

**IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

CP (IB) – 1085 (PB)/2020

**ORDER UNDER SECTION 10 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016 R/W RULE 7 OF THE
INSOLVENCY AND BANKRUPTCY (APPLICATION TO
ADJUDICATING AUTHORITY) RULES, 2016.**

IN THE MATTER OF:

**FDS Management Services
Private Limited**

... ..Corporate Applicant

ORDER PRONOUNCED ON: 09.01.2023

CORAM:

**JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT**

**SHRI AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Applicant :Ms. Dyuti Ghai
For the CGST :Adv.Samiksha Godiyal, Adv. Nakul Rajan,
Adv. Shivalika Rudrabatla, Adv. R.K
Mishra, Adv. Vipin Singh & Adv. Diksha
Goswami

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ORDER

PER : AVINASH K. SRIVASTAVA, MEMBER (TECHNICAL)

1. The present Petition has been filed by FDS Management Services Private Limited (**CIN:U74140DL2007PTC157502**), the Corporate Applicant, on 22.10.2020 under section 10 of the Insolvency and Bankruptcy Code, 2016 (the Code) for initiation of Corporate Insolvency Resolution Process (CIRP) against itself. The Application has been filed through its **Director Mr. Surinder Routela, DIN: 03153135**, duly authorised *vide* Board Resolution dated 28th April 2020. A copy of the Board Resolution dated 28th April, 2020 is annexed to the Application and marked as **Annexure- VIII/B** on **Page 508**.
2. The Corporate Applicant was incorporated on January 05, 2007 and it *inter alia* **was engaged in the business of providing pest control services, canteen services, guest house maintenance services, man power supply for menial works** to numerous establishments including governmental departments throughout the country. At present, there are around 350 employees working with the Corporate Applicant on either permanent or contractual basis.
3. During the course of business, the Corporate Applicant had raised the financial and operational debt from different sources for running the business operations. **The total financial debt and operational debt outstanding on 01.02.2020 is Rs. 5,00,000/- (Rupees Five Lakh) and Rs. 3,91,69,507/- (Rupees Three Crore Ninety-One Lakh Sixty-Nine Thousand**

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Five hundred and Seven) respectively.

4. The major amount of debt in the petition filed u/s 10 of IBC by the Corporate Applicant is against Central GST Authority

5. Facts of the Case

- i. It is submitted that the Corporate Applicant is not performing well since the last few financial years and the profit of the corporate debtor have decreased substantially since the financial year 2016-17 onwards.
- ii. It is submitted that in the previous financial year 2019-20, the corporate applicant had incurred losses to the extent of Rs. 4,54,96,642/- (Rupees Four Crore Fifty-Four Lakhs Ninety-six thousand six hundred and Forty-Two)
- iii. It is submitted that even though the corporate applicant had earned a meagre profit of Rs. 14,47,357/- (Rupees Fourteen Lakh Forty-Four Thousand Three Hundred and Fifty-Seven) in the financial year upto 09.10.2020, it is not sufficient to bring the corporate applicant back to a stable financial position.
- iv. It is submitted that the Corporate Applicant has received a show cause notice dated 22/09/2020 under section 74 from Goods and Service Tax Department stating that it is liable to pay the sum of Rs. 99,84,112/- (Rupees Ninety-Nine Lakhs Eighty-Four Thousands One Hundred and Twelve Only) towards the total GST liability including interest and penalty for the month of February, 2020 and March, 2020.

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- v. It is submitted that the Corporate Applicant had received show cause notice on 07.09.2020 from the Principal Commissioner of Central Taxes, New Delhi stating that the corporate applicant had committed default for the amount of **Rs. 4,69,94,491/- (Rupees Four Crores Sixty-Nine Lakhs Ninety-Four Thousands Four Hundred and Ninety-One Only)** as the service tax payable for the financial year 2014-15, 2015-16, 2016-17 and 2017-18
- vi. It is submitted that the operational Creditor “AAA ESS & CO” had sent a demand notice under section 8 of the Insolvency and Bankruptcy Code, 2016 to the Corporate Applicant on 19.03.2020 for the default of Rs. 16,14,235/- (Rupees Sixteen Lakh Fourteen Thousand Two Hundred and Thirty-Five only).
- vii. It is submitted that considering the financial performance of the Corporate Applicant in recent years, it is not in a position to clear the aforesaid defaults committed by it in the preceding financial years. To safeguard the interests of employees of the corporate debtor and to keep the corporate debtor as a going concern, the corporate applicant is filing the present application seeking initiation of Corporate Insolvency Resolution Process against the corporate debtor under section 10 of the Insolvency and Bankruptcy Code, 2016

6. Written Submissions on behalf of the Commissioner, Central Tax, CGST, Delhi West

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- i. That there has admittedly been evasion of service tax dues by the Corporate Applicant for the period 2014-15 to 2017-18 (up to 30.06.2017) and in this regard, the applicant was served a show cause notice [**“SCN”**] dated 07.09.2020 [CGST Affidavit dated 30.03.2022; Annexure A-1; Pg 7] by the Commissioner, Central Tax, CGST Delhi West with respect to a demand of Rs. 4,69,94,491/-. No written reply to the SCN was submitted.
- ii. That the SCN was adjudicated by the Commissioner CGST, Delhi West by Order-in-Original dated 31.03.2022 [**“Adjudication Order”**] [CGST affidavit dated 18.05.2022; Annexure A; Pg 6]. The SCN was upheld confirming the demand of Rs. 4,69,15,121/- against the applicant along with interest and penalty.
- iii. That the applicant’s conduct will show that the present application under section 10 of the Insolvency and Bankruptcy Code, 2016 has been filed only with the motive of defeating the statutory dues of the CGST and Central Tax department
- iv. That during investigation by the department, Sh. Surinder Routela, who is one of the directors of the applicant and the authorized signatory in the present proceedings, has admitted that there was a difference in the applicant’s service tax return income (ST-3) and its balance sheet and that the applicant was liable to pay service tax on the differential value. Further during investigation by the department, Sh. Surinder Routela admitted that the figure of the balance


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sheet was correct and ST-3 returns were reduced to evade payment of service tax [CGST affidavit dated 30.03.2022; SCN; Pg. 8].

- v. That SCN was issued to the applicant on 07.09.2020 and applicant had 30 days-time to file a reply to the SCN which expired on 06.10.2020.
- vi. That the applicant deliberately failed to file a reply to the SCN or seek an extension of time from the department for this purpose. The applicant also did not participate in the department's proceedings
- vii. That merely 15 days after the expiry of this period to reply to the SCN, the applicant filed the present application under section 10 of the IBC indicating that the department is the largest creditor but without any notice or communication to the department.
- viii. That the sole motive of applicant in this matter is to defeat the department's statutory dues through the moratorium. It is humbly submitted that this ought not to be permitted under section 10 of the IBC in view of the decision of the Hon'ble NCLT, Mumbai in re: Leo Duet Engineering & Consultants Ltd. (judgment dated 22.06.2017 at paragraphs 3-4, 6-7, 10-11). This judgment lays down the following propositions:
 - a. Consideration of application under section 10 of the IBC requires not only an adjudication of whether the application is complete in all respects but also whether it

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is a mala fide attempt to defeat a debt.

- b. An application under section 10 of the IBC which is aimed at securing advantage of the moratorium under section 14 to defeat creditors is an abuse of process and should be rejected.

7. Analysis and Findings

- i. We have heard the Ld. Counsel for the petitioner and respondents and perused the documents submitted by them. Considering the submissions made and documents placed on record, we find that the debt is due and payable by the Corporate Applicant to various creditors including the GST department and that the Corporate Applicant is unable to pay the same.
- ii. We further find that plea of CGST department that the present petition has been filed only to defeat the statutory dues of CGST and Central Tax Department cannot be accepted as the corporate applicant has incurred liability not only from the CGST but also towards other creditors. Also, the corporate applicant in **Volume IV at Pg 456** of the present petition has attached notes forming part of its balance sheet as on 31st March 2020 wherein we find that the corporate applicant is also having other current liabilities including ESI payable of Rs 3,55,222, EPF payable of Rs. 20,50,982, Director remuneration payable Rs 12,62,276, etc. Hence, the decision of co-ordinate bench will not apply to this case in facts

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iii. Further in this regard we rely upon the judgment of Hon'ble NCLAT in the case of **M/s Unigreen Global Pvt Ltd. Vs. Punjab National Bank 2017 SCC Online NCLAT 610** which has held that:

20. *Under both Section 7 and Section 10, the two factors are common i.e. the debt is due and there is a default. Sub-section (4) of section 7 is similar to that of Sub-section (4) of section 10. Therefore we, hold that the law laid down by the Hon'ble Supreme Court in "Innoventive Industries Ltd. (Supre) is applicable for Section 10 also, wherein the Hon'ble Supreme Court observed as "The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority".*

It is therefore clear that the applicant has proved that it is in default and has defaulted.

iv. The Corporate Applicant has proposed the name of **Mr. Manoj Kumar Anand (Regn. No. IBBI/IPA-001/IP-P00084/2017-18/10180)** to function as the Interim Resolution Professional (IRP). Mr. Manoj Kumar Anand has submitted his written communication in **Form 2** in terms of section 10(3)(b). The written communication is annexed to the application and marked as **Annexure-III/A on Pages 17-18.**

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- v. The Corporate Applicant has furnished the books of accounts for the relevant period under section 10(3)(a); the Corporate Applicant has also filed the Special Resolution passed by shareholders in General meeting dated 28th April 2020 under section 10(3)(c) as **Annexure-VIII/C on page 509**.
- vi. The application is free from defects and complete in all aspects as required under the law. The Application shows that the Corporate Debtor is in default of a debt that is due and payable, and the default is more than the threshold amount as stipulated under section 4(1) of the Code at the relevant time. The default stands established and there is no reason to deny the admission of the present Application.

8. ORDER:

In light of the above facts and circumstances, it is, **herely ordered** as follows: -

- i. The Application bearing **C.P. (IB)No. 1085/PB/2020** filed by the Corporate Applicant under section 10 of the Insolvency & Bankruptcy Code, 2016, is hereby admitted for initiating the Corporate Insolvency Resolution Process in respect of **M/s FDS Management Services Private Limited (CIN:U74140DL2007PTC157502)**.
- ii. There shall be a moratorium under section 14 of the IBC.
- iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan

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under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- iv. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- v. As per the proposal given by the Corporate Applicant, **Mr. Manoj Kumar Anand (Regn. No. IBBI/IPA-001/IP-P00084/2017-18/10180)** is appointed as the IRP for ascertaining the particulars of Creditors and convening a Committee of Creditors for evolving a Resolution Plan.
- vi. During the CIRP period, the management of the Corporate Person shall vest in the IRP / RP as the case may be in terms of section 17 of the IBC. The officers and managers of the Corporate Person shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- vii. The IRP/RP shall submit to this Adjudicating Authority periodical reports on quarterly basis with regard to the progress of the CIRP in respect of the Corporate Debtor.
- viii. The Corporate Applicant to pay to IRP a sum of Rs.2,00,000/- (Rupees Two Lakh only) to meet the initial

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costs, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment.

- ix. The Resolution Professional shall conduct CIRP in a time-bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- x. Additionally, the Corporate Person shall serve a copy of this Order on the IRP and on the Registrar of Companies, Delhi by all available means for updating the Master Data of the Corporate Person. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- xi. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

- Sd -

**RAMALINGAM SUDHAKAR
(PRESIDENT)**

Sd

**AVINASH K. SRIVASTAVA
MEMBER (TECHNICAL)**