

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/08/2018

23rd August, 2018

ORDER

(Under sub - regulation (7) of regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016)

1. Background

1.1 The Insolvency and Bankruptcy Board of India (**Board**) issued a show-cause notice (**SCN**) dated 18th December, 2018 to Mr. Dinkar T. Venkatasubramanian, Ernst & Young LLP, Golf View Corporate Tower B, Sector 42, Gurugram, Haryana, 122002, who is a Professional Member of the Indian Institute of Insolvency Professional of ICAI and an Insolvency Professional (**IP**) registered with the Board having registration number IBBI/IPA-001/IP-P00003/2016-17/10011 in respect of authorising E & Y LLP to raise invoices for his fee and other out of pocket expenses for work undertaken by him as an Interim Resolution Professional (IRP) and Resolution Professional (RP) in the matter of JEKPL Private Limited [Company Petition No. 24/Ald/2017] for violation of the provision of section 5 (13) of the Insolvency and Bankruptcy Code, 2016 (**Code**) read with regulation 33 and 34 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Board referred the SCN, response of Mr. Venkatasubramanian to the SCN dated 25th January, 2018 and other material available on record to the Disciplinary Committee (**DC**).

1.2 The DC notes that the corporate applicant, JEKPL Private Limited has filed an application under section 10 of the Code before the Adjudicating Authority (AA) (Allahabad) for initiating the corporate insolvency resolution process (CIRP) proposing Mr. Dinkar T. Venkatasubramanian's name as an Insolvency Professional. The AA by the order dated 17th March, 2017 admitted the case and appointed Mr. Venkatasubramanian as the IRP. On 19th April, 2017, the Committee of Creditors (**CoC**) resolved to replace Mr. Venkatasubramanian and appoint another insolvency professional to act as the Resolution Professional (**RP**) and the same was confirmed by the AA vide order dated 1st June, 2017.

1.3 In the said matter, Mr. Mukesh Mohan (replaced RP) vide his letter dated 25th July, 2017, made a complaint against Mr. Venkatasubramanian that the professional fee of Mr. Venkatasubramanian was illegally paid to M/s E & Y LLP thereby escaping his personal income tax liability by making the payment of his professional fee in the name of third party and requested the Board for taking necessary disciplinary action against Mr. Venkatasubramanian.

1.4 The DC also notes that in the CoC meeting held on 4th August, 2017 w.r.t. JEKPL Private Limited, the members of the CoC confirmed that nobody has appointed M/s E & Y LLP for any professional work relating to the resolution process of JEKPL Pvt. Ltd. Mr. Mukesh Mohan on 11th August, 2017 enclosed an email which he received from one of the members of the CoC in response to the previous mentioned issue – *“the payments to EY [Ernst and Young LLP] have been made by the bank on the instructions of Company JEKPL Private Limited through the then IRP Mr. Dinkar T. Venkatasubramanian. The Bank has not engaged the services of the EY for any purposes.”*

1.5 The replaced RP vide his communication dated 23rd August, 2017 informed to Board that to verify whether all the expenditure/payments after commencement of CIRP were pre-

approved by the Committee of Creditors, BGJC & Associates LLP was appointed to conduct vetting of CIRP cost of JEKPL Private Limited and the said Internal Auditor made the following remarks: -

- (a) *EY [Ernst and Young LLP] was neither appointed by the CoC nor the NCLT to carry the IRP/RP nor any professional activity. Further, EY LLP is not eligible to be appointed as an IRP/RP under IBC, 2016.*
- (b) *One of the creditors has stated in its email that the payments were released to the EY LLP based on the instructions of Mr. Venkatasubramanian.*
- (c) *The amount paid to EY appears to be contradictory to the approval of CoC which is contradictory to section 28 (e) of the Code.*
- (d) *The approval of payments by a third person is also contrary to the documents available on record.*

1.6 The DC further notes that the Board formed a *prima facie* opinion that Mr. Venkatasubramanian had violated provisions of the Code pertaining to insolvency resolution process costs and accordingly, Board on 18th December, 2017, issued the Show Cause Notice (SCN) to Mr. Venkatasubramanian in the matter of JEKPL Private Limited based on the material available on the record as to why appropriate action, as permissible under the Code and the relevant regulations should not be initiated for violation of section 5 (13) of the Code and regulation 33 and 34 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016.

1.7 Mr. Venkatasubramanian responded to the SCN vide letter dated 25th January, 2018. Further, Mr. Venkatasubramanian appeared for personal hearing before the DC on 27th March 2018. He has submitted further written submission vide letter dated 24th April, 2018.

2. Show Cause Notice

The DC notes from the SCN, as under:

- (a) During his tenure as an IRP, Mr. Venkatasubramanian entered into a "Fee Acknowledgement Letter" dated 17th March, 2017, with Ernst & Young LLP to "perform certain services to assist him in connection with CIRP of the Payer". Further, under clause 4 of the said agreement, Mr. Venkatasubramanian had authorised Ernst & Young LLP to raise invoices on payer for his "fees and other out of pocket expenses for work undertaken by him in connection with Corporate Insolvency Resolution Process (CIRP)" in respect of JEKPL Private Limited.
- (b) Mr. Venkatasubramanian contracted a Fee Acknowledgment under which Ernst & Young LLP raised the invoices violating to provisions of the Code and the regulations made thereunder.

3. Submissions by Mr. Venkatasubramanian

3.1 In reply to SCN dated 25th January, 2018, as regard to Fee Acknowledgement Contract and subsequent invoices raised by Ernst & Young LLP in their name against the work of IRP/RP done by Mr. Venkatasubramanian, he has submitted as under: -

- (a) The fee arrangement dated 17th March, 2017 with Ernst & Young LLP was entered into by him in good faith and is based on his understanding of the provisions of the Code, CIRP Regulations and the Code of Conduct for Insolvency Professionals, as also the best practice in this respect followed by insolvency practitioners in other jurisdictions.

- (b) The rights and duties of the partners of limited liability partnership are governed by the limited liability partnership agreement. Sub-section (1) of section 42 of the LLP Act states, the rights of a partner to a share and profit and distribution are transferrable. Schedule 1 to the LLP Act further provides that "the mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and its partners shall be determined, subject to the terms of any limited liability partnership agreement or in the absence of any such agreement on any matter, by the provisions in this Schedule." The limited liability partnership and its partners acquire rights and duties under the limited liability partnership agreement, are governed by the LLP Act.
- (c) He was a partner of EY which is a Limited Liability Partnership regulated by the LLP Act. He made full disclosure of his status as being a partner of LLP at the time of my enrolment with Indian Institute of Insolvency Professionals of ICAI and while applying for registration as insolvency professional with the Board. As a partner of Ernst & Young LLP, he was governed and bound by the limited liability partnership agreement of Ernst & Young LLP. The LLP Agreement of Ernst & Young LLP does not permit partners to earn fee outside of Ernst & Young LLP Agreement.
- (d) As the Code and the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 permit partners of a limited liability partnership to register as insolvency professionals, and by implication therefore, acknowledge, that such partner would be bound by the limited liability partnership agreement with his/her partners and governed by the LLP Act, he considered it as a reasonable view to take that the said fee arrangement would be in compliance of the LLP Act and the Code.
- (e) Until the Circular dated 16th January, 2018 was issued by the Board, sub-section (13) of section 5 and regulations 33 and 34 could not be read to be prescriptive or restrict resolution professional that are partners in a limited liability partnership or insolvency professionals entity from raising/receiving fee in the name of the limited liability partnership or insolvency professionals entity, as the case may be.
- (f) He was part of Ernst & Young LLP when selected by the financial creditors of JEKPL for appointment as IRP/RP. As he was expected to use the expertise, skills and time of the employees of EY in discharging his functions and duties as Interim Resolution Professional of JEKPL, these employees required to be compensated. Therefore, the following commercial arrangement was entered into between E&Y and him:
 - (i) EY will provide all support to him in rendering my services as the Interim Resolution Professional/ Resolution Professional.
 - (ii) He, as a Partner in EY, would receive remuneration and drawings in accordance with organizational policies and procedures.
 - (iii) In exchange, he would authorize EY to bill and collect all fee due to him in his role as Interim Resolution Professional/ Resolution Professional.

3.2 During personal hearing on 27th April, 2018, Mr. Venkatasubramanian stated that:

- (a) He is registered with the Board as Insolvency Professional since 27th January, 2017. There is an agreement between all the partners of the Ernst & Young LLP and that agreement applies to him as well. When the LLP Agreement was made, at that time the Code was not in existence. After the enactment of the Code, he took up the assignments as professional.
- (b) There was no clarity as to how and whom fee is to be paid for his professional services. The Board has clarified this issue vide circular dated 16th January,

2018, regarding fees payable to an insolvency professional and to other professionals appointed by an insolvency professional and he has followed it in letter and spirit after the date of issue of the said circular.

- (c) He questioned how the Board is aggrieved of such raising of invoices by M/s E & Y LLP for his fee for the services rendered by him as of IRP/RP in the CIRP of JEKPL Pvt. Ltd.

3.3 In his written submission dated 24th April, 2018 on affidavit received in the Board on 26th April, 2018, he stated as under:

"I have followed the circular, in respect of billing and collection of fee by Resolution Professionals, dated 5th January, 2018 of Insolvency and Bankruptcy Board of India (Ref: Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes) in letter and spirit, effective the date of the circular."

4. Analysis and Findings

4.1 The DC has carefully considered the SCN, written and oral submissions of Mr. Venkatasubramanian and other material available on record. The issue in this matter is *whether an IRP/RP can authorise a firm/company (in which he/she is a partner/director) to raise invoices for his professional fee on his behalf.*

4.2 For the purposes of examining the said issue, DC examined the submissions and material available on record *brevatim et seriatim*, and finds as under:

- (a) The IP, either as an interim resolution professional or as resolution professional, exercises powers of the Board of Directors of the corporate debtor undergoing CIRP. The specific duties and responsibilities of an IP during CIRP are detailed under sections 25 and 28 of the Code and regulations made thereunder. Sections 206 and 207 of the Code read with the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides that an individual can only act as IRP/RP. Mr. Venkatasubramanian was appointed as IRP/RP in his individual capacity not as partner of LLP. Section 3(19) of the Code further defines an insolvency professional as, "a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207".
- (b) The Bills towards the fees of the IRP/RP for the services rendered by Mr. Venkatasubramanian as an IRP/RP have been raised by Ernst & Young LLP and payments towards settlement of said bills have also been made to Ernst & Young LLP. This is in clear violation of the provisions of the Code and the regulations framed thereunder.
- (c) As per section 22 of the Code, it is the Committee of Creditors which resolves to continue IRP as RP or replaces him by another IP.
- (d) Mr. Venkatasubramanian himself directed for the settlement of the bills so raised by Ernst and Young LLP as being the IRP/RP of JEKPL Private Limited and thus influenced the decision or the work of the committee of creditors and the debtor.
- (e) Limited Liability Partnerships stands as a separate and independent legal entity as to the professionals who are its partners. Raising fee invoices by LLPs on behalf of Insolvency Professional who has been appointed as IRP/RP and for the services rendered by such professional is the violation of the very basic notion of the 'fee' as it is 'charging some against services rendered'. It is professional not the LLP who renders services under the Code. An LLP cannot enrol as Insolvency Professional.

- (f) Section 5(13) of the IBC, 2016 defines the expression "insolvency resolution process costs", which includes under its clause (b) "the fees payable to any person acting as a resolution professional." Therefore, only an IRP/RP is entitled to directly receive the fees payable along with the out-of-pocket expenses in relation to a resolution process for which he has been appointed as the IRP/RP. The explanation to regulation 33 and 34 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that "expenses" mean the "fees to be paid to the Resolution Professional" and other expenses, including the cost of engaging professional advisors, to be incurred by the IRP/RP as the case may be. Thus, the intention of the legislation is clear that the fees of the IRP/RP should be raised only by him and should only be received by him.
- (g) Section 238 of the Code provides that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Further, *generalia specialibus non derogant*- 'the provisions of a general statute must yield to those of a special one' and the raising of such fee by the LLP for the services rendered by IRP/RP can't be sheltered under any provisions of the LLP Act, 2008, when the Insolvency and Bankruptcy Code, 2016 read with Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 expressly provide for such IRP/RP fee to be part of the Insolvency Resolution Process Cost under section 5 (13) (b) of the Code.
- (h) Mr. Venkatasubramanian stated that the LLP Agreement of Ernst & Young LLP does not permit partners to earn fee outside of Ernst & Young LLP Agreement, but an LLP agreement is not supposed to circumvent and bypass the express provision of the Code.
- (i) Mr. Venkatasubramanian averred that he was expected to use the expertise, skills and time of the employees of EY in discharging my functions and duties as Interim Resolution Professional of JEKPL, these employees required to be compensated. But such expertise, skills and time of the employees cannot replace the role assigned to IRP/RP.
- (j) The Board issued a circular dated 16th January, 2018 regarding fees payable to an insolvency professional and to other professionals appointed by an insolvency professional which, *inter alia*, provides that:
- (i) 'the fees payable to any person acting as a resolution professional' is included in 'insolvency resolution process cost' as defined in section 5 (13) of the Code, which needs to be paid in priority.
 - (ii) an insolvency professional must provide services for remuneration which is charged in a transparent manner, and is a reasonable reflection of the work necessarily and properly undertaken. He shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.
 - (iii) Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.
 - (iv) any other professional appointed by an insolvency professional shall raise bills /invoices in his / its (such as registered valuer) name towards such fees, and such fees shall be paid to his / its bank account.

5. Conclusion

5.1 Insolvency professionals play a vital role in the resolution process and forms a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the resolution process. The Code of Conduct for Insolvency Professionals under the Code read with the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, provide under *Integrity and objectivity*- an insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships. Further, *Independence and impartiality*- an insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences. An insolvency professional shall not influence the decision or the work of the committee of creditors or debtor, or other stakeholders under the Code, so as to make any undue or unlawful gains for himself or his related parties, or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means.

5.2 In the aforesaid backdrop, the DC finds the following violations by Mr. Venkatasubramanian:

- (i) Mr. Venkatasubramanian had authorised Ernst & Young LLP to raise invoices for his "fees and other out of pocket expenses for work undertaken by him in connection with Corporate Insolvency Resolution Process (CIRP)" in respect of JEKPL Private Limited. Hence, he violated section 5(13) of the Code read with regulation 33 and 34 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 along with the items 1 and 5 of the Code of Conduct specified in the First Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.
- (ii) Mr. Venkatasubramanian himself directed for the settlement of the bills so raised by Ernst and Young LLP as being the IRP/RP of JEKPL Private Limited thus contravened item 9 and 25 of the Code of Conduct for Insolvency Professionals.
- (iii) He allowed Ernst and Young LLP to raise invoices for his professional fee, thereby, treating the profession of Insolvency Professionals as employment under an entity. He contravened section 208 of the Code.

6. Order

6.1 Mr. Venkatasubramanian has violated sections 5(13) and 208 of the Code read with regulations 33 and 34 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 along with the items 1, 5, 9 and 25 of the Code of Conduct for Insolvency Professionals specified in the First Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

6.2. The Bills towards the fees of the IRP/RP, Mr. Venkatasubramanian, have been raised by Ernst & Young LLP and payments towards settlement of said bills have been made to Ernst & Young LLP. The said settlement of bills is in violation to express provisions of the Code and regulations made thereunder. However, Mr. Venkatasubramanian has submitted that there was no clarity as to how and to whom fee is to be paid for his professional services as an IRP/RP and the Board has recently clarified this issue vide circular dated 16th January, 2018, regarding fees payable to an insolvency professional and to other professionals appointed by an insolvency professional. Given that the Code is a new law and Mr. Venkatasubramanian has undertaken CIRP in the matter of JEKPL Private Limited for the first time and he is following circular dated 16th January, 2018 in letter and spirit, effective the date of the circular as stated by him in his written submission on affidavit dated 24th April, 2018, the DC is inclined to take lenient view.

6.3 Accordingly, the Disciplinary Committee, in exercise of powers conferred under section 220 (2) of the Code read with sub-regulation (7) and (8) of regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, hereby, imposes a monetary penalty of one lakh rupees on Mr. Dinkar T. Venkatasubramanian, Insolvency Professional [Registration number IBBI/IPA-001/IP-P00003/2016-17/10011], IRP/RP in the matter of JEKPL Private Limited. Mr. Venkatasubramanian shall deposit the penalty amount by a crossed demand draft payable in favour of the Insolvency and Bankruptcy Board of India within 30 days of the issue of this order.

6.4 A copy of this order shall be forwarded to the Indian Institute of Insolvency Professional of ICAI where Mr. Venkatasubramanian is enrolled as a professional member.

6.5 A copy of this order shall be forwarded to the Registrar of the NCLT, Principal Bench, New Delhi for information.

Sd/-

(Dr. Mukulita Vijayawargiya)

Whole Time Member, IBBI

Dated: 23rd August, 2018

Place: New Delhi