

INSOLVENCY AND
BANKRUPTCY CODE
CA. Pravin Navandar, CA. Viral Doshi

In the matter of:

Ms. PoojaBahry –, liquidator , M/s. Shree Ram Lime Products Pvt. Ltd. OC Gee Ispat Pvt. Ltd. CD.

Pronounced by Hon'ble NCLT, New Delhi bench

Ratio Decided: Whether Capital Gain shall be taken into consideration as the liquidation cost ?

Liquidator, prayed for directions in respect of steps to be taken after liquidation. The secured creditors have relinquished their charge over the mortgaged properties. Liquidator proposed to proceed with the distribution. The Liquidator faced with a question that whether Capital Gain Tax attracted on sale of such secured assets be included in the Liquidation Cost, if so then she would first have to make provision for the capital gains and deduct the amount before proceeding further. The I.T. dept. claimed that the capital gain has to be deposited first as per provisions of Section 178 of the Income Tax Act, 1961.

The NCLT denied the arguments presented by the Department and opined that the distribution of the assets should be made as per the provisions of u/s, 53(1)(e). The dues of Government, Income tax would qualify for being an operational debt.

Assets liquidated are those released by secured creditors under the code where he is to effect the sale through SARFAESI Act provisions and appropriate the entire amount towards its dues, without any liability to first pay the capital gain. It is only upon residual liquidity that the distribution of assets has to be made according to the operational creditors – (tax authorities herein) in terms of the provisions of the code. If the capital gain is first to be provided for and then be included as liquidation cost, it would create an anomalous situation in the secured creditor getting a lesser remittance than what could have realised had they not realised the security into the common corpus. It is for this purpose that the provisions of section 178 of the code have been amended giving priority to the waterfall mechanism over government dues.

Hence tax liability arising out of the sale shall be distributed in accordance with the provisions of Section 53 of the Code and applicability of Section 178 or 194IA of the IT Act will not have an overriding effect on the waterfall mechanism provided u/s. 53 of the code and that capital gain shall not be taken into consideration as the liquidation cost.

Recent Notifications regarding the Insolvency and Bankruptcy Code, 2016:

- 1) IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019
<https://ibbi.gov.in/uploads/legalframework/2019-11-22-171205-h10bx-8573c02ee31bba941201afff84b95ae4.pdf>
- 2) IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019
<https://ibbi.gov.in/uploads/legalframework/2019-11-22-172331-pdm3h-40c64dd41380b7d710b874a8d1152fe6.pdf>
- 3) The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019
<https://ibbi.gov.in/uploads/legalframework/8e0ab9331455200b402d91257113805c.pdf>
- 4) The Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019
<https://ibbi.gov.in/uploads/legalframework/17662452f16d75fe4c221f39e303033f.pdf>
- 5) The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019.

For more details on updates, visit www.wirc-icai.org