

# Enhanced focus on disclosure of tax losses in the Information Memorandum (IM)

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## Introduction

The Insolvency and Bankruptcy Code, 2016 (IBC) was introduced to facilitate and streamline the process for revival of business and maximizing asset value by providing a framework for either the resolution of financial stress of the corporate debtor, on a going concern basis or the liquidation of the corporate debtor. From a bidder's perspective, there are certain aspects which are relevant to be considered while bidding / planning a bid for a corporate debtor. These aspects include business synergies, customer relationships, intellectual property, tax losses etc. available with the corporate debtor.

Accordingly, availability of tax losses is one of the important factors (and an asset) for potential resolution applicants to bid for a corporate debtor. Provisions of the Income-tax Act, 1961, *inter alia*, allow tax losses incurred by a closely held company to be set off against income / future income and to be carried forward for a period of 7 years<sup>1</sup> subject to certain conditions. For completeness, such restrictions do not apply to (i) unabsorbed depreciation and are limited to brought forward losses or (ii) listed companies. One of the conditions is that the shareholding of the closely held company in the year in which loss was incurred and the year in which such loss is sought to be set off should not change beyond a specified threshold.

To facilitate companies undergoing insolvency process and add economic value for the prospective resolution applicant, a specific amendment was brought into the Income-tax Act, 1961 (in 2018) to allow for tax losses to be carried forward where change in shareholding takes place pursuant to a resolution plan approved under IBC and the jurisdictional Principal Commissioner / Commissioner is given an opportunity of being heard.

In view of the aforesaid, it is important for the resolution plan to be carefully drafted to permit carry forward and set off of such tax losses. It is also critical that the resolution applicant is represented well before the National Company Law Tribunal (NCLT) to ensure provisions of the plan are approved by the NCLT.

However, the journey to evaluate and quantify tax losses available with the Corporate Debtor requires availability of sufficient data and careful diligence on the part of the potential resolution applicants. Towards this end, the Insolvency and Bankruptcy Board of India (Board) has issued a circular dated 17 March 2025 (Circular) pursuant to powers conferred to the Board under Section 196 of the IBC requiring detailed reporting of tax losses by the insolvency professionals in the information memorandum (IM).

## Circular from the Insolvency and Bankruptcy Board of India

Section 29 of the IBC and Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 (CIRP Regulations) mandates a resolution professional to provide potential resolution applicants access to all relevant information/documents as may be required by the resolution applicants to submit a resolution plan for the corporate debtor. Particularly, Regulation 36(j)

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<sup>1</sup> There are certain restrictions on the ability to set off and carry forward losses. Also, certain losses (for instance relating to speculative business) are allowed to be carried forward for a shorter time.

of the CIRP Regulations stipulated that in the IM required to be issued during the CIRP, the resolution professional is required to provide the overview of the corporate debtor including its business performance, key contracts, input credit of GST and details of carry forward losses in the income tax returns. While details of carry forward losses were always required to be provided as part of the broad company overview, the IBBI, upon reviewing the IM being issued during insolvency resolution processes, was of the opinion that these details have to be more robust and holistic, given the importance of assessing the tax losses which could be carried forward for determining the commercial terms of a bid.

In view thereof, the IBBI issued the Circular which now mandates information about tax losses should be provided in a more robust and exhaustive manner. With an attempt to enhance reporting framework and availability of data with potential resolution applicants, IPs are now required to report information in the IM which would enable a potential resolution applicant to get sufficient details on the carry forward of tax losses, including the following details:

1. Quantum of carry forward tax losses available to the corporate debtor;
2. Breakdown of these losses under specific heads as per the Income-tax Act, 1961;
3. Applicable time limits for utilizing these losses; and
4. An explicit statement in the IM in case there are no losses available to the corporate debtor.

The Circular is a welcome move and indicates a positive intent on the part of the Board to address concerns of potential resolution applicants and reduce uncertainty around available tax losses. While even currently, resolution applicants could review the tax losses on careful diligence, the Circular puts an express obligation on the IP to report losses *available* to the corporate debtor.

Further, the Tax Audit Report (TAR) required to be filed by specified taxpayers has a specific reporting on losses available with the taxpayer and includes losses available post assessment for a particular year. Thus, in cases where TAR is available and the IPs have access to such TAR, the relevant reporting in the TAR could be used for the purposes of reporting by the IPs.

## Comments

The Circular is a welcome move to enhance reporting to be made by IP and consequently ensuring more information with potential resolution applicants in evaluating their financials bids for a corporate debtor - as set out earlier, usually potential resolution applicants, amongst other things, also factor in the availability of tax losses with the corporate debtor. Availability of this information has the potential for better and more accurate price discovery of the Corporate Debtor which can aid and enhance the prospects of resolution of a company in insolvency.

- *Vinita Krishnan (Executive Director); Kumar Saurabh Singh (Partner); Ashwiji Ramaiah (Principal Associate) and Bharat Jain (Principal Associate)*



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