MONTHLY NEWSLETTER

LEXport Law made easy

Advocates & Legal Consultants

NOVEMBER 2018

1. RBI & FEMA
2. Foreign Trade
3. Corporate
4. Securities
5. Competition
6. Indirect Taxes
   a. Customs
   b. Service Tax
   c. GST
7. Intellectual Property Rights
8. Consumer
9. Environment

RBI/FEMA

1) RBI ALLOWS BANKS TO PROVIDE PARTIAL CREDIT ENHANCEMENT (PCE) TO BONDS ISSUED BY NBFCS & HFCS

RBI has allowed banks to provide partial credit enhancement (PCE) to bonds issued by the systemically important non-deposit taking non-banking financial companies (NBFC-ND-SIs) and Housing Finance Companies (HFCs), subject to the conditions as prescribed in the Circular. – ***[DBR.BP.BC.No.7/21.04.142/2018-19, dated 2nd November, 2018]***

2) RBI REVIEWS MINIMUM AVERAGE MATURITY AND HEDGING PROVISIONS OF EXTERNAL COMMERCIAL BORROWINGS (ECB) POLICY

The RBI has amended following provisions of the ECB framework (Master Direction No.5 dated January 1, 2016 on "External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers") *vide* present Circular:

i. Minimum average maturity: Reduce the minimum average maturity requirement for ECBs in the infrastructure space raised by eligible borrowers under paragraph 2.4.2 (vi) of the aforesaid Master Direction from 5 years, as stipulated under paragraph 2.4.1(iv), to 3 years; and

ii. Hedging requirements: Reduce the average maturity requirement from extant 10 years to 5 years for exemption from mandatory hedging provision applicable to ECBs raised by above referred eligible borrowers. Accordingly, the ECBs with minimum average maturity period of 3 to 5 years in the infrastructure space will have to meet 100% mandatory hedging requirement. Further, it is also clarified that ECBs falling under the aforesaid revised provision but raised prior to the date of this Circular will not be required to mandatorily roll-over their existing hedges. – ***[A.P. (DIR Series) Circular No.11, dated 6th November, 2018]***

3) IMPLEMENTATION OF POSITIVE CONFIRMATION FOR RTGS TRANSACTIONS

Up till now, NEFT system has been providing a positive confirmation to the remitter of the funds regarding completion of the funds transfer, thus giving an assurance to the remitter that the funds have been successfully credited to the beneficiary account. Now onwards same facility will be extended by the banks to the remitter of funds under the RTGS system as well.

As per RBI communication, initially, the positive confirmation feature in RTGS would be available for member banks wherein both remitter and beneficiary banks access RTGS through thick client interface / SFMS member interface. The positive confirmation feature would be subsequently enabled for member banks accessing RTGS through other channels as well.

For the above purpose, a new message format (camt.059) is being introduced to communicate an acknowledgement to the remitting bank containing the date and time of credit to beneficiary account. The beneficiary's bank would communicate the confirmation of funds transfer through the SFMS and the remitting bank in turn initiates an SMS and/ or generates an e-mail to the remitter.

RBI Circular further instructs all the banks to put in place systems to ensure straight-through processing (STP) based confirmation processing. The beneficiary bank shall ensure that such confirmation message is sent as soon as the amount is credited to the beneficiary account in CBS while the confirmation message from the remitting bank shall be necessarily sent on a real time basis and in any case not beyond one hour after receipt of credit message from the beneficiary bank.

The system of sending positive confirmation to the customers shall be operationalised by banks at the earliest but not later than two months from the date of this Circular. – ***[DPSS (CO) RTGS No.1049/04.04.016/2018-19, dated 15th November, 2018]***

4) RBI ISSUED GUIDELINES FOR VALUE FREE TRANSFER (VFT) OF GOVERNMENT SECURITIES

The RBI *vide* present Circular has issued separate directions for Value Free Transfer of Government Securities that enable more efficient operations in the Government securities market. VFT of the government securities shall mean transfer of securities from one SGL/CSGL to another SGL/CSGL account, without consideration. Such transfers could be on account of posting of margins, inter-depository transfers of government securities arising from trades in exchanges between Demat account holders of different depositories, gift/inheritance and change of custodians etc. VFT would also be required in the case of distribution of securities to the beneficiary De-mat/gilt accounts on allotment after participation in the non-competitive segment of the primary auction. – ***[IDMD.CDD.No.1241/11.02.001/2018-19, dated 16th November, 2018]***

5) RBI EASES EXTERNAL COMMERCIAL BORROWING (ECB) HEDGING PROVISIONS

The RBI has eased norms for ECBs by reducing the mandatory hedging provision to 70% from the current 100%. The relaxed norms will apply to the ECBs with a maturity period between 3 and 5 years. It has been clarified that the ECBs raised prior to this Circular will be required to mandatorily roll over their existing hedge only to the extent of 70% of outstanding ECB exposure. – ***[A.P. (DIR Series) Circular No.15, dated 26th November, 2018]***

6) RBI RAISES INTEREST SUBSIDY FOR MSME SECTOR EXPORTERS

RBI has increased w.e.f. November 02, 2018 Interest Equalisation rate from 3% to 5% in respect of exports by the Micro, Small & Medium Enterprises (MSME) sector manufacturers under the Interest Equalisation Scheme on Pre and Post Shipment Rupee Export Credit. – ***[DBR.Dir.BC.No.09/04.02.001/2018-19, dated 29th November, 2018]***

7) **RBI EASES GUIDELINES TO NBFCS ON SECURITISATION TRANSACTIONS**

In order to encourage NBFCs to securitise/assign their eligible assets, RBI has relaxed the Minimum Holding Period (MHP) requirement for originating NBFCs, in respect of loans of original maturity above 5 years, to receipt of repayment of six monthly instalments or two quarterly instalments (as applicable), subject to the following prudential requirement:
Minimum Retention Requirement (MRR) for such securitisation/assignment transactions shall be 20% of the book value of the loans being securitised/20% of the cash flows from the assets assigned. – ***[DNBR (PD) CC.No.95/03.10.001/2018-19, dated 29th November, 2018]***

*****

FOREIGN TRADE

1) **AMENDMENT IN PARA 4.32(I) OF CHAPTER 4 AND IN PARA 6.01(A) OF CHAPTER 6 OF THE FOREIGN TRADE POLICY 2015-20**

Para 4.32(i) and Para 6.01(a) of Foreign Trade Policy 2015-20 are amended to allow export of findings like posts, push backs, locks which help in collating the jewellery pieces together, containing gold of 3 carats and above up to a maximum limit of 22 carats only from domestic tariff area and EOU/ EHTP/STP/BTP Units. **– *[No.01/94/180/236/AM19/PC-4, 5th November, 2018 (NCDRC)]***

2) **AMENDMENT IN PARA 2.54 OF THE HANDBOOK OF PROCEDURES, 2015-2020.**

The period for installation and operationalisation of Radiation Portal Monitors and Container Scanner in the designated ports is extended up to 31.03.2019. Such sea ports which fail to meet the deadline will be derecognised for the purpose of import of un-shredded metallic scrap w.e.f 1st April, 2019. ***–[No.01/89/180/53/AM-01/PC-2 (B)/ e – 2382, 16th November, 2018 (DGFT)]***

3) **INSERTION OF A NEW PROVISION UNDER PARA 2.103 AND AMENDMENT IN PARA 2.104**

Provision for fees for (i) Preferential Certificate of Origin & (ii) Post Verification of self-certified Certificate of Origin under EU-GSP is laid down.

The European Union (EU) has introduced a self-certification scheme for certifying the rules of origin under GSP from 01.01.2017 onwards. Under the Registered Exporter System (REX) introduced from 01.01.2017, exporters with a REX number are able to self-certify the Statement on Origin of their goods being exported to EU under the GSP Scheme. The registration on REX is without any fee or charges. The details of the scheme are at Annex 1 to Appendix 2C.

The competent Local Authorities would undertake post verification of self-certified Certificate of Origin based on the request of the importers/customs agencies of the importing country and the fee to be changed is detailed in Appendix 2K. Agencies may charge TA and DA, as per government rates, separately from the unit.

-[F.No.01/93/180/56/AM-13/PC-2(B)/E-2205, 30, November, 2018 (NCDRC)]

*****

CORPORATE

1) COMPANIES (AMENDMENT) ORDINANCE, 2018

The Companies (Amendment) Ordinance, 2018 has been promulgated by the President with the twin objectives being Ease of Doing Business along with better corporate compliance. The key amendments are:

The provisos of the definition Financial Year in S. 2(41) have been substituted vesting in the Central Government the power to approve the alteration in the financial year of a company. This move will help in declogging the NCLT. Any application pending before the Tribunal as on the date of commencement of the Companies (Amendment) Ordinance, 2018, shall be disposed of by the Tribunal.

Similarly, with a view to declog the NCLT, S. 14 has been amended vesting in the Central Government the power to approve cases of conversion of public companies into private companies. Any application pending before the Tribunal, as on the date of commencement of this Ordinance shall be disposed of by the Tribunal

A new S. 10A regarding Commencement of Business providing that a company incorporated after the commencement of this Ordinance and having a share capital shall not commence any business or exercise any borrowing powers unless a declaration is filed by a director 180 days of the date of incorporation of the company in the prescribed format with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and the company has filed with the Registrar a verification of its registered office. Any default in complying with the requirements shall be liable with a penalty of Rs. 50,000 and every officer in default shall be liable to a penalty of Rs. 1000 for each day during which such default continues but not exceeding an amount of one lakh rupees. Where no declaration has been filed with the Registrar within the stipulated period and the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may initiate action for the removal of the name of the company from the register of companies.

S.53 which prohibits issue of shares at discount has been amended to provide that if a company contravenes the section then such company and every officer who is in default shall be liable to a penalty which may extend to an amount equal to the amount raised through the issue of shares at a discount or five lakh rupees, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of twelve per cent, per annum from the date of issue of such shares to the persons to whom such shares have been issued.

S. 90 regarding Register of significant beneficial owners in a company has been amended to provide that if a person is aggrieved by the order of the Tribunal he may make an application to the Tribunal for relaxation or lifting of the restrictions placed within one year from the date of such order. Also the penalty for failure to register beneficial ownership has been enhanced.

S. 117 has been amended enhancing the penalties for failure to file resolutions and agreements within the prescribed time period. Accordingly, if any company fails to file the resolution/agreement, such company shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of twenty-five lakh rupees and every officer of the company who is in default including liquidator of the company, if any, shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees.

S. 197(7) prohibiting an independent director from receiving any stock options or profit related commission has been omitted. Similarly, the penalty for contravention of S. 197 has been amended.

S. 441 amended enlarging the pecuniary jurisdiction of Regional Director by enhancing the limit up to Rs. 25 Lakh as against earlier limit of Rs. 5 Lakh

Many of the amendments are related to corporate compliance and corporate governance such as greater accountability with respect to filing documents related to creation, modification and satisfaction of charges; non-maintenance of registered office to trigger de-registration process holding of directorships beyond permissible limits to trigger disqualification of such directors and shifting of jurisdiction of 16 types of corporate offences from the special courts to in-house adjudication, which is expected to reduce the case load of Special Courts enabling them to concentrate on serious corporate offences. ***-[Ministry of Corporate Affairs, 2nd November, 2018]***

2) SCHEDULE IV OF THE ARBITRATION AND CONCILIATION ACT, 1996 AMENDED

The Ministry of Law and Justice by a Notification has substituted the Fourth Schedule of Arbitration and Conciliation Act, 1996 which regularizes the fees of arbitrators in domestic arbitration. In the Fourth Schedule to the Arbitration and Conciliation Act, 1996, under the heading 'Sum in dispute', against the entry 'Above Rs.10,00,00,000 and up to Rs.20,00,00,000', the model fee is inadvertently mentioned as *'Rs.12,37,500 plus 0.75 per cent. of the claim amount over and above Rs.1,00,00,000/'* instead of *'Rs.12,37,500 plus 0.75 per cent. Of the claim amount over and above Rs.10,00,00,000/'*. Hence, the said Schedule is amended to rectify the above with effect from the date the Arbitration and Conciliation (Amendment) Act, 2015 came into force (i.e. October 23, 2015). Further, it has been certified that no party to arbitration will be prejudicially affected by the retrospective effect being given to this amendment. The notification shall be deemed to have come into force on October 23, 2015. ***–[Ministry of Corporate Affairs, November 12, 2018 (MCA)]***

*****

SECURITIES

1) SEBI FURTHER STREAMLINES THE PROCESS OF PUBLIC ISSUE OF EQUITY SHARES AND CONVERTIBLES

With a view to further streamline the process and methodologies associated with public issue fund raising process, SEBI has to introduce the use of Unified Payments Interface (UPI) as a payment mechanism with Application Supported by Block Amount (ASBA) for applications in public issues by retail individual investors through intermediaries (Syndicate members, Registered Stock Brokers, Registrar and Transfer agent and Depository Participants). The proposed alternate payment mechanism and consequent reduction in timelines shall be introduced in a phased manner as below:

Phase I: From January 01, 2019, the UPI mechanism for retail individual investors through intermediaries will be made effective along with the existing process and existing timeline of T+6 days. It shall continue for a period of 3 months or floating of 5 main board public issues, whichever is later.

Phase II: For applications by retail individual investors through intermediaries, the existing process of physical movement of forms from intermediaries to Self-Certified Syndicate Banks (SCSBs) for blocking of funds shall be discontinued and only the UPI mechanism with existing timeline of T+6 days will continue, for a period of 3 months or floating of 5 main board public issues, whichever is later.

Phase III: Subsequently, final reduced timeline will be made effective using the UPI mechanism.

The important highlights of the public issue process are as follows:

New entities/mechanisms introduced: As a part of the public issue process, new entities/mechanisms are introduced – (a) National Payments Corporation of India (NPCI) is an umbrella organization for all retail payments in India setup with the guidance and support of RBI and Indian Banks Association (IBA); (b) Unified Payments Interface (UPI) is an instant payment system developed by the NPCI. It enables merging several banking features, seamless fund routing & merchant payments into one hood and allows instant transfer of money between any two persons' bank accounts using a payment address which uniquely identifies a person's bank a/c; and (c) Sponsor Bank means a Banker to the Issue registered with SEBI which is appointed by the Issuer to act as a conduit between the Stock Exchanges and NPCI in order to push the mandate collect requests and / or payment instructions of the retail investors into the UPI;

Channels for making application: For the purpose of public issues, UPI would allow facility to block the funds at the time of application. Under UPI as the payment mechanism, various channels for making application in public issue by various categories of investors such as Retail Individual Investor (RII), Qualified Institutional Buyer (QIB) and Non Institutional Investor (NII)

Timelines: An indicative process flow for applications in public issue submitted by retail individual investor is provided in Annexure I to this Circular. Similarly, revised indicative timelines for various activities in Phase I & II are specified at Annexure II and Annexure III, respectively, to this Circular. The timelines for Phase III will be notified subsequently.

Process of becoming a Sponsor Bank: Banks desirous of becoming Sponsor Bank and to be eligible to be appointed as a Sponsor Bank by the Issuer shall- (a) register with SEBI as Bankers to an Issue in terms of SEBI (Bankers to an Issue) Regulations, 1994; (b) obtain UPI certification as specified, with NPCI; (c) conduct mock trial run of the systems with stock exchange and Registrar and Transfer Agent (RTA), and certify to SEBI about readiness to act as a Sponsor Bank and for inclusion of their name in SEBI's list of Sponsor Bank, as per the format specified in Annexure IV. Such Banks shall submit the aforesaid certification to SEBI, latest by **December 15, 2018**, for uploading the names of such Sponsor Banks on SEBI website.

Process of UPI 2.0 Certification by Self Certified Syndicate Banks (SCSBs): Similarly, all SCSBs offering facility of making application in public issues shall also provide facility to make application using UPI. The SCSBs shall undertake necessary certification with NPCI, certify to SEBI about readiness to provide facility to investor to make application using UPI as an alternate payment mechanism, as per Annexure V and submit the aforesaid certification to SEBI, latest by **December 15, 2018**, for uploading the names of such SCSBs on SEBI website.

Validation by Depositories: The details of investor viz. PAN, DP ID / Client ID, entered in the Stock Exchange platform at the time of bidding, shall be validated by the Stock Exchange/s with the Depositories on real time basis.

Number of applications per bank account: For maintaining parity across the various channels for submitted applications, an investor making application using any of the aforesaid channel, shall use only his/her own bank account or only his/her own bank account linked UPI ID to make an application in public issues.

Obligations of the Issuer: The issuer shall appoint one of the SCSBs as Sponsor Bank to act as a conduit between the Stock Exchanges and NPCI in order to push the mandate collect requests and / or payment instructions of the retail investors into the UPI. The Sponsor Bank appointed by the issuer may be the same as the bank with whom the public issue account has been opened.

Other requirements: The details of commission and processing fees payable to each intermediary and the timelines for payment shall be disclosed in the offer document. The intermediaries shall provide necessary guidance to their investors in use of UPI while making applications in public issues etc. – ***[SEBI/HO/CFD/DIL2/CIR/P/2018/138, 1st November, 2018 (SEBI)]***

2) SEBI STANDARDIZES PROCEDURE FOR TRANSFER OF SECURITIES HELD IN PHYSICAL FORM

In order to standardise documentation and procedure for transfer of securities held in physical form, SEBI has issued a circular laying down new guidelines which will facilitate processing of pending applications. SEBI had noticed that RTAs seek various documents for effecting transfer of securities and the documents sought vary across RTAs. To remove the difficulties faced by transferees in providing these documents, SEBI in consultation with Registrars Association of India (RAIN) has modified the documentation / procedure for transfer of physical securities is modified as follows:

Non-availability of PAN of the transferor for transfer deeds executed prior to December 01, 2015 - Registrars tend to reject transfer deeds executed before the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR) which were notified on 1 December 2015, due to non-availability of PAN of the transferor. It is clarified that transfer deeds executed prior to notification of LODR may be registered with or without the PAN of the transferor as per the requirement of quoting PAN under the applicable Income Tax Rules.

Mismatch of name in PAN card vis-a-vis name on share certificate/ transfer deed: In such cases, transfer shall be registered on submission of any of the following additional documents explaining the difference in names: (a) Copy of Passport; (b) Copy of legally recognized Marriage Certificate; (c) Copy of gazette notification regarding change in name; and (d) Copy of Aadhar Card.

Other mismatches: In case of a mismatch in transferor's signature or if the signature is unavailable, the procedure has been simplified. The following documents are required from the transferee: An indemnity bond from the transferee in the format prescribed in Annexure A of the circular; (b) Copy of address proof; (c) Copy of driving license; and (d) An undertaking that the transferee will not transfer/Demat the physical securities until the lock-in period specified in the Circular is completed.

The documents will be verified by the registrar with KYC documents. Then, the company/RTA will publish an advertisement in the newspapers, in respect of the transfer, seeking objection, if any, within 30 days of the advertisement. The transfer will take effect in case no objection is received after 30 days newspaper advertisement. The securities so transferred shall bear a stamp affixed by the company / RTA stating that these securities shall be under lock-in for 6 months from the date of registration of transfer and should not be transferred / dematerialized during the said period

Similar procedure will be followed when documents essential for transfer is missing or the transferor is not co-operative.

In case the bank attested address of the transferor differs from the records available with the company / RTA, companies/ RTAs shall register the transfer by updating the new address as attested by the bank. Further, an intimation may also be sent by the RTA with regard to the updation of address on the old and new address of the transferor. – ***[SEBI/HO/MIRSD/DOS3/CIR/P/2018/139, 6th November, 2018 (SEBI)]***

3) SEBI ISSUES STRICTER DISCLOSURE REGIME FOR CREDIT RATING AGENCIES

SEBI has issued stricter disclosure guidelines for credit rating agencies (CRAs). Under the new framework, CRAs will have to make disclosures on factors such as promoter support, linkages with subsidiaries and liquidity position for meeting near-term payment obligations. The guidelines require:

Disclosures in the Press Release regarding Rating Actions: SEBI by its Circular dated

November 01, 2016, had prescribed the standard format for press release regarding rating action by CRAs. in order to enable investors to understand underlying rating drivers better and make more informed investment decisions, CRAs shall make the following specific disclosures in the section on "Analytical Approach" in the Press Release: (a) When a rating factors in support from a Parent/ Group/ Government, with an expectation of infusion of funds towards timely debt servicing, the name of such entities, along with rationale for such expectation, may be provided. (b) When subsidiaries or group companies are consolidated to arrive at a rating, list of all such companies, along with the extent (e.g. full, proportionate or moderate) and rationale of consolidation, may be provided.

The Press Release shall also include a specific section on "Liquidity", that will highlight parameters like liquid investments or cash balances, access to unutilised credit lines, liquidity coverage ratio, adequacy of cash flows for servicing maturing debt obligation among others. CRAs shall also disclose any linkage to external support for meeting near term maturing obligations.

Rating Criteria

CRAs may review their rating criteria with regard to assessment of holding companies and subsidiaries in terms of their inter-linkages, holding company's liquidity, financial flexibility and support to the subsidiaries, etc.

While monitoring of repayment schedules, CRAs will have to analyse the deterioration in the liquidity conditions of the issuer and also take into account any asset-liability mismatch.

SEBI has also asked CRAs to monitor sharp deviations in bond spreads with relevant benchmark yield. Such deviations will have to be treated as a "material event."

Average Rating Transition Rates for long-term instruments: CRAs shall publish their average one-year rating transition rate over a 5-year period, on their respective websites, which shall be calculated as the weighted average of transitions for each rating category, across all static pools in the 5-year period in the prescribed format.

Other Disclosures:

Each CRA shall furnish data on sharp rating actions in investment grade rating category to Stock Exchanges and Depositories for disclosure on website on half-yearly basis, within 15 days from the end of the half-year (31st March/ 30th September).

SEBI has also clarified that the half-yearly internal audit, mandated under Regulation 22 of the SEBI (Credit Rating Agencies) Regulations, 1999 and Circular dated January 06, 2010, shall also cover adherence to the prescribed methodology for calculation of transition rates and default rates. ***–[SEBI/ HO/ MIRSD/ DOS3/CIR/P/2018/140, 13th November,2018 (SEBI)]***

4) SEBI ASKS LISTED FIRMS TO DISCLOSE COMMODITY RISKS, HEDGING IN ANNUAL REPORT

To benefit the shareholders and to bring clarity in disclosures, and pursuant to the recommendations of the Uday Kotak-led Corporate Governance Committee, SEBI has issued a circular mandating listed entities to make disclosures regarding commodity price risk and hedging activities in the prescribed format (Annexure A of the Circular) in the corporate governance report section of the annual report of a listed entity. SEBI has accepted the following recommendations of the Committee:

The listed entities should disclose their risk management activities during the year, including their commodity hedging positions in a more transparent, detailed and uniform manner for easy understanding and appreciation by the shareholders.

For the consistent implementation of the requirements of the SEBI LODR Regulations regarding disclosure of commodity risks and other hedging activities across listed companies, a detailed format along with the periodicity of the disclosures may be outlined by SEBI which would depict the commodity risks they face, how these are managed and also the policy for hedging commodity risk, etc. followed by the company for the purpose of disclosures in the annual report. – ***[SEBI/HO/CFD/CMD1/CIR/P/2018/0000000141, 15th November, 2018 (SEBI)]***

5) SEBI (DELISTING OF EQUITY SHARES) (SECOND AMENDMENT) REGULATIONS, 2018

SEBI has amended the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 as follows:

The definition of Acquirer has been added while the definition of Company has been amended in conformance with Companies Act, 2013. The definition of promoter group has been deleted and the definition of 'public shareholders' has been substituted. Accordingly, 'public shareholders' shall mean the holders of equity shares, other than promoters, promoter group and persons acting in concert with them; acquirer(s) and persons acting in concert with such acquirer(s); and holders of depository receipts issued overseas against equity shares held with a custodian and such custodian holding the equity shares.

Reg. 10(3) regarding public announcement has been amended to provide that the public announcement shall also specify a date, being a day not later than one working day (earlier thirty working days) from the date of the public announcement, which shall be the 'specified date' for determining the names of shareholders to whom the letter of offer shall be sent. Reg. 10(4) requires the acquirer or promoter to appoint a merchant banker registered with the Board and such other intermediaries as are considered necessary, before making the public announcement. An explanation has been inserted which states that the merchant banker conducting due diligence on behalf of the company may also act as the manager to the delisting offer.

Reg. 11 requires acquirer or promoter to open an escrow account while Reg. 11(3) provides that the escrow account shall consist of either cash deposited with a scheduled commercial bank, or a bank guarantee in favour of the merchant banker, or a combination of both. An explanation has been inserted providing that the cash component of the escrow account may be maintained in an interest bearing account, provided that the merchant banker ensures that the funds are available at the time of making payment to shareholders.

Reg. 12(4) requires that the letter of offer shall be accompanied with a bidding form for use of public shareholders and a form to be used by them for tendering shares. An explanation has now been inserted stating that an eligible public shareholder may participate in the delisting offer and make bids even if he does not receive the bidding form or the tender offer /offer form and such shareholder may tender shares in the manner specified by the Board.

Reg. 14 provides the right of shareholders to participate in the book building process. Reg. 14(3) provides that any holder of depository receipts issued on the basis of underlying shares held by a custodian and any such custodian shall not be entitled to participate in the offer. Deleting sub-reg (4), new proviso has been added to reg. 14(3) stating that any holder of depository receipts shall be allowed to participate in the book building process under Reg. 14 (1) after exchanging such depository receipts with the shares of the class that are proposed to be delisted.

Reg. 15(2) provides that the floor price shall be determined in terms of Reg. 8 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. An explanation has been added providing that the reference date for computing the floor price would be the date on which the recognized stock exchange/s were required to be notified of the board meeting in which the delisting proposal would be considered.

Reg 16. has been amended to now provide the 'Right of the promoter to either make a counter offer or reject the offer' instead of 'Right of the promoter not to accept the offer price'. Accordingly a new sub-reg (1A) has been added providing that If the price discovered in terms of regulation 15 is not acceptable to the acquirer or the promoter, the acquirer or the promoter may make a counter offer to the public shareholders within two working days of the price discovered under regulation 15.However, the counter offer price shall not be less than the book value of the company as certified by the merchant banker.

Subsequently, Reg. 17 has been renumbered as 17(1) and amended to read – *"If a counter offer has not been made by the acquirer or promoter in accordance with regulation 16 (1A), an offer made under chapter III shall be deemed to be successful only if ………"* Further, an explanation has been inserted after the proviso to Reg. 17(1)(b). The explanation states that if the acquirer/merchant banker sends the letters of offer to all the shareholders by registered/speed post through India Post and is able to provide a detailed account regarding the status of delivery of the letters of offer (whether delivered or not) sent through India Post, the same would be considered as a deemed compliance with the proviso. Further, if the acquirer or the merchant banker is unable to deliver the letter of offer to certain shareholders by modes other than speed/registered post of India Post, efforts should be made to deliver the letters of offer to them by speed/registered post through India Post. In that case, a detailed account regarding the status of delivery of letter of offer (whether delivered or not) provided from India Post would also be considered as deemed compliance with the proviso. The existing explanation has been renumbered as 'Explanation II'.

A new sub-reg. (2) has been added to Reg. 17 providing that if a counter offer has been made by the acquirer or promoter in accordance with regulation 16(1A), an offer made under chapter

III shall be deemed to be successful only if the post offer promoter shareholding (along with the persons acting in concert with the promoter) taken together with the shares accepted at the counter offer price reaches ninety per cent. of the total issued shares of that class excluding the shares which are held by a custodian and against which depository receipts have been issued overseas

In Reg. 23, the existing sub-regulation (1) has been renumbered as sub-regulation (2) while the existing sub-regulation (2) has been re-numbered as sub-regulation (1) and the words "sub-regulation (1)" appearing therein shall be substituted with the words "sub-regulation (2)".

The existing Reg. 24 has been numbered as sub-regulation (1) and new sub-reg (2) has been added providing that in case of companies whose fair value is positive— (a) such a company and the depositories shall not effect transfer, by way of sale, pledge, etc., of any of the equity shares held by the promoters/promoter group and the corporate benefits like dividend, rights, bonus shares, split, etc. shall be frozen for all the equity shares held by the promoters/ promoter group, till the promoters of such company provide an exit option to the public shareholders; (b) the promoters and whole-time directors of the compulsorily delisted company shall also not be eligible to become directors of any listed company till the exit option as stated in clause (a) above is provided. ***–[SEBI Notification, 14th November, 2018]***

6) SEBI ASKS LISTED COMPANIES TO DISCLOSE REASONS FOR DELAY IN SUBMISSION OF FINANCIAL RESULTS

Regulation 33 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("Listing Regulations"), *inter-alia,* specifies timelines for submission of financial results by listed entities. SEBI noted that there have been delays in submission of financial results by certain listed entities in the past, but the reasons were not brought out clearly. In such cases, the investors were often left unaware as to the reasons for such delays which may have had an impact on their investment decision. Hence, a need for disclosure of reasons for delay in submission of financial results arises. Accordingly, if any listed entity does not submit its financial results in accordance with the timelines specified in Regulation 33, the listed entity shall disclose detailed reasons for such delay to the stock exchanges within one working day of the due date of submission for the results. However, if the decision to delay the results was taken by the listed entity prior to the due date, the listed entity shall disclose detailed reasons for such delay to the stock exchanges within one working day of such decision. ***–[CIR/CFD/CMD-1/142/2018, 19th November, 2018 (SEBI)]***

7) SEBI ISSUES FRAMEWORK ON FUND RAISING BY ISSUANCE OF DEBT SECURITIES BY LARGE ENTITIES.

Pursuant to Union Budget announcement for 2018-19 and its discussion paper of July 20, 2018, SEBI has issued framework for raising funds by large corporates by issuance of debt securities as follows:

For the entities following April-March as their financial year (FY), the framework will come into effect from **April 1, 2019**, and for the firms which follow calendar year as their financial year, the guidelines will become effective **January 1, 2020.**

The framework is applicable to all listed entities (except for Scheduled Commercial Banks), which as on last day of the FY (i.e. March 31 or December 31) have: (a) their specified securities/debt securities/ non-convertible redeemable preference share, listed on a recognised stock exchange(s); and (b) an outstanding long term borrowing of Rs. 100 crores or above, where outstanding long-term borrowings shall mean any outstanding borrowing with original maturity of more than 1 year and shall exclude external commercial borrowings and inter-corporate borrowings between a parent and subsidiary(ies); and (c) a credit rating of "AA and above", where credit rating shall be of the unsupported bank borrowing or plain vanilla bonds of an entity, which have no structuring/ support built in; and in case, where an issuer has multiple ratings from multiple rating agencies, highest of such rating shall be considered for the purpose of applicability of this framework.

Such firms shall be considered as **Large Corporates (LC).**

Such a LC shall raise not less than 25% of its incremental borrowings, during the financial year subsequent to the financial year in which it is identified as a LC, by way of issuance of debt securities.

For FY 2020 and 2021, the requirement of meeting the incremental borrowing norms shall be applicable on an annual basis. From the FY 2022, the requirement of mandatory borrowing by a large corporate in a financial year will need to be met over a contiguous block of two years. Further, at the end of the block, if there is any deficiency in the requisite bond borrowing, a monetary penalty of 0.2 per cent of the shortfall will be levied and the same will be paid to the stock exchange.

A listed entity, identified as an LC, will have to disclose the fact that they are identified as a LC to the exchanges, within 30 days from the beginning of a financial year. Listed entities shall also disclose details of the incremental borrowings done during the financial year within 45 days of the end of the financial year. These disclosures will have to be certified both by the company secretary and the chief financial officer of the company and also form part of audited annual financial results of the entity.

Exchanges will have to collate the information about the companies disclosed on their platform and submit the same to the regulator within 14 days of the last date of submission of annual financial results. In the event of a shortfall in the requisite borrowing, exchanges will collect the fine and the penalty so collected will be remitted by the exchange to SEBI"s Investor Protection and Education Fund (IPEF) within 10 days from the end of the month in which the fine was collected. –

[SEBI/HO/DDHS/CIR/P/2018/144, 26thNovember, 2018 (SEBI)]

8) IN THE MATTER OF SATYAM COMPUTER SERVICES LTD. (SCSL)

SEBI had passed final Order dated July 15, 2014 ('1st SEBI order') against B. Ramalinga Raju ('Noticee 1') and B. Rama Raju ('Noticee 2'), Promoters/Directors of Satyam Computer Services Ltd. ('SCSL') for having orchestrated fraudulent and manipulative practices by falsifying financial statements of SCSL and for having made illegal gains by indulging in insider trading in SCSL's shares and violating various provisions of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 ('PFUTP Regulations'); and Regulations 3 & 4 of the SEBI (Prohibition of Insider Trading) Regulations, 1992 ('PIT Regulations'). Subsequently, SEBI passed another final Order dated September 10, 2015 ('2nd SEBI order') against the relatives/associates of Noticees 1& 2 including B. Suryanarayan Raju ('Noticee 3') and SRSR Holdings ('Noticee 4') (collectively – Noticees) . By this Order, Noticees were considered to be insiders in SCSL and dealing in their shares on the basis of unpublished price sensitive information.

Appeals were separately preferred against both the orders. W.r.t the 1st SEBI Order, SAT upheld SEBI's findings and observed infirmities with the directions of disgorgement and debarment passed in the 1st SEBI order. w.r.t, 2nd SEBI Order, SAT set aside the directions w.r.t the quantum of illegal gain to be disgorged, the period of restraint in dealing in securities and accessing the securities market. Appeal was filed before SC against SAT 2nd Order wherein only Noticee 3 & 4 held to be liable for violation of the PIT Regulations and accordingly exonerated relatives of Noticee 1 & 2. Further, pursuant to both the SAT Orders the matter was remanded to SEBI.

The first issue framed before SEBI was whether the benefit of intrinsic value can be given to the Noticees while computing disgorgement? The WTM observed that the first and second SAT Orders have not made any specific mention of the need to consider the intrinsic value of the share while computing the amount to be disgorged from the noticees despite a specific plea to that effect from the Noticees. While the Hon'ble SAT directed WTM to give the benefit of cost of acquisition and taxes paid while computing illegal gains, its order is conspicuously silent on the aspect of "intrinsic value". Since the same set of issues were discussed in his order dated October 16, 2018 with respect to the employees of SCSL, he relied on the same observations made in that order.

Secondly, SEBI raised before itself the question, whether levy of interest on disgorgement amount at the rate of 12% from 2001 onwards is justified. SEBI *vide* its Order had directed payment of interest @12% p.a on the amount to be disgorged be calculated from the date on which Ramalinga Raju made the confession that made public the factum of the fraud in the books of Satyam. SEBI referred to the SC's decision in *Dushyant N Dalal and Another v. SEBI dated October 04, 2017,* wherein it was observed that interest could be levied right from the inception of the cause of actions up to the date of commencement of recovery proceedings of such interest. SEBI upheld its own order imposing interest on the disgorgement amount from the date of confession which was subsequent date to the date of the cause of action.

Further, SEBI was faced by the question of the quantum of illegal gain to be disgorged from each of the notices; Whether disgorgement from SRSR Holdings should at all cover the loan availed by it on the pledge of SCSL shares and the disgorgement from other Noticees would stand reduced or not.

SEBI rejected Noticee 1 & 2's submission w.r.t end use of the gains to fund philanthropic purposes, remarks that end use of gains made by executing fraudulent trades or indulging in insider trading does not change the illegal nature of receipts. W.r.t disgorgement from SRSR Holdings Pvt. Ltd., SEBI noted that lenders had liquidated the SCSL shares owned by SRSR Holdings in order to realise the sum advanced to SRSR, when there was margin shortfall. SEBI opined that the pledging of shares and raising funds was done by SRSR on the basis of unpublished price sensitive information regarding the inflation in share price. This pledge transaction entered into by SRSR cannot be treated as a loan transaction simpliciter. Rather, it is an ingeniously structured transaction, to park the SCSL shares with the lenders and raise a loan to the tune of Rs 1219.25 crore and to eventually allow the lenders to realise the loan by liquidation of SCSL shares in the market. SEBI observed that the amounts raised by SRSR for the benefit of the Satyam group entities to the extent of the loan amount realised by liquidation of SCSL shares would become part of the illegal gains liable to be disgorged. Upon re-appreciation of the facts of the case, SEBI held that amongst the relatives/associates, only Noticee 3 & 4 played a role in the fraud in collusion with Noticee 1 & 2. SEBI, consequently, held Noticees jointly and severally liable to disgorge the illegal gain quantified in this Order arising from sale and pledge of SCSL shares.

Furthermore, SEBI was asked whether an appropriate period of restraint to be imposed on each Noticee can be arrived at with supporting reasons.

SEBI observed that Ramalinga Raju and Rama Raju have perpetrated the fraud at SCSL which affected the integrity and credibility of the securities market. As far as Suryanarayana Raju is concerned, the Hon'ble Supreme Court has categorically pointed out his complicity in the fraud. As far as SRSR Holdings is concerned its liability in the fraud as upheld by SAT has been confirmed by the Hon'ble Supreme Court. Hence it found no reason to distinguish between SRSR Holdings and Suryanarayana Raju on the one hand and Ramalinga and Rama Raju on the other hand. All of them could be considered equal perpetrators of the same scam and therefore the period of restraint needed not be different.

SEBI partially modified 2nd SEBI Order and restrained B Ramalinga Raju, B. Rama Raju, B. Suryanarayana Raju and SRSR Holdings Pvt. Ltd. from accessing the securities market. SEBI further prohibited them from buying, selling or otherwise dealing in securities, directly or indirectly for a period of 14 years. SEBI clarified that period of restraint already suffered by Noticees shall be taken into account for calculating the period of restraint now imposed. Accordingly, SEBI directed Noticees to disgorge the wrongful gain amounting to over Rs. 813 Cr. within 45 days from the date of Order. **– *[WTM/GM/EFD/ 74 / 2018-19, 2nd November, 2018 (SEBI)]***

*****

COMPETITION

1) ALL INDIA ONLINE VENDORS ASSOCIATION ("AIOVA") V. FLIPKART INDIA PRIVATE LIMITED

The present information has been filed under Section 19(1)(a) of the Competition Act, 2002 ('the Act') by All India Online Vendors Association ('the Informant'/AIOVA) against Flipkart India Private Limited (Flipkart India/ 'OP-1') and Flipkart Internet Private Limited (Flipkart Internet/ 'OP-2') (collectively, OPs/ Flipkart) alleging contravention of the provisions of Section 4 of the Act. AIOVA is engaged in selling on e-commerce marketplaces through platforms like Flipkart. AIOVA based its allegations on an article by the ET Retail.com, whereby it was brought to light that certain arrangements were made between small vendors and big vendors like WS Retail on e-commerce platforms. AIOVA alleged preferential treatment to certain sellers by Flipkart which led to unfair trade practices. It also asserted that this led to a direct conflict of interest with other competitors on the e-commerce platform. Flipkart, being dominant in the e-commerce platform for selling goods, was thus alleged to have abused its dominant position in the said market. Thus, the information was filed under Section 19(1) (a) of the Act.

The issue farmed for the Competition Commission of India was whether Flipkart is in a dominant position in the marketplace for selling of goods online in India.

CCI observed that to examine any allegation of abuse of dominant position, it is first appropriate to define the relevant markets. Examining the rival contentions on the relevant market advanced by both parties carefully, CCI rejected Flipkart's submissions suggesting delineation of two distinct markets and concluded that the impugned conduct can be examined with reference to delineation of one relevant market alone which is relatable to OP-2. CCI observed that Flipkart Internet (OP-2) operates a marketplace-based e-commerce platform, which facilitates trade between end-customers and third party seller.

The CCI held that e-commerce market being a recent phenomenon is still an emerging concept and has also led to offline retailers entering into partnerships with e-commerce companies in order to attract consumers. It also noted that there is a difference between online retail store and online marketplace platform. Emphasizing on the difference between an online retail store, and an online marketplace platform such as Amazon or Flipkart, CCI observed that the sellers would be interested in selling on the platforms when increasingly high number of buyers visit an online platform, thus characterizing the online platforms with network effects. In the case of online retail stores, there are hardly any network effects though there may be efficiencies of scale. Further, as per the Guidelines for Foreign Direct Investment (FDI) on E-commerce issued by Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India, FDI is not permitted in inventory based model of e-commerce. However, 100% FDI under automatic route is permitted in marketplace model of e-commerce. For online market platforms, the conditions of competition are homogeneous Pan-India and as such, the relevant geographic market in this case may be taken as 'India'. Resultantly, the relevant market in the instant case may be defined as ***"Services provided by online marketplace platforms for selling goods in India".***

On the issue of dominance, the CCI observed that not only Flipkart but other e-commerce platforms like Amazon, Snapdeal, Paytm Mall, etc. are multiple competitors in the market. Although Flipkart has significant resources, yet, it cannot be disputed that the closest competitor to Flipkart is Amazon. Also, there are new entrants in the market that stand in the way of Flipkart being the dominant one in the market place. Looking at the present market construct and structure of online marketplace platforms market in India, CCI concluded that it does not appear that any one player in the market is commanding any dominant position at this stage of evolution of market. Thus, Flipkart India is not dominant in the relevant market.

Lastly, the Commission observes that the marketplace based e-commerce model is still a relatively nascent and evolving model of retail distribution in India and the Commission is cognizant of the technology-driven nature of this model. Recognizing the growth potential as well as the efficiencies and consumer benefits that such markets can provide, the Commission is of the considered opinion that any intervention in such markets needs to be carefully crafted lest it stifles innovation. ***–[Case No. 20 of 2018, 6th November, 2018, Competition Commission of India (CCI)]***

*****

INDIRECT TAXES

a. CUSTOMS

1) POSTPONEMENT OF IMPLEMENTATION OF INCREASED CUSTOMS DUTY ON SPECIFIED IMPORTS ORIGINATING IN USA

The implementation of increased Customs duty on specified imports originating in USA has been further postponed from 2nd November, 2018 to 17th December, 2018. – ***[Notification No.77/2018-Customs, dated 1st November, 2018]***

2) EXEMPTION TO GOLD AND SILVER IMPORTED UNDER SPECIFIED SCHEMES AMENDED

The CBIC has amended Notification No. 57/2000-Customs dated 08.05.2000 regarding exemption to gold and silver imported under specified schemes. In the said Notification, after the second proviso, the following proviso has been inserted, namely:-

"Provided further that no replenishment of the gold or silver shall be available to the exporter where the exporter avails, in respect of exported product -

(i) Cenvat credit on inputs under the Central Excise Act,1944; or

(ii) input tax credit on inputs or services or both under Chapter V of the Central Goods and Services Tax Act, 2017; or

(iii) refund of input tax credit or refund of integrated tax under section 54 of the Central Goods and Services Tax Act, 2017." – ***[Notification No. 78/2018 – Customs, dated 29th November, 2018]***

3) EXISTING ADD ON "O-ACID" EXTENDED TO "O-ESTER"

The CBIC has extended the existing anti-dumping on "O-Acid" originating in or exported from China PR and imposed *vide* Notification No. 6/2018-Customs (ADD) dated 12th March, 2018 to the imports originating and exported from China PR of "O-Ester". – ***[Notification No. 55/2018-Customs (ADD), dated 15th November, 2018]***

4) **TENTATIVE/PRELIMINARY "CUSTOMS FACILITATING" RULES FOR TRANSSHIPMENT SERVICES AT DOMESTIC PORTS FOR THIRD-COUNTRY EXPORT CARGO FROM BANGLADESH NOTIFIED**

After receipt of references from trade and industry for permitting transit of export cargo from Petrapole to Kolkata Port and Nhavasheva Ports / Kolkata Airport for better cargo evacuation and to improve logistics efficiency of the region, the CBIC has notified the tentative/preliminary procedure for Transhipment of Export Cargo from Bangladesh to third countries through Land Customs Stations (LCSs) to Kolkata Port / Airport, in containers or closed bodied truckscedure. This is a Pilot Program initiated for a period of six months, to gain experience and obtain feedback from industry, so as to build a Regulation which is facilitative as well as include safeguards against any cargo diversion. The facility has been made available from the following LCSs and ports/Air Cargo complexes w.e.f. 5th November 2018:

1. LCS Petrapole - By road to i. Kolkata Port; ii. Air Cargo complex, Kolkata; iii. Nhavasheva.
2. (i) LCS Petrapole & (ii) LCS Gede/Ranaghat - By rail to Nhavasheva port. – ***[Circular No. 42/2018-Customs, dated 2nd November, 2018]***

5) **EXTENSION OF FACILITY OF UPLOADING DIGITALLY SIGNED SUPPORTING DOCUMENTS TO ALL ICES LOCATIONS ON PAN INDIA BASIS**

The CBIC *vide* earlier Circular No. 29/2018-Customs dated 30th August, 2018 introduced the facility of uploading digitally signed supporting documents on a pilot basis at Air Cargo Complex, New Delhi and Chennai Customs House, and members of trade were allowed to use this facility to upload the supporting documents such as Shipping Bills that may be filed on or after 01st September, 2018 on voluntary basis. Now, CBIC has extended the above facility to all ICES locations on PAN India basis for all types of exports under ICES. The procedure for eSANCHIT in exports is similar to the one prescribed for eSANCHIT in imports *vide* Circular No. 40/2017 dated 13th October, 2017. – ***[Circular No. 43/2018-Customs, dated 8th November, 2018]***

6) **BAN ON ELECTRONIC NICOTINE DELIVERY SYSTEMS (ENDS) INCLUDING E--CIGARETTES, E-SHEESHA, E-NICOTINE FLAVOURED HOOKAH ETC.**

Considering the adverse health impact of ENDS/E-Cigarettes and in order to prevent the initiation of nicotine through ENDS by non-smokers and youth, with special attention to vulnerable groups, the Ministry of Health & Family Welfare had issued an advisory dated 28.08.2018 *vide* F.No. P-16012/19/2017-TC to ensure that any ENDS including e-Cigarettes, Heat-Not-Burn devices, Vape, e-Sheesha, e-Nicotine Flavoured Hookah, and the like devices that enable nicotine delivery are not sold, manufactured, distributed, traded, imported and advertised, except for the purpose and in the manner and to the extent, as may be approved under the Drugs and Cosmetics Act, 1940 and Rules made thereunder. In view of this, all the concerned officers are directed to ensure implementation of the aforesaid advisory by referring import consignments of ENDS including e-Cigarettes, Heat-Not-Burn devices, Vape, e-Sheesha, e-Nicotine Flavoured Hookah, and the like devices /products to the Assistant / Deputy Drugs Controller in their jurisdiction. – ***[Circular No. 46/2018- Customs, dated 27th November, 2018]***

b. SERVICE TAX

1) TAX ON SERVICES BY WAY OF GRANTING OF RIGHT OF WAY BY LOCAL AUTHORITIES

The CBIC has exempted the payment of Service Tax on services by way of granting of right of way by local authorities for the period commencing from the 1st of July, 2012 and ending with the 30th of June, 2017. – ***[Notification No. 1/2018-Service Tax, dated 30th November, 2018]***

c. GST

1) SUPPLIES BY PSU TO PSU EXEMPTED FROM APPLICABILITY OF PROVISIONS RELATING TO GST TDS

The CBIC *vide* present Notification has exempted supply from PSU to PSU from applicability of provisions relating to TDS. – ***[Notification No. 61/2018 – Central Tax, dated 5th November, 2018]***

2) EXTENSION OF DUE DATE OF FILING OF VARIOUS FORMS

The CBIC has extended the due date of filing the below forms:

i. FORM GSTR - 1 for taxpayers having aggregate turnover above Rs 1.5 crores and FORM GSTR-3B for taxpayers in Srikakulam district of Andhra Pradesh for the month of September, 2018 and October, 2018 by 30th November, 2018 and 11 districts of Tamil Nadu (Cuddalore, Thiruvarur, Puddukottai, Dindigul, Nagapatinam, Theni, Thanjavur, Sivagangai, Tiruchirappalli, Karur and Ramanathapuram) for the month of October, 2018 by 20th December, 2018. – ***[Notification No. 62/2018 – Central Tax, dated 29th November, 2018 & Notification No. 63/2018 – Central Tax, dated 29th November, 2018]***

ii. FORM GSTR – 7 for the months of October, 2018 to December, 2018 till the 31st day of January, 2019. – ***[Notification No. 66/2018 – Central Tax, dated 29th November, 2018]***

3) CBIC CLARIFIES SCOPE OF PRINCIPAL AND AGENT RELATIONSHIP UNDER SCHEDULE I OF CGST ACT, 2017 IN THE CONTEXT OF DEL-CREDERE AGENT

In commercial trade parlance, a DCA is a selling agent who is engaged by a principal to assist in supply of goods or services by contacting potential buyers on behalf of the principal. With regard to the issue that whether DCA can be treated as an agent under the CGST Act, the Circular reiterated that in case where the invoice for supply of goods is issued by the supplier to the customer, either himself or through DCA, the DCA does not fall under the ambit of agent and in case where the invoice for supply of goods is issued by the DCA in his own name, the DCA would fall under the ambit of agent. It was further clarified that in cases where the DCA is not an agent under Para 3 of Schedule I of the CGST Act, the temporary short-term transaction based loan being provided by DCA to the buyer is a supply of service by the DCA to the recipient on Principal to Principal basis and is an independent supply. Therefore, the interest being charged by the DCA would not form part of the value of supply of goods supplied (to the buyer) by the supplier. It may be noted that *vide* Notification No. 12/2017-Central Tax (Rate) dated 28th June, 2017 (S. No. 27), services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services) has been exempted. – ***[Circular No. 73/47/2018-GST, dated 5th November, 2018]***

4) CLARIFICATION REGARDING COLLECTION OF TAX AT SOURCE BY TEA BOARD OF INDIA

On receipt of a representation from Tea Board, seeking clarification whether they should collect TCS under Section 52 of the CGST Act from the sellers of tea (i.e. the tea producers), or from the auctioneers of tea or from both, it has been clarified that the TCS at the notified rate, in terms of Section 52 of the CGST Act, shall be collected by Tea Board respectively from the -

(i) sellers (i.e. tea producers) on the net value of supply of goods i.e. tea; and

(ii) auctioneers on the net value of supply of services (i.e. brokerage). – ***[Circular No. 74/48/2018-GST, dated 5th November, 2018]***

******

INTELLECTUAL PROPERTY RIGHTS

1) DELHI HIGH COURT CLARIFIES THE RESPONSIBILITIES AND LIABILITIES OF E-COMMERCE INTERMEDIARIES OF IP RIGHTS

This was a for a trade mark infringement suit filed by the manufacturer of luxury shoes, Christian Louboutin Sas against Darveys.com, a Delhi based e-commerce company. The Plaintiff is a manufacturer of luxury shoes and handbags under the name of its founder, Mr. Christian Louboutin, a famous designer of high-end luxury products. The name "Christian Louboutin", in word form and logo form, as also the red sole mark, are registered trademarks in India. The Plaintiff further claims that its products are sold only through an authorized network of exclusive distributors. The Defendants operate a website by the name www.darveys.com, that sells luxury brands. It is the Plaintiff's allegation that the Defendants, offer for sale and sell various products on their website, bearing the luxury brands/names of the Plaintiff. The website further claims that the products are 100% authentic. The Plaintiff has alleged trade mark infringement against the Defendant by *inter alia* selling goods that are counterfeit or impaired. The Defendants also use the image of the founder of the plaintiff, and the names “Christian” and “Louboutin” are used as meta-tags on the Defendant’s website to attract internet traffic.

It was the Defendant’s case that their role is only that of an “intermediary” as under Section 79 of the Information Technology Act, 2009, who book orders, through which the supplies are effected through various sellers.

The issues were i.) Whether the Defendants' use of the Plaintiff's mark, logos and image is protected under Section 79 of the Information Technology Act, 2000; ii.) Whether the Plaintiff is entitled to relief, and if so, in what terms A. E-commerce platforms and their liability as intermediaries.

The Delhi High Court in the present case discussed the meaning of intermediary, International and Indian Position on intermediary liability, role of the Defendant's website and thereafter held that Darveys.com was not just an intermediary and its role was more than an intermediary as it was identifying the sellers, enabling the sellers actively, promoting them and selling the products in India. The Court noted that the conduct of intermediaries, in failing to observe 'due diligence' with respect to IPR, could amount to 'conspiring, aiding, abetting or inducing' unlawful conduct would disqualify it from the safe harbour exemption, as per Section 79(3)(a). The court further held that when an e-commerce website is involved in or conducts its business in such a manner, which would see the presence of a large number of elements enumerated above, it could be said to cross the line from being an "intermediary" to an "active participant". In such a case, the platform or online marketplace could be liable for infringement in view of its active participation. So long as they are mere conduits or passive transmitters of the records or of the information, they continue to be intermediaries, but merely calling themselves as intermediaries does not qualify all e-commerce platforms or online market places as one.

Further, the court also noted that in order to decide whether there is abetment, aid or inducing or authorizing communication of an unlawful act, Sections 101 and 102 of the Trade Marks Act would also be of relevance. When an e-commerce company claims exemption under Section 79 of the IT Act, it ought to ensure that it does not have an active participation in the selling process. In the context of Darveys.com, the active use of its mark, displaying advertisements containing the mark, enclosing the goods with its own packaging and selling them onwards, would all constitute falsification and infringement under Section 29 of the Trademark Act and thereby constitute aid, abetment or inducement under Section 79 of the IT Act.

For Metatags, the court held that the use of meta-tags is illegal as it enables the Defendant to ride on the reputation of the Plaintiff.

Finally, the Delhi High Court decreed the present suit by directing Darveys.com to *inter alia* disclose complete details of all its sellers, their addresses and contact details on its website with immediate effect, to obtain a certificate from its sellers that the goods are genuine, to notify the trademark owner before offering their products for sale (in case of sellers located outside India), to enter into an agreement with the sellers (in case of sellers based in India) guaranteeing the authenticity of the products and consequences of violation, and to remove all metatags consisting of Plaintiff's mark. – ***[Christian Louboutin Sas* v. *Nakul Bajaj & Ors, dated 2nd November, 2018 (Delhi HC)]***

The Delhi High Court made similar observations against the e-commerce website www.shopclues.com in another two judgments passed in the cases of ***Skullcandy Inc Vs. Shri Shyam Telecom & Ors., dated 12th November, 2018 (Delhi HC)*** & ***L'Oreal* v. *Brandworld & Anr., dated 12th November, 2018 (Delhi HC).***

*****

CONSUMER

1) NEGLIGENCE IN AVAILING FREE SERVICE DOES NOT REVOKE DEALER WARRANTY; MANUFACTURER EQUALLY RESPONSIBLE FOR DENIAL OF WARRANTY

National Consumer Disputes Redressal Commission (NCDRC) has directed Tata Motors and one of its dealers to compensate their customer for refusing to repair the vehicle under warranty.

In the instant case, the complainant had purchased a truck from the instant Petitioner. The vehicle was under warranty but the petitioners refused to repair it, forcing the complainant to move the consumer forum in January 2014 against him and also the manufacturing company Tata Motors Limited.

Before the commission, Tata Motors denied any responsibility saying there was no manufacturing defect in the vehicle. The Petitioners stated that they were only the agent of principal Tata Motors Limited and that the warranty is granted by the manufacturer and the Tata Motors Limited in its written statement have clearly denied the applicability of warranty in the present case on the ground that there was negligence on the part of the complainant in maintaining the vehicle.

It was also claimed that the complainant did not avail of three free services in time and therefore, there was a lot of dust over the engine and according to warranty conditions, the warranty had ceased to exist. The dealer, who is an agent of principal Tata Motors, cannot take up the repairs under warranty when the principal has denied the operation of the warranty itself.

The Apex Commission noted that although there has been some delay in getting the free services done. However, this does not imply that the complainant was negligent in maintenance of the vehicle resulting in revoking of the warranty. It ruled that in practice, it is the dealer who repairs the vehicle under the warranty and then settles claim with the manufacturer under terms of their agreement. In this case, the petitioners refused to repair the vehicle under the warranty and therefore, they are equally liable for dishonoring the warranty. ***–[Shiv Motors Private Limited & Anr., v. Neeraj Kumar Tiwari and Anr., 19th November, 2018 (NCDCR)]***

*****

ENVIRONMENT

1) SC SETS ASIDE NGT'S ORDER IMPOSING RS 1 CRORE FINE ON MPCB

The Supreme Court has set aside an Order of the National Green Tribunal's principal bench in Delhi, imposing Rs. 1 crore fine on the Maharashtra Pollution Control Board for not following the tribunal's directions over the pollution caused by industrial units at Mahul village in Ambapada, Mumbai. The Court noticed that the tribunal itself constituted a team comprising senior scientists, engineers of Central Pollution Control Board, National Environmental Engineering Research Institute and MPCB (Maharashtra Pollution Control Board) and it is this committee which was to take further steps for carrying out the directions of the tribunal. Since the committee comprised members from the Central Pollution Control Board and National Environmental Engineering

Research Institute, the Court observed that it was not solely in the hands of the MPCB to stick to the time schedule mentioned in the (National Green Tribunal) Order dated July 17, 2018. – ***[The Times of India, dated 15th November, 2018]***

2) DELHI GOVT SEEKS CLARITY ON TRANSFER OF OLD CARS

The Delhi Government has moved the NGT seeking clarification whether it can restart giving 'No Objection Certificate' (NOC) for transfer of diesel vehicles that are 10-15 years old to identified districts with higher dispersion of air and least density of vehicles. It has also sought clarification on whether a similar process can be followed for transfer of registration of over 15 years old petrol vehicles outside the National Capital Region (NCR). – ***[The Times of India, dated 15th November, 2018]***

*****

NEW DELHI: R-1, SF, Park View Apartments | Hauz Khas Enclave | New Delhi - 110 016, India | Ph: +91-11-2651 0505 | delhi@lexport.in
BANGALORE: 516, 10th A Cross, 29th Main, Sector 1 | HSR Layout | Bangalore - 560 034, India | +91-80-2258 0308 | bangalore@lexport.in
Email: mail@lexport.in