

FIDC

Finance Industry Development Council

(A body incorporated as a Self Regulatory Organisation for Registered NBFCs – AFCs)
101/103, Sunflower, 1st Floor, Rajawadi Road No.2, Ghatkopar (East), Mumbai – 400 077 (India)
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18th May, 2017

To,
Sh. Amardeep Singh Bhatia
Joint Secretary
Ministry of Corporate Affairs,
Room No. 505, A Wing, 5th Floor,
Shastri Bhavan,
Dr. Rajendra Prasad Road,
New Delhi – 110001

Reference:

- (a) G.S.R. 1119(E) dated 7 December 2016 issued by the Ministry of Corporate Affairs, Government of India
- (b) S.O. 3676(E) dated 7 December 2016 issued by the Ministry of Corporate Affairs, Government of India

SUB: Clarification sought in relation to the Companies (Transfer of Pending Proceedings) Rules, 2016 notified vide G.S.R. 1119(E) dated 7 December 2016 issued by the Ministry of Corporate Affairs, Government of India.

Dear Sir,

Introduction

Finance Industry Development Council (FIDC) is a Self-Regulatory Organization (SRO) cum Representative Body of the NBFCs, registered with the Reserve Bank of India and engaged in Asset Financing. FIDC was formed 12 years ago, at the behest of the then RBI Governor and is the recognized face of NBFCs, specially, those engaged in asset financing. We have been engaged in regular interactions both with Reserve Bank of India and Ministry of Finance, which include pre-budget meetings with the Honourable Finance Minister and also important policy related meetings with the Governor and Deputy Governor of RBI. Almost all the leading NBFCs and a large number of small and medium sized NBFCs are our members.

1. We write to your esteemed self in relation to the Companies (Transfer of Pending Proceedings) Rules, 2016 notified vide G.S.R. 1119(E) dated 7 December 2016 issued by the Ministry of Corporate Affairs, Government of India whereby the rules regarding transfer of pending winding up petitions under the erstwhile Companies Act, 1956 from the Hon'ble High Courts to National Company Law Tribunals consequent to the coming into effect of the Insolvency and Bankruptcy Code, 2016 have been brought into effect. These rules have been issued pursuant to the amended Section 434 of the Companies Act, 2013.

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2. Section 434 of the Companies Act, 2013 has been amended vide the Insolvency and Bankruptcy Code, 2016 to *inter alia* read as follows,

434. Transfer of certain pending proceedings - (1) On such date as may be notified by the Central Government in this behalf,—

...

“(c) all proceedings under the Companies Act, 1956 (1 of 1956), including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer.

Provided that only those proceedings in relation to winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government.”

3. Prior to the amendment, all proceedings under the Companies Act, 1956 were to be transferred to the National Company Law Tribunal upon initiation / coming into effect of the relevant sections. However, the said proviso has been specifically added with an intent to allow the Central Government to specify the stage of such transfer.
4. Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 (*issued under the proviso to Section 434(c) of the Companies Act, 2013*) lays down the process and procedure for the transfer of the pending proceedings of winding up on the ground of inability to pay debts (*Section 433(e) of the erstwhile Companies Act, 1956*). The said rule is being reproduced herein for the ease of reference,

“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.— (1) All petitions relating to winding up under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under Rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of Section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under Sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate.

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(2) All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.”

5. Based on a perusal of the above, only those winding up petitions (*filed on the ground of inability to pay debts*) where notice / copy of the petition has not been served upon the respondent shall be transferred to the NCLT and whereas the winding up petitions (*filed on the ground of inability to pay debts*) where the notice / copy of the petition has been served upon the respondents shall continue to be dealt with by the relevant High Court under the provisions of the Companies Act, 1956. Further, the intent of the legislature can be deciphered from a conjoint reading of the amended Section 434 of the Companies Act, 2013 along with the Companies (Transfer of Pending Proceedings) Rules, 2016 (*issued thereunder*) to show that the intent of the legislature is to provide for a procedural amendment with respect to the “pending” proceedings. The provisions of the statute or the rules at no instance prescribe the status / procedure for new petitions which are to be filed under the newly enacted Insolvency and Bankruptcy Code, 2016.

6. In this context, attention is drawn towards the order of the Hon’ble National Company Law Tribunal, New Delhi (Principal Bench) dated 23 January 2017 (as amended on 2 March 2017) in the case of *Nikhil Mehta & Sons (HUF) & Ors. v. M/s. AMR Infrastructures Limited*, CP No. (ISB)-03(PB)/2017 wherein the application of the applicant under the Insolvency and Bankruptcy Code was rejected *inter alia* on the ground of pendency of winding up petitions (*although no liquidator was appointed in the same*). The relevant portion of the order is being reproduced herein for ready reference,

“14. Even otherwise the present petition would not be maintainable as many winding up petitions have been filed before Hon’ble Delhi High Court being Company Petition No.477 of 2014, Company Petition Nos. 689, 691, 692, 693, 694, 695, 700xx and 722 of 2015 along with CP No. 238 and 244 of 2016.”

7. Similarly, the Hon’ble Tribunal in the case of *M/s. Nowfloats Technologies Private Limited v. M/s. Getit Infoservices Private Limited*, CP No. (I.B.) 45(PB)/2017 *inter alia* observed that,

“8. Viewed from another angle also, assuming that this Tribunal proceeds further as canvassed by the petitioner in admitting the petition de-hors of the winding up proceedings, on such admission this Tribunal is enjoined to appoint an Interim Resolution Professional who is required to perform under the

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provisions of IBC including duties enjoined under Section 18 of IBC, more particularly so of sub section (e) of Section 18 of that of taking control and custody of any asset which the corporate debtor has ownership rights as well as those envisaged under Section 17 of IBC of taking control of the management of affairs of corporate debtor. Obviously the above actions of the Interim Resolution Professional will result in a collusive course of action with that of the functioning of the provisional liquidator as directed by the Hon'ble High Court of Delhi. It is to be borne in mind that both winding up proceedings under the erstwhile Companies Act of 1956 as well as the Insolvency Resolution Process is initiated for the benefit of the general body of creditors and is a representative action and not for the recovery of money of the individual creditor for which necessarily claims are required to be submitted to the Official Liquidator or the Interim Resolution Professional as the case may be. In the instant case in view of the matter pending before the Hon'ble High Court of Delhi which has also thought it fit to appoint the Official Liquidator as the Provisional Liquidator of the respondent company, the Interim Resolution Professional, if appointed will again be put on a collusive course with the Official Liquidator even in accepting the claims as may be filed as envisaged under Section 21 of IBC."

8. The above observations of the Hon'ble National Company Law Tribunal, New Delhi (Principal Bench) interpreting the effect of the Section 434 of the Companies Act, 2013 along with the Companies (Transfer of Pending Proceedings) Rules, 2016, have most respectfully fallen short of addressing the scheme and intent of the Insolvency and Bankruptcy Code, 2016 for the following reasons:
 - 8.1. Subsequent to the repeal of the Companies Act, 1956, there is no ground available for winding up of a company on account of 'inability to pay debts'. The only equivalent under the law is that under the provisions of the Insolvency and Bankruptcy Code, 2016.
 - 8.2. A financial creditor's right under the provisions of the Insolvency and Bankruptcy Code, 2016, is not for recovery of monies or liquidation in the alternative, instead, a financial creditor by moving an application under the provisions of the Insolvency and Bankruptcy Code seeks the resolution of the affairs of the debtor company in a time bound manner as prescribed under the Insolvency and Bankruptcy Code, 2016, failing which the company may be taken into liquidation.
 - 8.3. A winding up proceeding is not equivalent to an insolvency resolution process under the provisions of The Insolvency and Bankruptcy Code, 2016. The insolvency resolution prescribed under The Insolvency and Bankruptcy Code, 2016 provides for the establishment of a committee of the financial creditors of the debtor company (*including unsecured creditors*) which committee has the right to accept or reject a resolution plan for revival of the company. No such

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right / obligation is provided under the Companies Act, 1956 as a remedy in favour of the creditors.

- 8.4. Only if a resolution plan has failed to receive the appropriate approval (*as prescribed under the Insolvency and Bankruptcy Code, 2016*) or the resolution plan has failed, the company enters into liquidation and the secured creditors are given an option to remain outside the liquidation in terms of Section 52 of the Insolvency and Bankruptcy Code, 2016. Only those unsecured creditors or those of the secured creditors who choose to relinquish their security and participate in the winding up get the benefit of the estate of the debtor company.
- 8.5. Further, the waterfall prescribed under the Insolvency and Bankruptcy Code, 2016 is significantly different from the waterfall prescribed under Companies Act, 1956 whereby in a significant move the government has taken an intentional policy decision to allow priority of all financial claims (*both secured and unsecured*) above its own dues which in furtherance of the intent of the Insolvency and Bankruptcy Code, 2016.
9. The mere fact that a notice was issued and served upon the respondent is no ground to deny another creditor of the debtor company the benefits of the new procedure; the priority in payments; benefits of the moratorium or calm period for resolution and the direct involvement in deciding a resolution plan (*prescribed under the Insolvency and Bankruptcy Code, 2016*), as no such right or remedy was available under the erstwhile Companies Act, 1956.
10. The above interpretation of the procedural amendment by way of Section 434 of the Companies Act, 2013 along with the Companies (Transfer of Pending Proceedings) Rules, 2016 by the Hon'ble National Company Law Tribunal also results in taking away the substantive rights of the creditors to initiate resolution proceedings under the Insolvency and Bankruptcy Code, 2016 merely because of the pendency of other winding up proceedings. In fact, the above interpretation has resulted in destruction of the efficacious remedy provided under the Insolvency and Bankruptcy Code, 2016. Section 434 of the Companies Act, 2013 read along with the Companies (Transfer of Proceedings) Rules, 2016 aimed at defining procedure with respect to pending petitions. However, the above interpretation has resulted in substantive rights of the creditors being abrogated.
11. In fact a different view has been taken by the Hon'ble National Company Law Tribunal, Chennai in the case of *M/s. Alcon Laboratories (India) Private Limited v. M/s. Vasan Health Care Private Limited*, C.A./1/(IB)/2017 wherein while allowing an application under Section 9 of the Insolvency and Bankruptcy Code, 2016, the Hon'ble Bench has observed that:

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“The last objection has been raised by the counsel for corporate debtor is that winding up petition is sub judice before the Hon’ble High Court of Madras, where the Court permitted Andhra Bank to appoint suitable person to conduct forensic audit of the corporate debtor. The pendency of the winding up petition cannot be a bar under the Code for initiating the corporate insolvency resolution process, because the Hon’ble High Court has not passed any order for winding up of the corporate debtor and no Official Liquidator has been appointed. Therefore, this objection is also rejected.”

The above observation of the National Company Law Tribunal, Chennai is in furtherance of the object and purpose of the Insolvency and Bankruptcy Code, 2016. The Companies (Transfer of Pending Proceedings) Rules, 2016 have been brought into effect for the transition to the time bound resolution process under the Insolvency and Bankruptcy Code, 2016 and not to take away substantive rights of creditors or to render the provisions of the Insolvency and Bankruptcy Code, 2016 otiose. In fact, in furtherance of the said object, the Insolvency and Bankruptcy Code, 2016 also defines a definitive time period of two (2) years for culmination of liquidation proceedings in the event the resolution plan is not passed / fails. The said step is clearly to overcome the hardships the creditors have faced over the years under the laborious and elongated winding up proceedings under the erstwhile Companies Act, 1956.

12. Further, the effect of Section 434 of the Companies Act, 2013 along with the Companies (Transfer of Pending Proceedings) Rules, 2016 has been so interpreted so as to create an anomaly to the extent that a company against whom a winding up proceeding (*filed on the ground of inability to pay debts*) wherein the notice / copy of the petition has been served upon the respondents (*although there being no certainty of a winding up order being passed in relation to the said company*) on one hand shall not be transferred to the National Company Law Tribunal while on the other hand basis the observations of the National Company Law Tribunal, New Delhi (Principal Bench), no application under the Insolvency and Bankruptcy Code, 2016 would be maintainable against such companies. Therefore, creditors of a company against whom winding up proceedings are pending would not be able to take recourse to the process under the Insolvency and Bankruptcy Code, 2016 and on account of the same a significant number of companies shall fall outside the regime prescribed under the Insolvency and Bankruptcy Code, 2016 and would result in the denial of significant substantive statutory rights and benefits which the Insolvency and Bankruptcy Code, 2016 aims to bestow for the benefit of the creditors and the debtor companies.
13. In this respect, it is relevant to highlight the purpose and intent of the enactment of the Insolvency and Bankruptcy Code as reflected in its preamble:

“An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all

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the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.”

14. Further, the report of the Bankruptcy Law Reforms Committee stated the intent and rationale behind the enactment of the new law to *inter alia* include **(a)** a time-bound process to better preserve economic value; **(b)** respecting the rights of all creditors equally and impartially; **(c)** facilitating the assessment of viability of the enterprise; and **(d)** binding outcome of bankruptcy for companies which are not viable.
15. It is respectfully stated, that the above intent and purpose would be defeated if the present interpretation / practice of disallowing petitions under the Insolvency and Bankruptcy Code, 2016 is continued on account of pendency of winding up proceedings under the erstwhile Companies Act, 1956 where only a mere notice has been issued upon the respondents.
16. Respectfully, all the aforesaid anomalies and difficulties could have been avoided if the “stage of transfer” prescribed under the Companies (Transfer of Pending Proceedings) Rules, 2016 was in consonance with the mandate of Section 11 of the Insolvency and Bankruptcy Code, 2016. Your kind attention at this juncture is drawn towards Section 11 of the Insolvency and Bankruptcy Code, 2016 which elaborates on the circumstances in which an application under the Insolvency and Bankruptcy Code, 2016 cannot be pursued.

*“11. The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:—
(a) a corporate debtor undergoing a corporate insolvency resolution process; or
(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
(d) a corporate debtor in respect of whom a liquidation order has been made.*

Explanation.—For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

A perusal of the Section 11 of the Insolvency and Bankruptcy clarifies that the intent of the Insolvency and Bankruptcy Code, 2016 was that companies where a “winding up order” has been passed would not be eligible to apply for the initiation of the corporate insolvency resolution process. The intent is that the companies which have already been ordered to be wound up cannot be given a fresh start / lease of life by accessing the resolution process envisaged under the Insolvency and Bankruptcy Code, 2016. However, there is no bar on initiation of corporate insolvency resolution process on all other instances where although winding up proceedings may have been filed but no winding up order has been made.

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17. Therefore, it is respectfully stated that the Companies (Transfer of Pending Proceedings) Rules, 2016 needs to be amended to specify that all winding up proceedings pending before the High Courts shall be transferred to the National Company Law Tribunal except those where an order of liquidation has been passed, so as to avoid the mischief and the anomalies caused due to the present stage of “service on the respondents” prescribed under the Companies (Transfer of Pending Proceedings) Rules, 2016.
18. Further, to ensure a level playing field to all the creditors and stakeholders of the companies where winding up order has already been made, it would also be necessary to stipulate a time period for completion of the liquidation proceedings pending before the High Courts under the provisions of the Companies Act, 1956 in terms of the period of two years prescribed under the provisions of the regulations issued under the Insolvency and Bankruptcy Code.
19. Keeping the above intent of the Insolvency and Bankruptcy Code, 2016 in mind (*basis a reading of Section 11*) we most humbly request you to clarify that instead of the transfer of only those winding up petitions where a copy of the petition / notice has not been served, the said notification dated 7 December 2016 should be amended to clarify that ‘all pending proceedings of winding up on the ground of inability to pay debts filed under Section 433 (e) of erstwhile Companies Act, 1956 where a liquidation order has not been passed by the Hon’ble High Court shall be transferred to the newly established National Company Law Tribunal and would be treated as applications under Sections 7, 8 or 9 the Insolvency and Bankruptcy Code, 2016, as the case may be, and the winding up petitions which are being retained by the Hon’ble High Court on account of liquidation order having passed shall be endeavored to be disposed of within a period of two (2) years from the date of this notification’.
20. We therefore request your kind indulgence and most humbly request that the above request may be given your kind and immediate attention. If your esteemed self-pleases, we would be most willing for a personal meeting to explain the above scenario / anomaly and assist your esteemed self.

Best regards,

Thanking you,

Yours faithfully,

For **FINANCE INDUSTRY DEVELOPMENT COUNCIL**

MAHESH THAKKAR
DIRECTOR GENERAL

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