b) *Annual Subscription Rs. 1770/- and Admission fees Rs. 1770/- (for individual) (inclusive of GST)*
   c) *Annual Subscription will be half, if Membership Commences after 30th September of the year in which the membership is approved.*
3. *Cheques should be drawn in favour of* ***Association of Corporate Advisers & Executives****.*

Activities at a Glance ...

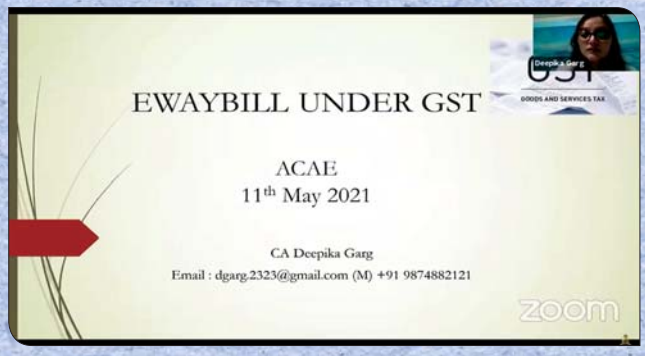
Sl.No.	Date	Topics & Speaker
1.0	**05.05.2021 (Virtual)**	**Virtual Group Discussion on Sections 148 and 263 of Income Tax Act, 1961.** Initiator : Adv Sumermal Surana, Kolkata. CA Vikash Kr Banka, Chairman – Group Discussions Sub-Committee.
2.0	**08.05.2021 (Virtual)**	**Joint programme with VIP Road Chartered Accountants' Association on Care is the answer to Covid.** Speakers : Dr. Rajesh Hembram (UK) and Dr. Rahul Sarkar (UK).
3.0	**12.05.2021 (Virtual)**	**Virtual Group Discussion on E-way Bill under GST.** Initiator : CA Deepika Garg, Kolkata. CA Vikash Kr Banka, Chairman – Group Discussions Sub-Committee.
4.0	**18.05.2021 to 08.06.2021 (Virtual)**	**Programme on Automate your Firm/Clients.** 18.05.2021 & 21.05.2021 – **MS-Excel From Advance to Expert.** Speaker : CA Risabh Pugalia. 01.06.2021 – **Secure your Office from Cyber Attacks.** Speaker : CA Sachin Dedhia. 04.06.2021 & 08.06.2021 – **Automate your Firm using G-Suite (Forms, Sheets, Docs).** Speaker : CA Kewal Kishan. CA Sanjib Sanghi, Chairman – Digital Transformation Sub-Committee.
5.0	**19.05.2021 (Virtual)**	**Virtual Panel Discussion on Cryptocurrency Sahi Hai?** Panelists : Mr. Nischal Shetty, Founder & CEO at Wazirx ; Mr. Prashant Surana, Co-Founder Snapper Future Tech ; Adv Ashim Sood, Counsel at Hon'ble Supreme Court in Circular on Ban on Cryptocurrencies; & CA R Lakshmi Rao, CEO at Catax. Blockchain Auditing Expert. CA Pushp Deep Rungta, Chairman – Nexgen Sub-Committee.
6.0	**20.05.2021 (Virtual)**	**Virtual Group Discussion on Implementation of TDS/TCS through Tally.** Initiator : CA Vivek Jain, Guwahati. CA Vikash Kr Banka, Chairman – Group Discussions Sub-Committee.
7.0	**22.05.2021 (Virtual)**	**VCM on Insolvency & Bankruptcy Code.** Speaker : Advocate Balbir Singh, Additional Solicitor General of India, Supreme Court. Topic – **Limitation Act and its impact on Insolvency Law.** Speaker : Advocate Sandeep Bajaj, Managing Partner, PSL Chambers, New Delhi. Topic : **PF Related Issues in CIRP and Liquidation & Steps for Selling Corporate Debtor as a Going Concern by Liquidator.** CA Jitendra Lohia, Chairman – Insolvency & Bankruptcy Code Sub-Committee.
8.0	**24.05.2021 (Virtual)**	**VCM on Forensic Accounting – Are we Ready?** Topic – **Forensic Insights in Investigation.** Speaker : CA Gagan Puri, Partner & Leader – Forensic Services, PWC India. Topic – **Interview Techniques & Writing effective Investigation Report.** Speaker : CA Durgesh Pandey, Partner, DMKS & Associates, Ahmedabad. CA Pramod Kr Mundra, Chairman – Accounts & Audit Sub-Committee.
9.0	**26.05.2021 (Virtual)**	**Virtual Group Discussion on Insolvency and Bankruptcy Code.** Topic : **Decoding the Hon'ble Supreme Court Judgment on Personal Guarantors.** Initiator : Adv & IP GP Madaan, New Delhi. CA Vikash Kr Banka, Chairman – Group Discussions Sub-Committee.
10.0	**27.05.2021 (Virtual)**	**VCM on Goods & Services Tax (GST).** Topic – **Finalisation and Audit of Accounts from GST perspective.** Speaker : CA Vikash Parakh, Kolkata. Topic – **3CD vs GST.** Speaker : CA Vikash Kr Banka, Kolkata. CA Shivani Shah, Chairman – GST/Indirect Tax Sub-Committee.
11.0	**29.05.2021 (Virtual)**	**VCM on Insolvency & Bankruptcy Code.** Topic – **Compliance by IPs under other laws while handling CIRP and Liquidation.** Speaker : CS Vinod Kothari, Kolkata. Topic – **Fast Tracking the Liquidation Closure and Dissolution of Corporate Debtor.** Speaker : CA Anil Goel, New Delhi. CA Jitendra Lohia, Chairman – Insolvency & Bankruptcy Code Sub-Committee.
12.0	**30.05.2021 (Virtual)**	**Virtual Group Discussion on Fighting Covid 19 – The Ayurveda Way.** Initiator : Vaidya Pooja Shah. CA Vikash Kr Banka, Chairman – Group Discussions Sub-Committee.

Sl.No.	Date	Topics & Speaker
13.0	**02.06.2021 (Virtual)**	**Virtual Group Discussion on Payroll Implementation in Tally with Special Emphasis on TDS through Payroll.** Initiator : CA Vivek Jain, Guwahati. CA Vikash Kr Banka, Chairman – Group Discussions Sub-Committee.
14.0	**04.06.2021 & 05.06.2021 (Virtual)**	**Accounts & Audit VCM.** Theme : **Hindsight to Insight to Foresight.** Day 1 – Topic : **Journey of the CA Profession.** Keynote Speaker : CA P R Ramesh, Former Chairman of Deloitte India. Topic : **Fraud Detection and Forensic Audit – Growing Relevance.** Speaker : CA Abhinav Rajvanshi, Jaipur. Topic : **Conducting Audit during Covid Times.** Speaker : CA Shriniwas Y Joshi, Central Council Member, ICAI. Parallel Session : Topic : **Outsourcing Opportunities for Chartered Accountants.** Speaker : CA Rajeev Agrawala, New Jersey, USA. Day 2 – Topic : **Empowering Small and Medium Practitioners.** Keynote Speaker : CA (Dr.) Debashish Mitra, Vice President, ICAI. Topic : **Internal Audit – Value Addition to Stakeholders.** Speaker : CA S Narayanaswamy, Group Head – Internal Audit, Indorama – Bangkok. Topic : **Using Software for Audit – Conduct & Management.** Speaker : CA Abdul Rafeq, Bengaluru. Parallel Session: Topic : **Accounting and Auditing issues in Real Estate Industry.** Speaker : CA Amit Gupta, Partner, S R Batliboi & Co LLP, Gurugram. CA Rishi Khator, Chairman – Accounts & Audit Conclave Sub-Committee.
15.0	**07.06.2021 to 23.06.2021 (Virtual)**	**Virtual Certificate Course on GST for Professionals/Corporates –** Everyday except Sundays starting on 7th June, 2021 to 23rd June, 2021. Total Course Duration : **30 Hours.** Course Structure : **GST Administration and Levy, Time of Supply and Invoicing, Classification of Goods and Services, Nature and Place of Supply, Exemption and RCM, Input Tax Credit, Registration and Job-Work, Valuation, Returns and Payments under GST, Refunds under GST, Assessment, Audit and Records, Demand and Recovery, Appeals and Revision, Offences and Penalties, Inspection, Search Sezure and Arrest & many more**. Speakers : CA Arun Kr Agarwal, Kolkata; CA Jayesh Gogri, Mumbai; CA Madhukar N Hiregange, Bengaluru; CA Jayesh Gupta, Bengaluru; Adv (CA) Jatin Harjai, Jaipur; Dr. Avinash Poddar, Gujarat; CA Vinamar Gupta, Amritsar; CA Shivani Shah, Kolkata; CA Tarun Kr Gupta, Kolkata; CA Hanish S, Bengaluru; CA Venugopal Gella, Bengaluru; CA A Jatin Christopher, Bengaluru; CA Abhay Desai, Vadodara; CA Aanchal Kapoor, Amritsar, CA Shubham Khaitan, Kolkata. CA Shivani Shah, Chairman – GST/Indirect Tax Sub-Committee.
16.0	**09.06.2021 (Virtual)**	**VCM on Companies Act, 2013.** Topic – **Compounding Offences under Companies Act, 2013 and Implications on Auditors on non-compliances of Companies Act, 2013 by Company.** Speaker : CS Manoj Banthia, Kolkata. Topic – **Recent Changes in Companies Act, 2013 and Returns to be filed by Companies post closure of Financial Year.** Speaker : CS Ravi Varma, New Delhi. CA Mohit Bhuteria, Chairman – Corporate Laws Sub-Committee.
17.0	**10.06.2021 (Virtual)**	**Lecture Meeting on Reopening of Assessment under Section 147 of the Income Tax Act, 1961 : Appellate and Writ Remedy.** Speaker : Advocate Naresh Jain, Mumbai. CA R R Modi, Chairman – Direct Tax Sub-Committee.

* * * * *

ACAE at a Glance ...

Virtual Group Discussion initiated by Adv Sumermal Surana on Section 148 and 263 of Income Tax Act held on 5th May 2021



Virtual Group Discussion initiated by CA Deepika Garg on E-way Bill under GST held on 12th May 2021

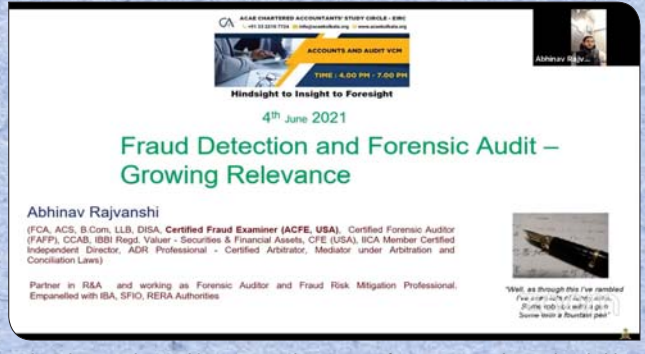
Virtual Panel Discussion by Mr. Nischal Shetty, Founder & CEO of Wazirx on Cryptocurrency Sahi Hai held on 19th May 2021

Virtual CPE Meeting by Adv Balbir Singh and Adv Sandeep Bajaj on Limitation Act & PF Issues in relation to Insolvency & Bankruptcy Code, 2016 held on 22nd May 2021

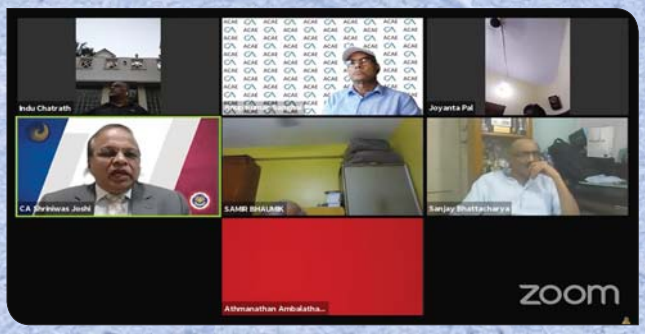
Virtual CPE Meeting by CA Vikash Parakh and CA Vikash Kr Banka on Audit of Accounts & 3CD from Goods & Service Tax perspective held on 27th May 2021

Virtual Group Discussion initiated by Vaidya Pooja Shah on Fighting Covid-19 - The Ayurveda Way held on 30th May 2021

Keynote Address by CA P R Ramesh, Former Chairman of Deloitte India on Day 1 of Accounts & Audit Conclave held on 4th June 2021

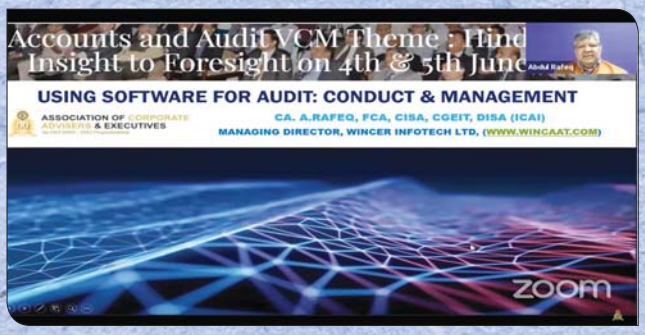


Technical Session by CA Abhinav Rajvanshi on Day 1 of Accounts & Audit Conclave held on 4th June 2021



Technical Session by CA Shriniwas Joshi on Day 1 of Accounts & Audit Conclave held on 4th June 2021

Keynote Address by CA (Dr.) Debashis Mitra, Vice President, ICAI on Day 2 of Accounts & Audit Conclave held on 5th June 2021



Technical Session by CA Abdul Rafeq on Day 2 of Accounts & Audit Conclave held on 5th June 2021

Technical Session by CA S Narayanaswamy on Day 2 of Accounts & Audit Conclave held on 5th June 2021

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2/7, Sarat Bose Road , "Vasundhara", Unit No. - 07, 2nd Floor, Kolkata - 700 020. Contact No.: 9836128000; +91-33-40016105. Email id: info@arsconsultants.net Web: www.arsconsultants.net		
Mumbai :	**New Delhi:**	**Bhubaneswar:**
6th level, HDIL Kaledonia-A,Sahar Road, Sambhaji Nagar, Andheri East, Mumbai, Maharashtra - 400 069, Phone: 022-46125600	A-36, First Floor, Rajouri Garden, New Delhi - 110 027 Ph: 011- 45565338, 45134430(8 Lines)	Block-B1, Flat No-202, Vaishno Monarch Apartment, Rasulgarh Ind. Estate, Bhubaneswar - 751 010. Ph:93385-03007/93385-03008

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E-Mail: nichetechpl@nichetechpl.com

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Website : www.acaekolkata.org