

INSOLVENCY & BANKRUPTCY

Impact of Provident Fund Dues on Approval of Resolution Plans under the Insolvency and Bankruptcy Code, 2016

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Employee Provident Fund ***("EPF")*** dues pertain to contributions that are to be made by the employer on behalf of the employee as a part of the employee welfare scheme mandated by the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (**"*EPF Act*"**).

Accordingly, the Insolvency and Bankruptcy Code, 2016 ***("Code")*** under the Explanation to Section 18, which deals with duties of the RP which includes taking control and custody of any asset over which the Corporate Debtor has ownership rights, makes it clear that the assets that are owned by a third party, but in possession of the Corporate Debtor held under a trust will not be included among the assets of the Corporate Debtor. Section 36(4)(a)(iii) of the Code also provides that all sums due to any workmen or employee from the provident fund are assets owned by a third party which are in possession of the Corporate Debtor held in trust, and will therefore not form part of the liquidation estate of the Corporate Debtor. The intent of the legislature can be further ascertained by referring to para 5.5.5 of the Bankruptcy Law Reforms Committee (BLRC) Report, wherein the Committee observed that assets held in trust such as pension funds will not include assets of the Corporate Debtor and could therefore note be used to realize the dues of the creditors. Therefore, it is clear from the scheme of the Code that EPF dues fall under the category of assets that are not included in the assets of the Corporate Debtor.

Payment of EPF dues is a statutory liability that needs to be undertaken by the management of the establishment. Since the management of the Corporate Debtor passes over from the Suspended Directors to the RP upon commencement of the Corporate Insolvency Resolution Process ***("CIRP")***, the Resolution Professional ***("RP")*** is tasked with making payment of EPF dues during the tenor of the CIRP. Once a Resolution Plan has been received, the Resolution Applicant must provide for payments to the outstanding EPF dues under the Resolution Plan. This transfer of liability of making contributions to the EPF from management to management is encapsulated under Section 17B of the EPF Act, which stipulates that both the employer and the person to whom the establishment is so transferred shall jointly and severally by liable to pay the contribution due.

The National Company Law Appellate Tribunal ***("NCLAT")*** had the occasion to deliberate in detail on the question of law pertaining to payment of EPF dues in cases where Resolution Plans have already been approved by the National Company Law Tribunal ***("NCLT")***.

In *Tourism Finance Corporation of India Pvt. Ltd. v. Rainbow Papers Ltd & Ors1,* the 3-judge Principal Bench of the NCLAT allowed an appeal filed by the RPF Commissioner for non-payment of entire EPF dues along with interest calculated as per the provisions of the EPF Act, by concluding that there was no inconsistency between the EPF Act and the Code since EPF dues have been categorically treated as assets not forming part of the liquidation estate under Section 36(4)(a)(iii) of the Code. The NCLAT partially modified the approved Resolution Plan by while making the following observation:

"*45. Therefore, we direct the 'Successful Resolution Applicant'- 2nd Respondent ('Kushal Limited') to release full provident fund and interest thereof in terms of the provisions of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' immediately, as it does not include as an asset of the 'Corporate Debtor'. The impugned order dated 27th February, 2019 approving the 'Resolution Plan' stands modified to the extent above."*

The judgment of the NCLAT was challenged before the Supreme Court, but the appeal was dismissed vide order dated 22.05.2022 citing lack of merit.2

More recently in *Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd. & Ors3*, a 2-judge Principal Bench of the NCLAT examined the issue of EPF dues in greater detail. Herein the workmen, employees, and the RPF Commissioner had filed separate appeals for non-payment of the entire EPF dues under a Resolution Plan already approved by the NCLT. The NCLAT cited and differentiated all its prior judgments on EPF dues and finally followed the line of reasoning adopted in *Toursim Finance (supra)* in partly allowing the said appeals, and went one step further by clarifying the following:

. EPF dues have to be paid in full calculated till the Insolvency Commencement Date ***("ICD")***, along with any damages and interest as levied as per the provisions of the EPF Act, since they do not form part of the assets of the Corporate Debtor by virtue of Section 18 and Section 36 of the Code.

. EPF dues have to paid irrespective of whether or not the Corporate Debtor has maintained a separate fund for provident fund contributions.

. The Resolution Applicant must provide for payment of EPF dues in full under the Resolution Plan to ensure that the Resolution Plan is complaint with Section 30(2)(e) of the Code.

. EPF dues calculated for the period post the ICD will be paid under CIRP costs under the Resolution Plan only to the workmen and employees who have been retained in employment during the CIRP.

In light of the above judicial pronouncements, it is now made clear that a Resolution Plan will have to provide for payment of the outstanding EPF dues calculated as on ICD. Such provisioning under the Resolution Plan is essential to make it compliant with Section 30(2)(e) of the Code which stipulates that the Resolution Plan must not contravene any of the provisions of the law for the time being in force. For the period from ICD till approval of Resolution Plan by the NCLT, the EPF dues will be paid as CIRP costs under the Resolution Plan as per Section 30(2)(a) of the Code.

In both the cases discussed, the workmen and the Employee Provident Fund Organization ***("EPFO")*** had filed their claims with the RP in due time and the dispute was only over the amount allocated towards their claims under the Resolution Plans. The law is still unclear on what were to unfold if EPF claims are lodged based on assessments/ inspections carried out at belated stages where the Resolution Plan is already approved by the Committee of Creditors ***("CoC")*** but is pending approval by the NCLT, or where a Resolution Plan is already approved by the NCLT but is challenged in appeal before the NCLAT and/or the Supreme Court on account of non-payment of EPF dues.

1 Company Appeal (AT) (Insolvency) No. 354 of 2019 & Other Appeals

2 Civil Appeal No. 2088 of 2020

3 Company Appeal (AT) (Insolvency) No. 752 of 2021 & Other Appeals