



WEBINAR ON

INTERFACE OF DIFFERENT LAWS WITH IBC, 2016 AND CHALLENGES IN IMPLEMENTATION OF RESOLUTION PLAN



INTERFACE OF DIFFERENT LAWS WITH IBC, 2016

Overriding Clauses

The Section 238 of IBC gives it an overriding effect over other laws. Section 245-255 of the IBC deal with Amendments to various other statutes to facilitate the afore-stated overriding effect.

IBC AND SARFAESI:

It is a legal framework enacted by the Indian government to tackle non-performing assets (NPAs) and facilitate asset reconstruction. The act empowers banks and financial institutions to take action against defaulting borrowers and recover their dues. Under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act'), banks and other financial institutions, in the capacity of secured creditors are allowed to auction residential or commercial properties of borrowers to recover loans, without approaching the courts. However, after the introduction of IBC, the secured creditor's interest in some sense has been compromised. Under the IBC, once a CIRP is initiated, the Moratorium is applicable to ***“any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)”***. Therefore, financial institution or ARC seeking to enforce its security under SARFAESI has to be wary of any impeding proceedings under IBC.

INTERFACE OF DIFFERENT LAWS WITH IBC, 2016

IBC AND TAXING STATUTES:

Most of the taxing statutes provide for attachment of property as a mode of recovery, which may turn the revenue department in a 'secured creditor' in some sense. However, under IBC, the government dues are lower in hierarchy in the waterfall mechanism. An anomalous situation may arise where an attachment order for recovery of dues under a taxing statute is made prior to initiation of liquidation under IBC. In such a scenario, will the property subject to attachment form part of liquidation estate or not? This question came up for consideration in ***Leo Edibles & Fats Ltd. vs. The tax Recovery Officer, Income Tax Department, Hyderabad, Andhra Pradesh High Court***. The court observed that an attachment itself creates no interest in a property and the tax department does not enjoy the status of a "secured creditor", who can avail provisions of Section 52 of IBC. ***Pr. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd. (SLP(C) No. 6483 of 2018)***, the Hon'ble Supreme Court while dealing with the interplay between Income Tax Act, 1961 and the Code held that the incorporation of Section 238 in the Code makes it obvious that the Code will override anything inconsistent contained in any other enactment.

INTERFACE OF DIFFERENT LAWS WITH IBC, 2016

IBC AND ARBITRATION ACT

Section 9 Proceedings: Application by an Operational Creditor

IBC is not a recovery mechanism. Therefore, if there is a “pre-existing dispute” in relation to an “operational debt”, an application to initiate CIRP is not admitted. A “dispute” as defined under Section 5(6) of the IBC, includes an “arbitration proceeding”. An application filed by an operational creditor under section 9 of the IBC during the pendency of arbitration proceedings with respect to that operational debt, will be rejected. The Hon’ble Apex Court has also held in ***K Kishan vs. Vijay Nirman Company Pvt Ltd.*** that a challenge to an arbitration award under Section 34 of the Arbitration & Conciliation Act, 1996, amounts to existence of dispute under IBC. Therefore, CIRP cannot be initiated even after conclusion of arbitration proceedings with respect to the operational debt, unless the challenge to the award has been concluded or the time period for filing such a challenge is over and the award has become final.

However, due to the overriding effect of the IBC, an arbitration clause by itself will not automatically oust the jurisdiction of the NCLT under the IBC, if other conditions for admission of application are fulfilled.

WHAT IS RESOLUTION PLAN?

- 01 Once a Corporate Debtor goes into Corporate Insolvency resolution Process. Then the IRP or the RP as per the timelines publishes FORM-G under Regulation 36A of Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) Regulation, 2016
- 02 Any person or entity who is interested in the revival of the Corporate Debtor and takeover the business of the Corporate Debtor may submit the expression of interest as per Form-G and once their name is mentioned in the final list of prospective Resolution Applicant, then they may submit the Resolution plan within the specified timelines along with the EMD and other requirement laid down by the CoC.
- 03 The Plan submitted by the Prospective Resolution Applicant is placed before the CoC for its consideration and after detailed negotiations and modification, the CoC approves the same with a majority voting of 66 % in accordance with Section 30 (4) of Insolvency and bankruptcy Code, 2016 read with Regulation 39 of Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) Regulation,
- 04 The Hon'ble NCLT upon receiving the application filed by the IRP or RP under Section 31 of Insolvency and bankruptcy Code, 2016 may approve or reject the Resolution Plan for the Corporate Debtor .



RESOLUTION PLAN [SECTION 5 (26)]

Means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.

Explanation.- For removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger.

RESOLUTION APPLICANT [SECTION 5 (25)]

Means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25 2[or pursuant to section 54K, as the case may be.



REGULATION 37 OF THE CIRP REGULATIONS

Regulation 37 of the CIRP Regulations provides that a Resolution Plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following: -

- (a) transfer of all or part of the assets of the corporate debtor to one or more persons;
- (b) sale of all or part of the assets whether subject to any security interest or not;(ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;
- (c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons(ca)cancellation or delisting of any shares of the corporate debtor, if applicable
- (d) satisfaction or modification of any security interest



PROVISION REGARDING IMPLEMENTATION OF RESOLUTION PLAN

Sec 30: Mandatory contents of resolution plan.

Sec 30(2)(d): RP to confirm that resolution plan provide for implementation and supervision of the resolution plan.

Explanation. For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013(18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.] Inserted w.e.f. 06/06/2018

Sec. 31(1): Approval of resolution plan.

Proviso to Sec 31(1):

[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation] Inserted w.e.f.

06/06/2018



PROVISION REGARDING IMPLEMENTATION OF RESOLUTION PLAN IN CODE



**Regulation 38 -
Mandatory contents
of the resolution plan
(CIRP Regulations)**



**Regulation. 38(2): A
resolution plan shall
provide:**
the term of the plan
and its
implementation
schedule; the
management and
control of the
business of the
corporate debtor
during its term; and
adequate means for
supervising its
implementation.



**Regulation 38(3) A
resolution plan shall
demonstrate that it
has provisions for its
effective
implementation.**



**Regulation 39(9) A
creditor, who is
aggrieved by non-
implementation of a
resolution plan
approved under sub-
section (1) of section
31, may apply to the
Adjudicating
Authority for
directions (inserted
w.e.f. 24/01/2019)**





EFFECT OF APPROVAL OF RESOLUTION PLAN BY ADJUDICATING AUTHORITY

- However, Section 31 of the Code provides as follows:
- Section 31 Approval of Resolution Plan
- *(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which 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.*

EFFECT OF RESOLUTION PLAN BY ADJUDICATING AUTHORITY



Hon'ble Supreme Court In the case of Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and Ors. reported in MANU/SC/0273/2021 in the following words: "Para-86.

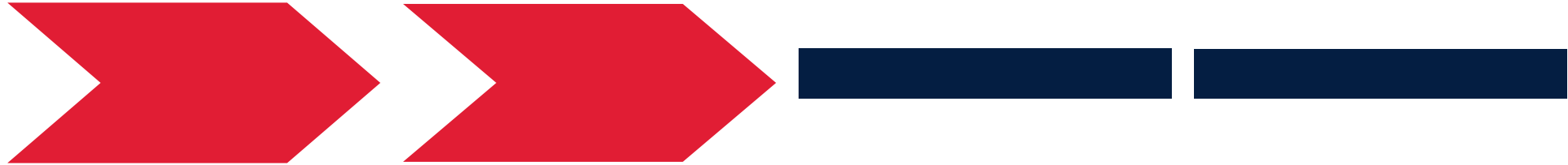


The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.



The word "other stakeholders would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said





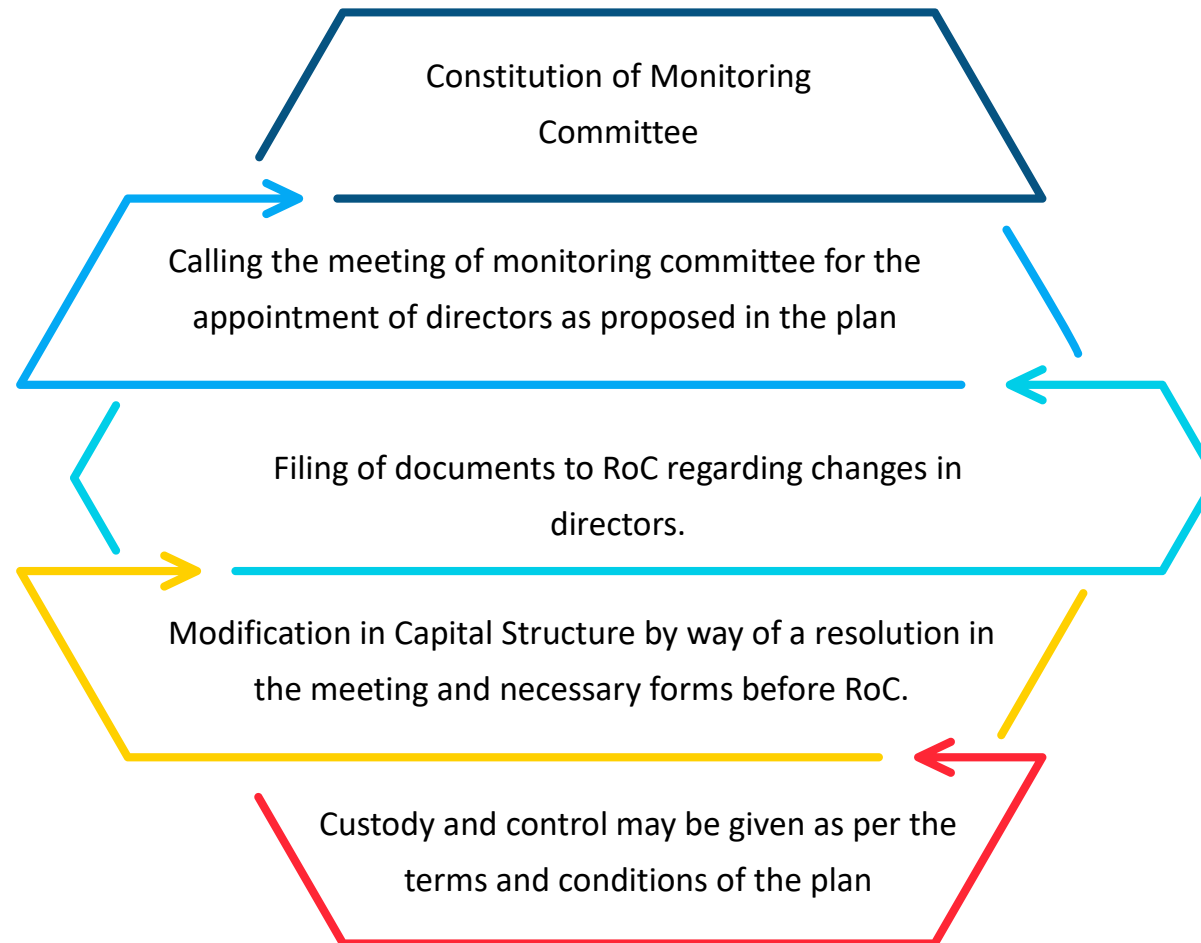
RECENT DEVELOPMENT WITH RESPECT TO MODIFICATION OF RESOLUTION PLAN

- Recently, in the case of Deccan, the issue before the Hon'ble Supreme Court was whether the Adjudicating Authority's approval for the grant of ownership rights over the trademarks "**Deccan Chronicle**" and "**Andhra Bhoomi**" following the CoC's approval of the Resolution Plan wherein ownership rights were not a part of the Resolution Plan submitted amounted to a modification or alteration of the approved Resolution Plan. The Hon'ble Supreme Court held that the CoC only approved exclusive use over the trademarks and not their ownership and, therefore, any right or ownership claimed over the trademarks post approval by the CoC stands extinguished. The Court held that the order passed by the NCLT granting ownership rights over the trademarks would amount to modification of the Resolution Plan, thereby rendering it impermissible.

Further, in the case of ***M.K Rajagopalan*** ,the Hon'ble Supreme Court dealt with the issue of submission of revised plan by the RP to the Adjudicating Authority without getting it approved by the CoC. The Court held that any revision is subject to final approval of CoC and the RP cannot submit a revised plan to the Adjudicating Authority without first getting it approved by the CoC. Even post-facto approval by CoC of such changes to the Resolution Plan will not make the same valid. This case serves as a very important precedent as it clearly establishes that under any circumstance the Resolution Plan must get approved by the CoC at its final stage before it is sent to the Adjudication Authority for approval. The Court opined that there is no concept present in the IBC, permitting, any post facto approval of a Resolution Plan by the CoC which has not been placed before the Adjudicating Authority. The Court further stressed upon the fact that even certain aspects of the Resolution Plan, which may seem procedural or technical in nature, cannot be overlooked. Each aspect of the Resolution Plan must be approved by the CoC and no modification can be made by the Adjudicating Authority once such plan is approved by the CoC.



STEPS PURSUANT TO APPROVAL OF RESOLUTION PLAN



CHALLENGES FACED WHILE IMPLEMENTATION OF RESOLUTION PLAN

- ***PAST LIABILITIES ARE INVALID AFTER APPROVAL OF RESOLUTION APPLICANT***

- The approved resolution plan is binding on all parties including the Government. Section 31(1) of the Code prescribes the same. All the past liabilities of the Corporate debtor are discharged after the approval of the plan. The pre-CIRP liabilities i.e., the liabilities of the debtor before verification of claims of the creditors and which state unclaimed under the process are released from the clutches of the Corporate debtor as well as the approved resolution applicant. In the case of the Committee of Creditors of Essar Steel India Limited vs Satish Kumar Gupta, it was held that undecided claims after approval of the resolution plan cannot be entertained.

- ***PENDING LITIGATION DELAYS THE IMPLEMENTATION.***

- The NCLT takes time for the approval of the plan approved by the CoC. After the approval of COC, NCLT receives many intervening applications from third parties. The amount of time taken for the application for approval of the resolution plan to be approved by the Adjudicating Authority. There have been times when this takes over 12-15 months. This delay is due to multiple reasons, including multiple applications filed by various parties to try and delay the hearing of the application, and the constant to and fro of such applications from the NCLT to NCLAT, and in some cases, even upto the Hon'ble Supreme Court.

• ***IMPOSSIBILITY TO PERFORM THE DUTIES MENTIONED IN THE PLAN.***

- The Resolution applicants propose plans to acquire the debt-ridden Corporate debtor company. To do the same, a time period of 30-90 days is given by the NCLT. Sometimes, after the approval of the plan by CoC as well as the NCLT, it becomes impossible for the Resolution applicant to complete the agreed upon integration activities. The impossibility can be because of various reasons for e.g., due to natural calamity, unforeseen circumstances in the business of the successful resolution applicant, pandemic, lockdown, change in government regulations etc. One such example is the COVID-19 pandemic which showed an adverse effect on the implementation of the approved plans.

• ***OTS by the Corporate Debtor***

- Section 10 of IBC allows the Corporate debtor to file an application for initiation of the corporate insolvency resolution process by itself or through the Corporate applicant. The application can be withdrawn by the Corporate debtor by offering a one-time settlement to the creditors. On one occasion, the Corporate debtor came up with a one-time settlement when the resolution plan was pending approval before NCLT. Appu Hotels Judgment is an exception case where OTS was approved despite approval of Resolution Plan.

• ***DELAY TACTICS BY THE PROMOTOR .***

- Often, it is the erstwhile promoters of the corporate debtor who are responsible for the delay. The pretexts include challenging the constitution of the CoC, offering OTS at the last minute just before the approval, and questioning the constitution of the resolution applicant under Section 29A of IBC.

• ***OTHER RELEVANT FACTORS***

- There have been instances where even operational creditors hold up the approval of the resolution plan by filing multiple applications, which they then insist be taken up before the hearing of the application for approval of the resolution plan. Invocation of the writ jurisdiction of Hon'ble High Courts has also been resorted to by unsuccessful resolution applicants, after approval of the resolution plan by the Adjudicating Authority, in an attempt to scuttle the implementation of the resolution plan.

▪ ***OTHER ISSUES***

- ***Issues pertaining to the required compliances under the Companies Act, 2013***
- ***Issues pertaining to Tax Liabilities under the Income Tax Act, 1961***
- ***Issues regarding Sectoral Regulators- SEBI and CCI***

ISSUES PERTAINING TO THE REQUIRED COMPLIANCES UNDER THE COMPANIES ACT, 2013

- That post approval of Resolution Plan by the Adjudicating Authority, there are various compliances that are to be carried out by the Resolution Applicant under the Companies Act, 2013.
- That in terms of Section 31 (4) of the Code, the Resolution Applicant shall pursuant to the approval of the Resolution Plan by the Adjudicating Authority, obtain the necessary approval quired under any law for the time being in force within a period of one year from the date of approval of the Resolution Plan by the Adjudicating Authority or within such period as provided for in such law, whichever is later:
- That it is pertinent to note that in terms of Explanation provided under Section 30, if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.
- However, the no such deemed approval in respect of approval of ROC and filings.

APPROVAL AND COMPLIANCES

- Change the status of the company from CIRP to Active with the ROC.
- Reconstitution of the Board of Directors of the Corporate Debtor by appointment of new Board of Directors, as nominated by the resolution applicant and removal of all the previous Board of Directors of the company.
- Restructure of capital base of the Corporate Debtor by extinguishment of erstwhile paid- up share capital from existing Shareholders and to update with the new paid-up share capital as per the approved resolution plan to the new shareholders as inducted by the Resolution applicant.
- Filing of pending Annual Returns (Form MGT-7) and Balance sheets (Form AOC-4) of the company if any.
- That the said compliances usually take time and subsequently the same results in further delaying the implementation of the Resolution Plan.
- N
- Change of status of the company from Corporate Insolvency resolution Process to Active. INC-28 along with MGT-7 & AOC-4 will be filed as attachment to Form GNL-2
- Filing of INC-28 within 30 days of the order of approval of Resolution plan.

ISSUES IN RECONSTITUTION OF THE BOARD OF DIRECTORS OF THE CORPORATE DEBTOR BY APPOINTMENT OF NEW BOARD OF DIRECTORS, AS NOMINATED BY THE RESOLUTION APPLICANT AND REMOVAL OF ALL THE PREVIOUS BOARD OF DIRECTORS OF THE COMPANY

- When a company Appoints or removes a Director, DIR-12 (Directors Appointment or Resignation) form is filed on the MCA portal along with the fees and the process is carried online. After approval of Resolution Plan
- That after the approval of Resolution Plan, the Monitoring Agency holds a meeting to appoint Directors of the Company and remove the old Directors.
- That the RP then writes a letter to the ROC intimating the ROC of the approval of resolution Plan by the AA, and subsequent appointment of the new Directors as recommended by the RA. The following Documents are required to be attached :-
 - DIR-12 Form.
 - DIR-2 (Consent by the Director)
 - Certified copy of Resolution Plan approval Order.
 - Resolution Plan.
 - Copy of INC-28 Form.
 - Eligibility Affidavit by New Director signifying that the Directors are not disqualified from being appointed under Section 164 (2) of the Companies Act.

ISSUE WITH REGARD TO RESTRUCTURE OF CAPITAL BASE OF THE CORPORATE DEBTOR BY EXTINGUISHMENT OF ERSTWHILE PAID-UP SHARE CAPITAL FROM EXISTING SHAREHOLDERS AND TO UPDATE WITH THE NEW PAID UP SHARE CAPITAL AS PER THE APPROVED RESOLUTION PLAN TO THE NEW SHAREHOLDERS AS INDUCTED BY THE RESOLUTION APPLICANT

- **.INCREASE IN AUTHORIZED SHARE CAPITAL:**

- Procedure under Companies Act, 2013 to increase Authorised Share Capital of the Company.
- During the general course of events, Form SH-7 is filed by the Company before the MCA electronically for increasing the Authorized Share Capital.
- The process may or may not require payment of additional fees depending on the Shares to be acquired.
- However, the process is quite simplified and only requires filing of form appointed under Section 164 (2) of the Companies Act.

➤ ***ISSUES PERTAINING TO TAX LIABILITIES UNDER THE INCOME TAX ACT, 1961***

- **PROFITS CHARGEABLE TO TAX-REMISSION OR CESSATION OF LIABILITY**

- Sec 41(1) of Income-tax Act

Where an allowance or deduction has been made in the assessment for any year

- In respect of loss, expenditure or trading liability incurred by the assessee
- And subsequently during any previous year,-

- The first-mentioned person or the successor in business has obtained,

- Whether in cash or
- In any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof,
- The amount obtained by such person or
- The value of benefit accruing to him

- Shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or

- **Section 170A of the Act was inserted vide Finance Act, 2022** in order to make provisions for giving effect to the order of business reorganization issued by tribunal or court or an Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016.
- The section provides that in case of business reorganization, where a return of income has been filed by the successor under section 139 of the Act, such successor shall furnish a modified return within six months from the end of the month in which such order of business reorganization was issued, in accordance with and limited to the said order. Consequently, Rule 12AD has been notified prescribing the form and manner of furnishing such modified return by companies by the Board vide Notification No. 110/2022 dated 19.09.2022.
- **Finance Bill, 2023: Substitution of new section for section 170A:** Clause 77. For section 170A of the Income-tax Act, the following section shall be substituted, namely:-Effect of order of tribunal or court in respect of business reorganisation.'170A. (1) Notwithstanding anything to the contrary contained in section 139, in a case of business reorganisation, where prior to the date of order of a High Court or tribunal or an Adjudicating Authority as defined in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as order in respect of business reorganisation), as the case may be, any return of income has been furnished by an entity to which such order applies under the provisions of section 139 for any assessment year relevant to the previous year to which such order applies, the successor shall furnish, within a period of six months from the end of the month in which the order was issued, a modified return in such form and manner, as may be prescribed, in accordance with and limited to the said order

- (2) Where the assessment or reassessment proceedings for an assessment year relevant to a previous year to which the order in respect of the business reorganisation applies,-(a) have been completed on the date of furnishing of the modified return in accordance with the provisions of sub-section (1), the Assessing Officer shall pass an order modifying the total income of the relevant assessment year determined in such assessment or reassessment, in accordance with such order and taking into account the modified return so furnished;(b) are pending on the date of furnishing of the modified return in accordance with the provisions of sub- section (1), the Assessing Officer shall pass an order assessing or reassessing the total income of the relevant assessment year in accordance with the order of the business reorganisation and taking into account the modified return so furnished.
- **79 Carry forward and set off of losses in case of certain companies.** - (1) Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place during the previous year in the case of a company, not being a company in which the public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, unless on the last day of the previous year, the shares of the company carrying not less than fifty-one per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred:(2) Nothing contained in sub-section (1) shall apply, -(c) to a company where a change in the shareholding takes place in a previous year pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 (31 of 2016), after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner;

- Explanation. For the purposes of this section, -(1) a company shall be a subsidiary of another company, if such other company holds more than half in nominal value of the equity share capital of the company;(ii) "Tribunal" shall have the meaning assigned to it in clause (90) of section 2 of the Companies Act, 2013 (18 of 2013).)Section 79 of Act provides that carry forward and set off of losses in a closely held company shall be allowed only if there is a continuity in the beneficial owner of the shares carrying not less than 51 percent. of the voting power, on the last day of the year or years in which the loss was incurredA proviso to sec. 79 inserted by the Finance Act, 2018 to allow carry forward and set off of losses even if there is change in voting power or shareholding due to pursuant to a Resolution Plan approved by NCLT.
- **Section 115JB-**
- Section 115JB of the Act, provides for levy of a minimum alternate tax (MAT) on the "book profits" of a company. In computing the book profit, it provides, inter alia, for a deduction in respect of the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account. Consequently, where the loss brought forward or unabsorbed depreciation is Nil, no deduction is allowed.
- Clause (iih) to explanation 1 in section 115JB inserted by Finance Act, 2018 to provide that the aggregate amount of unabsorbed depreciation and loss brought forward (excluding unabsorbed depreciation) shall be allowed to be reduced from the book profit, if a company's application for corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 has been admitted by the Adjudicating Authority (w.e.f. 01.04.2018). Clause (iih) & (iii) reproduced here:"[iih) the aggregate amount of unabsorbed depreciation and loss brought forward in case of a company against whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under section 7 or section 9 or section 10 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016)