

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/110/2022

5th July 2022

ORDER

In the matter of Mr. Avishek Gupta, Insolvency Professional (IP) under Section 220 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 and Regulation 13 of the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/R(INSP)/2020/13/3548 dated 17th May, 2022, issued to Mr. Avishek Gupta who is a Professional Member of the Insolvency Professional Agency of Institute of Cost Accountants of India and an Insolvency Professional registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No IBBI/IPA-003/IP-N00135/2017-2018/11499.

1. Background

- 1.1 Mr. Avishek Gupta, IP was appointed as Liquidator for the Liquidation process in the matter of M/s Global Coke Limited, Corporate Debtor (CD-I) vide Order of the Hon'ble National Company Law Tribunal, bench at Kolkata (AA) dated 19.02.2019. Also Mr. Avishek Gupta was appointed as Interim Resolution Professional (IRP) / Resolution Professional (RP) in the corporate insolvency resolution process (CIRP) in the matter of Sri Ganesh Sponge Iron Private Limited (CD-II) by AA vide its orders dated 18.02.2019 and 04.06.2019 respectively.
- 1.2 The IBBI, in exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Avishek Gupta. IA submitted the Inspection Report to IBBI on 19.08.2021.
- 1.3 The IBBI on 17th May 2022 had issued the SCN to Mr. Avishek Gupta, based on findings in the inspection report in respect of his role as Liquidator in the process of CD-I and IRP/RP in the process of CD-II. Mr. Avishek Gupta replied to the SCN vide email dated 22.06.2022.
- 1.4 The IBBI referred the SCN, response of Mr. Avishek Gupta to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Avishek Gupta availed an opportunity of personal hearing before the DC on 29th June, 2022 wherein he was represented by Mr. Ashish Makhija, Advocate and he reiterated the submissions made in his written reply.
- 1.5 The DC has considered the SCN, the reply to SCN, oral and written submissions of Mr. Avishek Gupta, other material available on record and proceeds to dispose of the SCN

2. Show Cause Notice, Submissions and Findings

The contraventions alleged in the SCN and Submissions by Mr. Avishek Gupta are summarized as follows:

In the matter of Global Coke Limited, Corporate Debtor (CD-I)

3. Contravention- I:

3.1 It has been observed that Mr. Gupta realised an amount of Rs. 61.10 crore from the sale of assets of CD-I. Out of 61.10 crore, Rs. 56.51 has been realized in the first six month and Rs. 4.59 crore in the next six months. It has further been observed that Mr. Gupta calculated his remuneration for realizing an amount of Rs.4.59 crore under the category of "next six months" by applying 3.75% on Rs. 1.00 crore and @ 2.80 % on remaining 3.59 crore. Similarly for distribution, Mr. Gupta applied @ 1.88% for Rs.1.00 crore and 1.40% for the remaining amount under the category of "next six months".

3.2 In this connection, regulation 4 of the Liquidation Regulations provides that:

“(2) The liquidator shall be entitled to such fee and in such manner as has been decided by the committee of creditors before a liquidation order is passed under sections 33(1)(a) or 33(2).

(3) In all cases other than those covered under sub-regulation (2), the liquidator shall be entitled to a fee as a percentage of the amount realized net of other liquidation costs, and of the amount distributed, as under:

<i>Amount of Realisation / Distribution (In rupees)</i>	<i>Percentage of fee on the amount realised / distributed</i>			
	<i>In the first six months</i>	<i>In the next six months</i>	<i>In the next one year</i>	<i>Thereafter</i>
<i>Amount of Realisation (exclusive of liquidation costs)</i>				
<i>On the first 1 crore</i>	<i>5.00</i>	<i>3.75</i>	<i>2.50</i>	<i>1.88</i>
<i>On the next 9 crore</i>	<i>3.75</i>	<i>2.80</i>	<i>1.88</i>	<i>1.41</i>
<i>On the next 40 crore</i>	<i>2.50</i>	<i>1.88</i>	<i>1.25</i>	<i>0.94</i>
<i>On the next 50 crore</i>	<i>1.25</i>	<i>0.94</i>	<i>0.68</i>	<i>0.51</i>
<i>On further sums realized</i>	<i>0.25</i>	<i>0.19</i>	<i>0.13</i>	<i>0.10</i>
<i>Amount Distributed to Stakeholders</i>				
<i>On the first 1 crore</i>	<i>2.50</i>	<i>1.88</i>	<i>1.25</i>	<i>0.94</i>
<i>On the next 9 crore</i>	<i>1.88</i>	<i>1.40</i>	<i>0.94</i>	<i>0.71</i>
<i>On the next 40 crore</i>	<i>1.25</i>	<i>0.94</i>	<i>0.63</i>	<i>0.47</i>
<i>On the next 50 crore</i>	<i>0.63</i>	<i>0.48</i>	<i>0.34</i>	<i>0.25</i>
<i>On further sums distributed</i>	<i>0.13</i>	<i>0.10</i>	<i>0.06</i>	<i>0.05</i>

3.3 As the realization amount of Rs. 4.59 crore falls under the category of next fifty crore and in the next six months category, the rate applicable on realization as per above mentioned table shall be 0.94%. Correspondingly, rate applicable on distribution shall be @0.48%. By wrong application of the rate, Mr. Gupta has drawn excess remuneration of Rs. 13,68,522. Mr. Gupta has refunded the excess amount vide cheque bearing number 072953 dated 26.04.2021 in CD-I's account after the receipt of draft inspection report.

3.4 In view of the above, the Board is of the prima facie view that Mr. Gupta inter alia has violated section 208(2)(a), 208(2)(e) of Code read with regulation 4 of the Liquidation

Regulations as well as Clause 14 and 25 of Code of Conduct of IP Regulations.

Submission

- 3.5 Mr. Gupta has submitted that the interpretation by the liquidator seems to be valid and consistent with the table as per regulation 4 of Liquidation Regulations. It is nowhere mentioned that the Liquidator is required to move down the column on every realization /distribution as per waterfall mechanism under section 53 of the Code. It is reiterated that the Respondent has paid the Income Tax (@30% of income thereon) and fee of IBBI (@0.25% of receipts) upon the fee charged by him as a Liquidator.
- 3.6 He also submits that the matter relating to the liquidator fee and its computation methodology was discussed before Stakeholders Consultation Committee (SCC) in the meeting held on 31.07.2019 wherein he informed the stakeholders that he has already shared a computation sheet in excel format containing the details relating to the liquidation expenses, CIRP cost, liquidator's fees on realization and disbursement and respective share of the banks for remittance. Thereafter, the SCC members never raised any objection over the remuneration proposed in the meeting. Also the matter being the first assignment as Liquidator, Mr. Gupta had also sought for a legal opinion dated 20.04.2021, for the purpose of correct understanding of regulation 4 of Liquidation Regulations from an eminent law firm practicing in the space of Insolvency and Bankruptcy which validated the computation methodology adopted by Mr. Gupta.
- 3.7 Mr. Gupta also mentions that based upon the directions of the IBBI, issued vide Draft Inspection Report dated 09.04.2021, he has already transferred the excess amount of Rs. 13,68,522/- to the account of Global Coke Ltd (in Liquidation) which was credited on 28.04.2021 to meet the ends of justice.

Findings

- 3.8 The DC notes the submission of Mr. Gupta that excess remuneration was calculated due to wrong interpretation of table provided in the regulation 4 of Liquidation Regulations and there was no *mala fide* intent to draw such excess remuneration. Mr. Gupta has also submitted that he had also shared the computation sheet with details of liquidator's expenses and liquidator's fees on realization and disbursement and respective share of the banks for remittance with the SCC members. Since, Mr. Gupta has already remitted the excess amount of Rs. 13,68,522/- to the account of CD-I, the DC accepts the submission of Mr. Gupta and advised him to be more careful in future in such cases.

4. Contravention-II

- 4.1 Regulation 35(2) of the Liquidation Regulations provides that where the liquidator is of the opinion that fresh valuation is required under the circumstances, he shall within seven days of the liquidation commencement date, appoint two registered valuers to determine the realisable value of the assets or businesses of the CD-I under clauses (a) to (f) of regulation 32. In the said matter, liquidation commencement date was 19.02.2019 and therefore the registered valuers should have been appointed by Mr. Gupta on or before 26.02.2019. However, it has been noted that there has been delay in appointments of valuers and that the delay is in the range of 45-66 days. The table below states the date of appointment of valuers and the delay.

Sl. No.	Name of the Registered valuer	Date of appointment	Delay in appointment of registered valuers
1.	Mr. Dharampal Bhatia	12.04.2019	45 days beyond due date
2.	Sandeep Kumar Agarwal	15.04.2019	48 days beyond due date
3.	Seth Tarik Anowa	14.04.2019	47 days beyond due date
4.	Rajesh Gupta	11.04.2019	44 days beyond due date
5.	Gunjan Agarwal	03.05.2019	66 days beyond due date
6.	Puneet Tyagi	12.04.2019	45 days beyond due date

4.2 In view of the above, the Board is of the prima facie view that you inter alia violated section 208(2)(a), 208(2)(e) of Code read with regulation 35 of the Liquidation Regulations as well clause 14 of Code of Conduct of IP Regulations.

Submission

4.3 Mr. Avishek Gupta submitted that even after the initial handover provided by the erstwhile RP, some annexures of the valuation reports submitted during the CIRP were provided to the Liquidator on 09.03.2019. Therefore, in any case, it was not possible for Mr. Gupta to appoint the registered valuers within 7 days from the date of liquidation commencement date. The valuation report prepared during CIRP period did not address the valuation of the coking coal stock properly and had significant difference in liquidation values of asset of CD-I of around 43%.

4.4 Mr. Gupta also submits that as per the unamended regulation 35 of the Liquidation Regulations prior to 25.07.2019, he was not empowered to conduct the revaluation of the CD-I in liquidation when the valuation was already conducted during the CIRP. Therefore, it was not possible to conduct the revaluation of the assets of the CD-I and to appoint the registered valuers. However, the said matter was also discussed in the first stakeholder / monitoring committee meeting held on 25.03.2019 and stakeholders of the CD-I decided to conduct the revaluation of the assets of the CD-I and suggested Mr. Gupta to take action with this respect.

Findings

4.5 The regulation 35 of the Liquidation Regulations (unamended as prior to 25.07.2019) as applicable on the date of appointment of valuers is provided as follows,

“35. Valuation of assets intended to be sold.

(1) Where the valuation has been conducted under regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or regulation 34 of the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017, as the case may be, the liquidator shall consider the average of the estimates of the values arrived under those provisions for the purposes of valuations under these regulations.

(2) In cases not covered under sub-regulation (1), the liquidator shall within seven days of the liquidation commencement date, appoint two registered valuers to determine the realisable value of the assets or businesses under clauses (a) to (f) of regulation 32 of the corporate debtor”

4.6 In the present case it is observed that there has been delay of 44-66 days from the liquidation

commencement date in appointments of valuers. While considering the submission of Mr. Gupta that there was delay in supply of the valuation report during the initial handover from RP and the same was received on 09.03.2019, it is noted that there is still a delay of 34-56 days. Moreover, under the unamended Liquidation regulation it was not required to conduct valuation during liquidation if it was conducted during CIRP. Hence the DC accepts submission of Mr. Gupta.

In the matter of Sri Ganesh Sponge Iron Private Limited (CD-II)

5. Contravention- III

5.1 As per regulation 36(2) of the CIRP Regulations, the details about the assets and liabilities with such description, as are generally necessary for ascertaining their values as well, details about the list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted etc are to be included in the Information Memorandum (IM). It has been observed that Mr. Gupta has not mentioned the details such as amount of claims submitted, voting share and details of security interest, if any, with respect to the financial creditors in the IM. Further, the description such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details related to assets, as on the insolvency commencement date was also missing from the IM. The IM is a crucial document which contains all information required for formulating of a resolution plan. These missing details are strategic for any resolution applicant.

5.2 In view of the above, the Board is of the *prima facie* view that you inter alia violated section 208(2)(a), 208(2)(e) of Code read with regulation 36 of the CIRP Regulations as well as clause 14 of Code of Conduct of IP Regulations.

Submission

5.3 Mr. Gupta has submitted that he has faced severe challenges while preparing IM. It is reiterated that the erstwhile management of the CD-II never extended their cooperation towards the CIRP and even after various follow ups, the erstwhile management of the CD-II did not provide the requisite information/ documents/ details with respect to the CD-II based on which an IM could be prepared. The latest audited balance sheet of the CD-II available with Mr. Gupta was as on 31.03.2011. He had filed an application for non-cooperation against the erstwhile management of the CD-II on 30.05.2019 seeking all the requisite information/ details with respect to the CD-II. Even then cooperation of the suspended directors of the CD-II was not received. Mr. Gupta has submitted that due to his sincere efforts, the CD-II was revived as one of the Resolution Plans was approved by the members of the CoC. The value of final Resolution Plan after negotiations was Rs 30.6 crore which is 2.15 times more than the average liquidation value i.e., Rs.14.2 crore, of the assets of the CD-II. He also pointed out that no objection was ever raised by any of the potential resolution applicants regarding the content of the IM issued to them. Also, that after collecting some documents relating to the CD-II, Mr. Gupta reissued the revised IM on 26.07.2021 containing some additional details such as amount claimed/ admitted, CoC percentage and security interest etc. as available at that point of time.

Findings

5.4 It is observed that in accordance with the regulation 36 of the CIRP Regulations, Mr. Gupta

has not mentioned the amount of claims, voting share, details of security interest, date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details related to assets, as on the insolvency commencement date in the IM. Mr. Gupta has replied to the allegations stating that the CD-II was not in operation for about 7 years prior to commencement of CIRP and several key documents such as the Fixed Asset Register (FAR) along with List of Creditors and securities offered as well as other documents/ records were not available at the office of CD-II nor the was the same provided by the ex-Directors of the CD-II despite several requests. That inspite of filing of application of non-cooperation against the ex-Directors before the AA no information was forthcoming.

5.5 It is also submitted by Mr. Gupta that he had made efforts to provide as much details and information available with him and as requested by the eligible Resolution Applicants regarding details on assets, financial and operational creditors and their claim and charge over email/ online data room and during discussions and he was even successful in obtaining nine Expression of Interest and four Resolution Plans during the CIRP. Since, the CIRP has been successfully completed in CD-II and the resolution plan was approved by the AA, Cuttack Bench on 01-11-2021, it cannot be said that inadequacy of information in IM had deterred the resolution applicants or hurt the prospects of the CD-II. Further, due to non-cooperation of ex-Directors, Mr. Gupta could not have provided the details in IM. Hence, the DC accepts the submission of Mr. Gupta.

6. ORDER

6.1 In view of the above, the DC, in exercise of the powers conferred under Section 220 (2) of the Code read with Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 and Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 disposes of the SCN with a warning to Mr. Avishek Gupta to be careful and ensure full compliance with the provisions of the Code and Regulations made thereunder in future assignments.

6.2 This Order shall come into force with immediate effect, in view of para 6.1 of the order.

6.3 A copy of this order shall be forwarded to the Insolvency Professional Agency of Institute of Cost Accountants of India where Mr. Avishek Gupta is enrolled as a member for their further necessary action.

6.4 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.

6.5 Accordingly, the show cause notice is disposed of.

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(Ravi Mital)
Chairperson, IBBI

Dated: 5th July 2022
Place: New Delhi