

Impact of GST on companies under Insolvency and Bankruptcy Code, 2016

Volume I

June 2020



Introduction

Government of India has announced several relief measures in light of the coronavirus pandemic, which has affected businesses and economies around the world. To bring relief to companies/LLPs, the default threshold limit for an entity under the Insolvency and Bankruptcy Code (IBC) has been revised to INR 1 crore from INR 1 lakh. According to IBC, if an entity defaults on the threshold amount and upon approval by the adjudicating authority National Company Law Tribunal (NCLT) on the basis of application filed by the aggrieved creditor, Corporate Insolvency Resolution Process (CIRP) gets triggered and powers of the board of directors stand suspended. Upon commencement of CIRP, management of affairs of such entity (corporate debtor) vests with an interim resolution professional (IRP) or resolution professional (RP). The IRP/RP endeavors to protect and preserve the value of the property of the corporate debtor (CD) and manages the operations of the CD as a going concern.

To overcome and streamline the compliances under goods and services tax (GST), the government has prescribed special procedures/rules under the Central Goods and Services Tax Act, 2017 (CGST Act) for the corporate debtors who are undergoing CIRP under the provisions of the IBC and the management of whose affairs is being undertaken by IRP/RP.

However, the new rules do not seem to have envisaged several eventualities. One such issue is the interplay between the IBC and GST laws.



About GST and IBC 2016

The IBC 2016 is a bankruptcy law that consolidates all framework related to insolvency and bankruptcy under one law. Previously, this was a long process, neither economically viable nor time bound. The IBC has provided a clear, coherent and speedy process for early identification of financial distress and resolution of entities.

The GST is an indirect tax levied on the supply of goods and services. This legislation has replaced many erstwhile indirect tax laws. It is a comprehensive, multi-stage, destination-based tax levied on every value addition. The GST legislation consists of various Acts mainly Integrated Goods and Services Tax (IGST) Act, 2017, Central Goods and Services Tax (CGST) Act, 2017 and State/Union Territory Goods and Services Tax (SGST/UTGST) Act, 2017 and respective rules, notification, circulars etc.

GST procedures for corporates under IBC

Under an IBC, an IRP/RP has the responsibility for managing affairs including statutory compliances of the corporate debtor (CD). This includes filing of returns and payment of tax dues. However, most CDs defaulted in filing of GST returns and/or payment of dues at the commencement of CIRP. This made it impossible for IRP/RP to file GST returns and discharge dues for the CIRP period. Based on some of the judicial pronouncements, the GST department directed acceptance of GST returns in hard copies from IRP/RP. However, there was no uniform approach and the IRP/RP struggled to comply with filing requirements of GST returns.

Considering the above challenge, the government has now notified special procedures ^[1] under GST related to new registration, filing of returns and payment of tax dues for the CIRP period. Later, the Central Board of Indirect Taxes and Customs (CBIC) also issued certain clarifications ^[2] where the board addressed various representations raised by trade and industry.

However, as per the recent amendment ^[3], the above special procedures are not applicable for those CDs, who have furnished the statement of outward supplies (i.e., GSTR-1) and consolidated return of inward and outward supplies (i.e. GSTR-3B) for all the tax periods prior to appointment of IRP/RP.



Need for separate GST registration

A registered person (referred to as erstwhile/existing registered person), who is CD under the provisions of IBC and presently undergoing CIRP, shall be liable to obtain new registration (referred to as new registered person) in each of the states/UTs where it was registered earlier, within 30 days of the appointment of IRP/RP and in case, where the IRP/RP was appointed prior to the issuance of this notification, then within 30 days of the issue of this notification ^[1].

Recently, CBIC has extended ^[3], the due date for obtaining new registration is **30 June 2020**.

The CBIC has further clarified that existing registration of an entity for which CIRP has been initiated should not be cancelled. If required, the proper officer (PO) may suspend the registration. However, where the registration of an entity undergoing CIRP has been cancelled already and the period of revocation of cancellation (i.e., 30 days from the date of service of cancellation order) has not yet lapsed, then such cancellation order needs to be revoked.



Filing of first GST return by the new registered person

The new registered person is liable to file the first return ^[4] from the date on which he becomes liable to obtain registration till the date the new registration has been granted.

Further, the CBIC has clarified that IRP/RP is under an obligation to comply with all the legal requirements for the period after the insolvency commencement date ^[5]. Accordingly, IRP is not liable to furnish GST returns of pre-CIRP period.



Relaxation measures amidst COVID-19

Initially, insolvency filings could be initiated against the company/LLP failing to make the payment above INR 1 lakh. However, in order to bring some relief to the company/LLP

amidst the coronavirus pandemic, the default threshold limit has been raised to INR 1 crore ^[6] to prevent triggering all insolvency filings.

Note: ^[1] Vide Notification No. 11/2020-Central Tax dated 21-03-2020

^[2] Vide Circular No. 134/04/2020-GST dated 23-03-2020

^[3] Vide Notification No. 39/2020-Central Tax dated 05-05-2020

^[4] Section 40 states that "Every registered person who has made outward supplies in the period between the date on which he became liable to registration till the date on which registration has been granted shall declare the same in the first return furnished by him after grant of registration"

^[5] Insolvency commencement date means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or Section 10, as the case may be of IBC, 2016

Eligibility of input tax credit under GST

The new registered person shall be eligible to avail the entire input tax credit (ITC) from the date of appointment of IRP/IP to the date of registration in its first return. The ITC will be available, if it bears the GST details of erstwhile registered person, subject to provisions of the ITC. However, the restrictions related to last date of availing ITC ^[6] and maximum ITC to be availed ^[7] has been lifted by the government. Accordingly, the new registered person can claim ITC in its first return despite the last date for availing ITC being lapsed and/or his supplier not furnishing his return of outward supplies.

The CBIC has further clarified that the above exception has been made only for the first returns filed under the relevant GST Legislation.



Illustration

XYZ Ltd. is registered under GST in Haryana and is undergoing the CIRP process. IRP was appointed on 1 April 2020. Company applied for new registration in Haryana and the same was duly granted on 20 April 2020. Company received supplies with invoices dated 2 February 2020 and 3 April 2020 carrying ITC under IGST amounting to INR 4.50 lakh and INR 9 lakh respectively bearing the erstwhile registration of entity. What would be the eligible ITC under both the erstwhile and new registration of XYZ Ltd., considering the recent amendments made under GST law?



Solution

The new registration was availed within the period prescribed in the notification. ^[3] Therefore, the IRP shall avail only the ITC accrued since the date of his appointment in the first return to be filed for the new registered person.

Accordingly, ITC of INR 9 lakh will be available to the new registered person in its first return. ITC of INR 4.50 lakh pertaining to the prior period may be eligible under the registration of erstwhile registered person; however, there are no specified procedures with respect to its availment, adjustment/utilisation.

Further, the registered buyers receiving supplies from the new registered person will be eligible to avail the ITC on invoices issued using the GST details of erstwhile registered person on or after the date of appointment of IRP/RP till the date the new registration is granted or 30 days from the date of this notification, whichever is earlier, subject to provisions of the ITC.

Note: ^[6] Section 16(4) states that the last date for taking the input tax credit in respect of any invoice or debit note pertaining to a financial year is the due date of furnishing of the return under Section 39 for the month of September following the end of financial year or furnishing of the relevant annual return, whichever is earlier.

^[7] Rule 36(4) aims to limit the availment of ITC by the recipient in respect of invoices/debit notes, details of which have not been uploaded by the supplier in its FORM GSTR-1 filed under Section 37(1) of the CGST Act, 2017

Balance in electronic cash ledger

Any amount deposited by IRP/RP in the electronic cash ledger of erstwhile registered person shall be eligible for refund. However, the refund shall be eligible, only if the amount has been deposited after the date of appointment of IRP/RP till the date the new registration is granted.



Illustration

Under the erstwhile registration, the IRP/RP has deposited an amount of INR 2 lakh under the IGST head of electronic cash ledger on 10 April 2020. What shall be the correct treatment considering the procedures recently notified by the government?



Solution

Any amount deposited in electronic cash ledger of erstwhile registered person from the date of appointment of IRP/RP to the date the new registration is granted shall be eligible for refund. Accordingly, an amount of INR 2 lakh deposited on 10 April 2020 will be eligible for refund in the erstwhile registration under 'refund from electronic cash ledger'.

The CBIC has further clarified that erstwhile registered person can file refund application under the head 'refund from electronic cash ledger', even though the relevant Form GSTR-3B/GSTR-1 is not filed for the said period.

Note: [8] The above amendment would be applicable only on the fresh applications filed w.e.f. 24-03-2020 not in the case applications pending as on notified date.

Challenges and our views

There were certain practical challenges faced by the CD/IRP/RP, due to lack of clarity/procedure given while aligning the IBC with the GST. Some of those are given below along with our views in line with the procedures introduced by Ministry of Finance for ensuring GST compliances of CDs undergoing CIRP.



Challenge 1

How to proceed for filing of GST returns and payment of dues for CIRP period where GST returns and dues related to pre-CIRP period are not discharged?



Our view

In order to discharge GST dues and filing of returns pertaining to CIRP period, the government has prescribed special procedures, where the CDs have been directed to obtain new registration compulsorily. However, where all the GST returns pertaining to pre-CIRP period are duly filed by the CDs undergoing CIRP, there is no requirement to obtain new registration.

Further, for unpaid GST dues pertaining to pre-CIRP period, the CBIC has clarified that tax authorities may consider those dues as operational debt and file the claim before the National Company Law Tribunal (NCLT) in accordance with the provisions of the IBC.



Challenge 2

Are new and separate GST registration required in the following cases:

- Where there are multiple registrations in a single state/UT
- Where there is 'no place of business' ^[9] in a particular state/UT
- Where there is a place of business in a state/UT, but the valid documents (such as lease deed, ownership proof, etc.) required for registration are not available on record in order to submit an application for fresh registration.



Our view

- In case there are multiple erstwhile registrations in a particular state/UT irrespective of business verticals, the procedures don't specify any relaxation. In the absence of any clarification in this regard, it appears that the IRP has to take new registration for every erstwhile registration. However, where there are no set of asset/operation, requirement of new registration becomes a challenge/unviable.
- Where there is no place of business ^[9] in respect of an existing registration in a particular state/UT and the same cannot be cancelled due to restrictions imposed under the new procedures, there is no clarity from CBIC for what would be mentioned as place of business while submitting the application for fresh registration.
- In case the valid documents required as a proof of place of business for submitting fresh application are not available on record, there is no clarification from the CBIC for how we will be able to get the GST registration.

Note: ^[9] Section 2(85) of CGST Act defines place of business to include the following-

- a place from where the business is ordinarily carried on, and includes a warehouse, a godown or any other place where a taxable person stores his goods, provides or receives goods and/or services
- a place where a taxable person maintains his books of account or
- a place where a taxable person is engaged in business through an agent



Challenge 3

In case, if the CIRP does not materialise and the CD goes into liquidation proceedings under the IBC, will the new registration under special procedure continue or erstwhile registration be used during liquidation?



Our view

The notification here provides special procedures for only those CDs that are undergoing CIRP and not for those who are already under the liquidation proceedings. So, irrespective of whether CIRP materialises or fails, the notification is silent with respect to continuation of new registration or revival of erstwhile registration.



Challenge 4

Can the balance available in electronic credit ledger of erstwhile registered person be utilised for payment of GST liability arising during CIRP period?



Our view

While clause 4 of the notification allows the IRP/RP to take the ITC of GST paid on supplies received during CIRP period, it does not mention about the procedure for transitioning the ITC already available in the electronic credit ledger of erstwhile registration to new registration. In this scenario, the government needs to clarify on utilisation or transfer of ITC.



Challenge 5

Will suppliers be able to file their GST returns mentioning erstwhile GST registration number of CD's that are cancelled or invalid?



Our view

In case where CD's GST registration number is cancelled/invalid, supplier is unable to declare the tax invoice in its periodical return as B2B supply because GST portal throws an error while submitting the said return. Thus, the government needs to clarify if such transactions can be declared as B2C supplies by suppliers in their GST returns.

The government has addressed certain complexities and challenges faced in the subject matter. However, it is quite evident that there are various inevitable gaps in the procedures prescribed under notification and circular, which need to be addressed keeping in mind the intent and objectives of the IBC, 2016.

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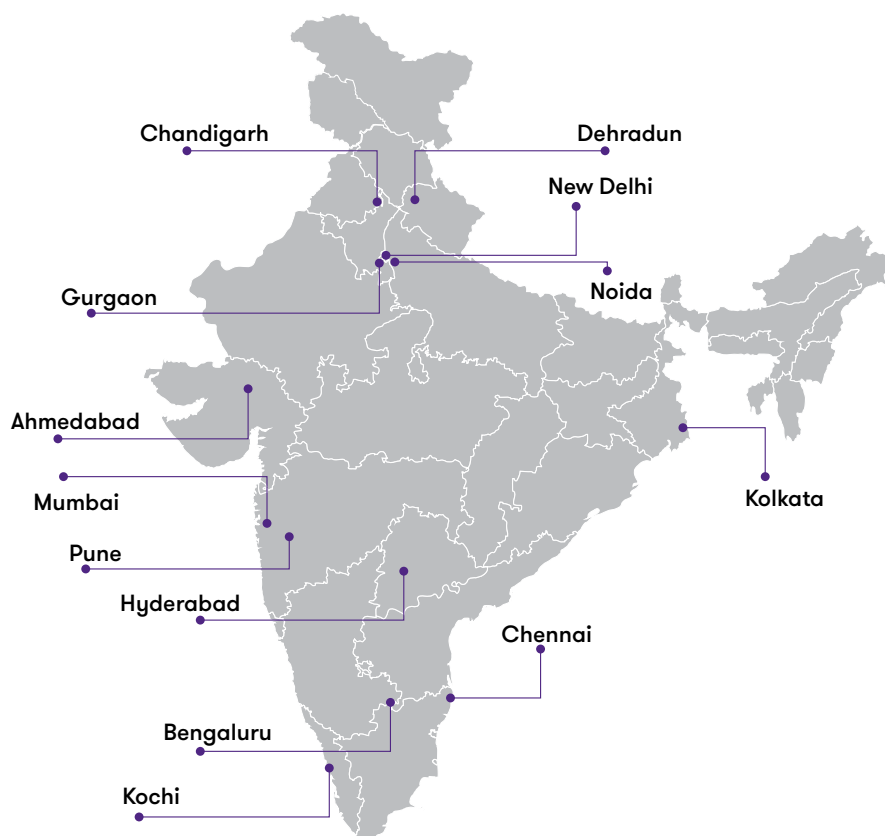
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