

Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi – 110001

CIRCULAR

No. IBBI/LIQ/61/2023

28th September, 2023

To,
All Registered Insolvency Professionals
All Recognised Insolvency Professional Entities
All Registered Insolvency Professional Agencies
(By mail to registered email addresses)

Dear Madam/Sir,

Subject: Clarification w.r.t. Liquidators' fee under clause (b) of sub-regulation (2) of Regulation 4 of IBBI (Liquidation Process) Regulations, 2016

Regulation 4 of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Regulations) provides for Liquidator's fee. Sub-regulation (1) and (1A) provide that the fee payable to the liquidator be decided by the Committee of Creditors (CoC) or Stakeholders' Consultation Committee (SCC), as the case may be. If liquidators' fee is not fixed under sub-regulation (1) and (1A), clause (b) of sub-regulation (2) of Regulation 4 provides that the liquidator shall be entitled to a fee *as a percentage of the **amount realised** net of **other liquidation costs**, and of the **amount distributed**, for the balance period of liquidation, as under:*

Amount of Realisation / Distribution (In rupees)	Percentage of fee on the amount realised / distributed		
	<i>in the first six months</i>	<i>in the next six months</i>	<i>Thereafter</i>
Amount of Realisation (exclusive of liquidation costs)			
<i>On the first 1 crore</i>	5.00	3.75	1.88
<i>On the next</i>			
Amount Distributed to Stakeholders			
<i>On the first 1 crore</i>	2.5	1.88	0.94
<i>On the next</i>			

2. Based on records examined during the inspections and investigations and interaction with stakeholders, it has been observed that different interpretations of terms highlighted above are being made by the liquidator which are being clarified below: -

2.1 Amount realised: Regulation 4(2)(b) provides that the fee shall be “*as a percentage of the **amount realised** net of other liquidation costs, and of the amount distributed, for the balance period of liquidation....*”

“Amount realised” means an amount that is being realised from the sale of an asset where the asset changes form. Where the asset is already liquid such as cash and bank balance including

term deposits, mutual funds, and quoted shares, there is no ‘realisation’, and funds are readily available for distribution. The amount realised, thus, implies the proceeds from the sale/realization from the liquidation of assets which are not liquid. Therefore, the liquidator is not entitled to a fee on realisation for these liquid assets and is entitled to a fee only on distribution.

Clarification: *“Amount realised” shall mean amount realised from assets other than liquid assets such as cash and bank balance including term deposit, mutual fund, quoted share available on start of the process after exploring compromise and arrangement, if any.*

2.2 Other liquidation costs:

The term “Amount of Realisation (exclusive of liquidation costs)” given in the table in Regulation 4(2)(b) mandates that all liquidation costs are to be deducted from the realisation amount. However, as per regulation 4(2)(b), “other liquidation cost” is to be deducted from realisation. There is a gap in understanding in the market about what components of the liquidation cost are to be excluded from the liquidation cost to derive “other liquidation cost”.

The component that can be excluded is only that part of the liquidation cost which is itself dependent for its calculation on other liquidation costs i.e., liquidator’s fee. Including the same in “other liquidation cost” would entail a circular reference to the liquidator fee for the calculation of liquidator fee making the calculation very tedious and impractical. Hence, all other components of liquidation cost apart from liquidator’s fee shall be part of the “other liquidation cost”.

In few cases, liquidators are only considering process cost as “other liquidation cost” and thereby, exclude the cost incurred in preserving and protecting the assets of the CD, and running the CD as a going concern to calculate “other liquidation cost”. Before amendment dated 25th July, 2019 to the Liquidation Regulations, the liquidation cost under Regulation 2(1)(ea) had four components. To clarify the liquidation cost, through aforesaid amendment four new components of liquidation cost were added. In some cases, it is being wrongly interpreted that these newly added four components, *inter-alia*, such as going concern costs etc., are to not be considered as the liquidation cost in respect of all those cases where the liquidation process commenced before the aforesaid amendment. Since these four components are paid in priority to payment to stakeholders as per section 53 of the Code by virtue of it being liquidation cost under section 53(1)(a), these newly added components were always part of the liquidation cost irrespective of the date of commencement of liquidation process. Any other interpretation would create uncertainty about the priority of payment of these components of liquidation cost over payment to stakeholders.

Furthermore, the term “other liquidation cost” existed right from the inception of liquidation regulations and thus could not have meant to exclude certain components of liquidation costs from “liquidation costs” which were added by a subsequent amendment in 2019.

Clarification: *The “other liquidation cost” in regulation 4(2)(b) shall mean liquidation cost paid in priority under section 53(1)(a), after excluding the liquidator’s fee.*

2.3 Amount distributed to stakeholders:

Section 53 provides for order of priority for making distribution out of proceeds from sale of assets. Further, Regulation 42 provides that:

Distribution.

(1)

(2) *The liquidator shall distribute the proceeds from realization within ninety days from the receipt of the amount to the stakeholders.*

(3) *The insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made.*

Furthermore, the table in Regulation 4(2)(b) provides for liquidator's fees to be calculated as a percentage of the 'Amount Distributed to Stakeholders'. However, in few cases, it has been observed that the liquidators are erroneously calculating fees even on distribution of the CIRP cost and liquidation cost, including expenses incurred in running the business of the CD during the liquidation process. The conjoint reading of Regulation 42(2) and 42(3) read with Regulation 4(2)(b) mandates the liquidator to distribute the proceeds from realization after deducting the payment of CIRP cost and liquidation costs as these costs do not represent distribution of proceeds to stakeholders/ claimants.

Clarification: "Amount distributed to stakeholders" shall mean distributions made to the stakeholders, after deducting CIRP and liquidation cost.

2.4 Amount of Realisation /Distribution:

It is observed that different interpretations are being made for the words "Amount of Realisation /Distribution" used in table in the Regulation 4(2)(b). Though, most of them are interpreting it correctly to mean the cumulative value of assets realised till date, few are interpreting it to mean the value of assets realised during the first six months and then next six months and so on. The words "Amount of Realisation /Distribution" are mentioned in column 1 only. Other columns are for percentage of fees on such realisation/distribution. Thus, the cumulative value of amount realised/ distributed is to be bifurcated in various slabs as per column 1. Only after that, liquidator has to divide the amount realised in a particular slab based on the tenure in which it was realised such as in first six months, next six months or thereafter. Out of the total amount pertaining to that slab, for the amount realised in first six months, % of fees will be as per column 2; for the amount realised in next six months, % of fees will be as per column 3; and for the amount realised thereafter, % of fees will be as per column 4.

Illustration: Assume the liquidation commencement date is 01.11.2021. Further, the liquidation cost and period spent on compromise or arrangement are nil. The liquidator has realised Rs.10 crore on 01.01.2022 and another Rs.1 crore on 01.10.2023.

Liquidator's fee – erroneously computed:

Liquidator fee while interpreting "Amount of Realisation /Distribution" to mean value of assets realised during the first six months and then next six months period and so on, without considering the slab value of assets, computed as under:

Particulars	in first six months	Fee	in next six months	Fee
On the first 1 crore	5.00%	5,00,000	3.75%	3,75,000
On the next 9 crore	3.75%	33,75,000		
Total		38,75,000		3,75,000
Total fee				42,50,000

In the same illustration, if we consider that entire Rs 11 crores was realised within 6 months, the calculation of the liquidator fee is as under:

Particulars	in the first six months	Fee
On the first 1 crore	5.00%	5,00,000
On the next 9 crore	3.75%	33,75,000
On the next 40 crore	2.80%	2,80,000
Total fee		41,55,000

In the above illustrations, the liquidator is getting more fee if he realises the assets within 12 months in comparison to realisation of the assets within 6 months which is against the spirit of the regulation. Thus, it is clear that the cumulative value of amount realised/ distributed is to be bifurcated in various slabs as per column 1. Only after that, the liquidator has to divide the amount realised in a particular slab based on the tenure in which it was realised such as in first six months, next six months or thereafter. Thereafter, fee rate for various amounts realised in various periods are to be taken as per columns 2, 3 and 4.

Clarification: “Amount of Realisation /Distribution” shall mean cumulative value of amount realised/ distributed which is to be bifurcated in various slabs as per column 1 and thereafter the same is to be bifurcated into realisation/ distribution in various periods of time and then corresponding fee rate from the table is to be taken.

2.5 Period for calculation of fee: It has been observed that the liquidators are *suo-moto* excluding various time periods such as stay by court on sale of a particular asset, delay in relinquishment by secured creditor, for the purpose of calculating the fee. However, since the liquidator works under the overall guidance of the Adjudicating Authority, any such exclusion should have stamp of judicial authority and should be only for the asset for which such exclusion has been granted.

Clarification: Exclusion for purpose of fee calculation is to be allowed only when the same has been explicitly provided by the Hon’ble NCLT/ NCLAT or any other court of law and will operate only for the asset which could not have been realised during the excluded period.

3. The IPs who are currently handling or have handled in the past any liquidation assignment shall ensure that the fee charged by them under Regulation 4(2)(b) is in accordance with above clarifications and inform the same to the Board electronically on the website of IBBI. In cases, where excess liquidator’s fee is returned and distributed on or before 31st October 2023 no disciplinary proceedings will be initiated on the ground that the excess fee was charged and has now been returned.

4. This Circular is being issued in exercise of the powers conferred under the provisions of section 196 of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully
Sd/-
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