MONTHLY NEWSLETTER
Lexport
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## RBI/FEMA

### 1) NPA DIVERGENCE RULES MADE EASIER FOR BANKS

Banks' disclosure of divergence practice mandated by RBI aims at improving transparency in asset classification and preventing under-reporting of bad loans. It was observed that some banks, on account of low or negative net profit after tax, are required to disclose divergences even where the additional provisioning assessed by RBI is small, which is contrary to the regulatory intent that only material divergences should be disclosed. Therefore, RBI has decided that henceforth, banks should disclose divergences, if either or both of the following conditions are satisfied:

a. the additional provisioning for NPAs assessed by RBI exceeds 10 per cent of the reported profit before provisions and contingencies for the reference period, and
b. the additional Gross NPAs identified by RBI exceed 15 per cent of the published incremental Gross NPAs for the reference period. –

***[DBR.BP.BC.No.32/21.04.018/2018-19, dated 01st April, 2019]***

### 2) ASSIGNMENT OF LEAD BANK RESPONSIBILITY AFTER AMALGAMATION OF VIJAYA BANK AND DENA BANK WITH BANK OF BARODA

Amalgamation of Vijaya Bank and Dena Bank with Bank of Baroda has been notified *vide* Gazette of India Notification G.S.R. 2(E) dated January 2, 2019. The Notification called the 'Amalgamation of Vijaya Bank and Dena Bank with Bank of Baroda Scheme, 2019' has come into force on April 1, 2019. In view of this, the RBI has decided to assign the lead bank responsibility of districts hitherto held by Vijaya Bank and Dena Bank. Accordingly, lead bank responsibility is assigned as described in the present Circular. – ***[FIDD.CO.LBS.BC.No.17/02.08.001/2018-19, dated 01st April, 2019]***

### 3) NORMS FOR BANKS TO SET UP CURRENCY CHESTS

The Committee on Currency Movement (CCM), *inter-alia*, recommended that the Reserve Bank should encourage banks to open large Currency Chests (CCs) with modern facilities and Chest Balance Limit (CBL) of at least Rs. 10 billion. Accordingly, RBI has decided to have the following minimum standards for setting up new CCs:

i. Area of the strong room/ vault of at least 1500 sq. ft. For those situated in hilly / inaccessible places (as defined by Central / State Government/ any appropriate authority), the strong room/ vault area of at least 600 sq. ft.
ii. Processing capacity of 6,60,000 pieces of banknotes per day. For those situated in the

hilly/ inaccessible places, capacity of 2,10,000 pieces of banknotes per day.

iii. Amenability to adoption of automation and adaptability to implement IT solutions.

iv. CBL of Rs.10 billion, subject to ground realities and reasonable restrictions, at the discretion of the Reserve Bank.

v. Adherence to other extant technical specifications issued *vide* DCM (CC) No G-18/03.39.01/2008-09 dated November 14, 2008 relating to construction, etc. – ***[DCM (CC) No.2482/03.39.01/2018-19, dated 08th April, 2019]***

## 4) REINSURANCE AND COMPOSITE INSURANCE BROKERS ALLOWED TO OPEN FOREIGN CURRENCY ACCOUNTS

The extant Regulations regarding opening of foreign currency accounts in India by persons resident in India have been reviewed and it has been notified that the re-insurance and composite insurance brokers registered with IRDA may open and maintain non-interest bearing foreign currency accounts with an AD Bank in India for the purpose of undertaking transactions in the ordinary course of their business. – ***[A.P. (DIR Series) Circular No.29, dated 11th April, 2019]***

## 5) ELIGIBLE NBFCS CAN GET LICENCE TO OFFER FOREX TRANSACTIONS TO INDIVIDUALS

Taking note that a large segment of population is increasingly getting connected with forex transactions on individual accounts, the RBI in order to increase the accessibility and efficiency of services extended to the members of the public for their day-to-day non-trade current account transactions, has decided that Systemically Important Non-Deposit taking Investment and Credit Companies shall be eligible for Authorized Dealer- Category II (AD- Cat II) licence, subject to meeting the following conditions:

i. NBFCs offering such services shall have a 'minimum investment grade rating'.

ii. NBFCs offering such services shall put in place a board approved policy on (a) managing the risks, including currency risk, if any, and (b) handling customer grievances arising out of such activities. A monitoring mechanism, at least at monthly intervals, shall be put in place for such services.

The eligible NBFCs can approach the RBI, Foreign Exchange Department, Central Office, Mumbai for the AD-Cat II licence. – ***[DNBR (PD) CC.No.098/03.10.001/2018-19, dated 16th April, 2019]***

## 6) FOREIGN PORTFOLIO INVESTORS (FPI) ARE NOW PERMITTED TO INVEST IN MUNICIPAL BONDS

As a measure to broaden access of non–resident investors to debt instruments in India, the RBI has declared that FPI are now permitted to invest in municipal bonds. FPI investment in municipal bonds shall be reckoned within the limits set for FPI investment in State Development Loans (SDLs). All other existing conditions for investment by FPIs in the debt market remain unchanged. – ***[A.P. (DIR Series) Circular No. 33, dated 25th April, 2019]***

## 7) TIMELINES FOR IMPLEMENTATION OF THE LEI SYSTEM IN NON-DERIVATIVE MARKETS EXTENDED

Based on the feedback and requests received from market participants, and with a view to enable smoother implementation of the LEI system in non-derivative markets, the RBI has extended the timelines for implementation (Phase I and Phase II) as under:

i. Phase I: Net Worth of Entities above Rs.10000 million – From April 30, 2019 to December 31, 2019;
ii. Phase II: Net Worth of Entities between Rs.2000 million and Rs 10000 million - From August 31, 2019 to December 31, 2019;
iii. Phase III: Net Worth of Entities up to Rs.2000 million – From March 31, 2020 to March 31, 2020. –***[FMRD.FMID.No.15/11.01.007/2018-19, dated 26th April, 2019]***

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## FOREIGN TRADE

### 1) DISCONTINUATION OF ISSUE OF PHYSICAL COPY OF MEISSEIS SCRIPS FOR EDI PORTS WITH EFFECT FROM 10TH APRIL, 2019

In order to improve ease of doing business, it has been decided to discontinue issue of physical copy of MEIS/SEIS scrips by DGFT regional authorities with effect from April 10, 2019. To start with, this facility of paperless scrip will be available for EDI ports only and will not be available for non-EDI/SEZ ports. ***–[Trade Notice:03/2015-2020, 3rd April, 2019 (DGFT)]***

### 2) AMENDMENT IN PARA 2.16 OF HANDBOOK OF PROCEDURES OF FTP-2015-2020.

The validity period of export authorisation for restricted (non-SCOMET) goods has been extended to 24 (twenty four) months. ***–[Public Notice:01/2015-2020, 4th April, 2019 (DGFT)]***

### 3) AMENDMENT IN APPENDIX 2-K OF FOREIGN TRADE POLICY 2015-20

Scale of fee for application for reimbursement of benefits under Transport and marketing Assistance (TMA) has been notified as one thousand Indian rupees. ***–[Public Notice:02/2015-2020, 5th April, 2019 (DGFT)]***

### 4) EXTENSION OF VALIDITY OF PRE-SHIPMENT INSPECTION AGENCIES

Validity of Pre-shipment Inspection Agencies (PSIA) as listed in the Appendix 2G of the Aayat Niryat Forms (A&NF), whose validity expires on or before 30.06.2019 is extended up to 30.06.2019. ***–[Public Notice:03/2015-2020, 11th April, 2019 (DGFT)]***

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## CORPORATE

### 1) MCA EXTENDS THE DATE OF FILING E-FORM CRA-2

On account of Companies (Cost Records and Audit) Amendment Rules, 2018, which mandate the Company to get its cost records audited for the first time under Companies Act, 2013 and pursuant to representations received, MCA has

extended the last date of filing e-form CRA-2 (Form of intimation of appointment of cost auditor by the company to Central Government) without payment of additional fees up to **May 31, 2019. *–[General Circular No. 04/2019, 4th April, 2019 (Ministry of Corporate Affairs)]***

## 2) IBBI CIRCULAR REGARDING FILING OF FORMS E AND G BY IPS AND IPEs

Regulation 7(2)(ca) & 13(2)(ca) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations), requires Insolvency Professionals (IPs) and Insolvency Professional Entity (IPEs) to pay the prescribed fees on or before the 30th of April every year, along with a statement in Form E and G respectively. The Board has enabled a facility for electronic submission of Form E or G, and details of login in this regard have already been shared with IPs and IPEs. IBBI has clarified that-

Form E / Form G for the year 2018-19 shall be submitted electronically by an IP / IPE before 30th April, 2019; and

Form E / Form G shall be submitted by every IP / IPE even if he has not earned any professional fee or does not have turnover during 2018-19. ***–[No. IBBI/IP/020/2019, 12th April, 2019 (IBBI)]***

## 3) SUPREME COURT REAFFIRMS THE REGULATORY POWERS OF RESERVE BANK OF INDIA IN DHARANI SUGARS V. UNION OF INDIA

The petitions and transferred cases raise questions as to the constitutional validity of Sections 35AA and 35AB of the Banking Regulation Act introduced by way of amendment w.e.f. 04.05.2017. The real bone of contention is a RBI Circular issued on 12.02.2018, by which the RBI promulgated a revised framework for resolution of stressed assets. On February 12, 2018, RBI had issued a Circular prescribing new early detection/reporting framework for all stressed assets alike, which mandated Banks to refer any accounts with total exposure exceeding Rs.2,000 Cr. under the Insolvency and Bankruptcy Code, 2016 ('IBC' / 'the Code'), if resolution was not completed within 180 days. The Circular also laid down that banks would have to disclose defaults if interest re-payments were defaulted on by a single day, and will have to ensure a resolution plan is in place within 180 days. Additionally, all previous schemes laid down by the RBI (JLF, SDR, S4A), were abolished by the Circular.

The Circular was challenged by petitioners such as The Association of Power Producers ("APP") and Independent Power Producers Association of India, who argued that the Circular clearly suffers from non-application of mind, as it is unable to draw crucial distinctions between various types of 'stressed assets' from different industrial sectors. Moreover, it was also contended that the Circular fails to distinguish between genuine and wilful defaulters. Reference was made by Petitioners to a case, challenging the impugned Circular before Allahabad High Court in *Independent Power Producers Association of India v. Union of India and Ors.* In August 2018, the Allahabad High Court refused to grant interim relief to various large power projects which were going to be affected by the Circular, and went ahead to direct the Central Government to consider the initiation of a consultative process envisaged under Section 7 of the RBI Act. The Order also clarified that rights and powers of a financial creditor under Section 7 of IBC would not be curtailed. Moreover, the Court also stated

that the RBI would retain its power to issue directions in specific cases under Section 35AA of the Banking Regulation Act, 1949 ("BR Act") to initiate corporate insolvency resolution process under chapter II of the IBC.

By an Order dated 11.09.2018, the Supreme Court allowed various transfer petitions and made orders in Writ Petition No. 1086 of 2018, by which it was ordered that status quo as of today shall be maintained in the meantime. As a result, insofar as the petitions and transferred cases in this Court are concerned, the Circular has, in effect, been stayed on and from 11.09.2018.

Relying on the 37th Parliamentary Standing Committee Report on Stressed / Non-performing Assets ["NPAs"] in the Electricity Sector, the Petitioners pointed out that NPAs in the power sector amounting to Rs. 34,044 crores are primarily on account of Government policy changes, failure to fulfil commitments by the Government, delayed regulatory response and non-payment of dues by DISCOMs. This Report, therefore, recommended the setting up of a task force to look into the NPAs problem in the power sector. Petitioners also referred to the relevant sections of the Banking Regulation Act and the RBI Act, and argued that the impugned Circular was ultra vires the provisions of those Acts. According to him, Section 35A and Section 35AB of the Banking Regulation Act cannot possibly be the source of power for the impugned Circular.

The Petitioners strongly relied upon the Press Note that introduced Sections 35AA and 35AB as well as the Statement of Objects and Reasons introducing the said Sections by the Amending Act of 2017. They argued that Sections 35AA and 35AB, being manifestly arbitrary provisions, are violative of Article 14 of the Constitution of India. Further, they are also arbitrary on the ground of excessive delegation of power.

The issue before the Supreme Court was the Constitutional validity of Sections 35AA and 35B of the Banking Regulation Act and whether the RBI Circular of February 12, 2018 was ultra vires the provisions of the Banking Regulation Act.

Discussing the Constitutional Validity of Sections 35AA and 35AB and relying on the judgment in *Swiss Ribbons Pvt. Ltd. and Anr. v. Union of India and Ors., 2019 (2) SCALE 5* and *Shayara Bano v. Union of India, (2017) 9 SCC 1*, the Supreme Court noted that none of the petitioners have been able to point out as to how either of these provisions is manifestly arbitrary. They are not excessive in any way nor do they suffer from want of any guiding principle. As a matter of fact, these amendments are in the nature of amendments which confer regulatory powers upon the RBI to carry out its functions under the Banking Regulation Act, and are not different in quality from any of the Sections which have already conferred such power. U/s 35A, vast powers are given to issue necessary directions to banking companies in public interest, in the interest of banking policy, to prevent the affairs of any banking company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the banking company, or to secure the proper management of any banking company. It is clear, therefore, that these provisions which give the RBI certain regulatory powers cannot be said to be manifestly arbitrary. Referring to a catena of judgments as well as the Statement of Objects and Reasons, the Preamble and the various provisions of the Banking Regulation Act, the Supreme Court held that there was no dearth of guidance for the

RBI to exercise the powers delegated to it by these provisions. Consequently, the plea of constitutional validity fails.

Petitioners argued that Section 35A cannot possibly be relied upon for the reason that it is an old provision, introduced in 1956. Whether or not to invoke IBC was certainly not in Parliament's contemplation when it enacted Section 35A, and for this reason, referring to a host of international judgments, the Supreme Court rejected this argument holding that a cursory reading of Section 35A makes it clear that there is nothing in the aforesaid provision which would indicate that the power of the RBI to give directions, when it comes to the Insolvency Code, cannot be so given. The width of the language used in the provision which only uses general words such as 'public interest' and 'banking policy' etc. makes it clear that if otherwise available, we cannot interdict the use of Section 35A as a source of power for the impugned RBI Circular on the ground that the Insolvency Code, 2016 could not be said to have been in the contemplation of Parliament in 1956, when Section 35A was enacted.

Relying upon the judgment in *Indian Banks' Association v. Devkala Consultancy Service, (2004) 11 SCC 1*, petitioners argued that the RBI cannot possibly give directions as to how the banks must exercise their discretionary power before filing applications under Section 7 of the Insolvency Code. Rejecting this argument the Supreme Court held that if a specific provision of the Banking Regulation Act makes it clear that the RBI has a specific power to direct banks to move under the Insolvency Code against debtors in certain specified circumstances, it cannot be said that they would be acting outside the four corners of the statutes which govern them, namely, the RBI Act and the Banking Regulation Act.

Analyzing the language of Section 35AA, the Supreme Court noted that Section 35AA makes it clear that the Central Government may, by order, authorize the RBI to issue directions to any banking company or banking companies when it comes to initiating the insolvency resolution process under the provisions of the Insolvency Code. The first thing to be noted is that without such authorization, the RBI would have no such power. There are many sections in the Banking Regulation Act which enumerate the powers of the Central Government vis-à-vis the powers of the RBI. Analyzing the language of various sections of the Banking Regulation Act (Sections 36ACA, 36AE, 36AF, 45Y, 52, 53, 55A), Supreme Court observed that all these provisions show that the Banking Regulation Act specifies that the Central Government is either to exercise powers along with the RBI or by itself. The role assigned, therefore, by Section 35AA, when it comes to initiating the insolvency resolution process under the Insolvency Code, is thus, important. Without authorization of the Central Government, obviously, no such directions can be issued.

Relying on the principle "if a statute confers power to do a particular act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any manner other than that which has been prescribed" propounded in *Taylor v. Taylor, [1875] 1 Ch. D. 426,* Supreme Court held that the RBI can only direct banking institutions to move under the Insolvency Code if two conditions precedent are specified, namely, (i) that there is a Central Government authorization to do so; and (ii) that it should be in respect of specific defaults. The Section, therefore, by necessary implication, prohibits this power from being exercised in any manner other than the manner set out in Section 35AA. Further contrasting Section 35 with 35AA, the Supreme Court held that Section 35AA makes

it clear that *de hors* the authorization of the Central Government, the RBI has no power to issue directions on its own, unlike Section 35 and rejected RBI's contention that it has concurrent powers.

Supreme Court also observed that the power to issue directions given by Section 35AB is without prejudice only to the provisions of Section 35A, i.e., it has to be read in conjunction with Section 35A. Further, Section 35AB is not without prejudice to the provisions contained in Section 35AA. This being so, it is clear that the power under Section 35AB, read with Section 35A, is to be exercised separately from the power conferred by Section 35AA. Dissecting the language of 35A, 35AA, and 35AB, Supreme Court specified the scheme of the sections as follows:

When it comes to issuing directions to initiate the insolvency resolution process under the Insolvency Code, Section 35AA is the only source of power.

When it comes to issuing directions in respect of stressed assets, which directions are directions other than resolving this problem under the Insolvency Code, such power falls within Section 35A read with Section 35AB.

The Supreme Court noted that Section 35AA enables the Central Government to authorize the RBI to issue such directions in respect of "a default".

Reading the definitions of "default", "debt" and "Corporate debtor" under the Insolvency and Bankruptcy Code, 2016 (Code/IBC), Supreme Court observed that it is a particular default of a particular debtor that is the subject matter of Section 35AA. The expression "issue directions to banking companies generally or to any banking company in particular" occurring in Section 35A is conspicuous by its absence in Section 35AA. This is another good reason as to why Section 35AA refers only to specific cases of default and not to the issuance of directions to banking companies generally, as has been done by the impugned Circular. The Statement of Objects and Reasons for introducing Section 35AA also emphasises that directions are in respect of "a default". Thus, it is clear that directions that can be issued under Section 35AA can only be in respect of specific defaults by specific debtors. Thus, any directions which are in respect of debtors generally, would be ultra vires Section 35AA.

On reading Section 45L of the RBI Act, the Supreme Court noted that the impugned Circular does not satisfy the conditions of Section 45L(3). The impugned Circular nowhere says that the RBI has had due regard to the conditions in which and the objects for which such institutions have been established, their statutory responsibilities, and the effect the business of such financial institutions is likely to have on trends in the money and capital markets. Further, it is clear that the impugned Circular applies to banking and non-banking institutions alike, as banking and non-banking institutions are often in a joint lenders' forum which jointly lends sums of money to debtors. Such non-banking financial institutions are, therefore, inseparable from banking institutions insofar as the application of the impugned Circular is concerned. It is very difficult to segregate the non-banking financial institutions from banks so as to make the Circular applicable to them even if it is ultra vires insofar as banks are concerned. Therefore, the impugned Circular will have to be declared as ultra vires as a whole, and be declared to be of no effect in law.

Consequently, all actions taken under the said Circular, including actions by which the Insolvency Code has been triggered must fail along with the said Circular. As a result, all cases

in which debtors have been proceeded against by financial creditors under Section 7 of the Insolvency Code, only because of the operation of the impugned Circular will be proceedings which, being faulted at the very inception, are declared to be *non-est.* ***–[Dharani Sugars and Chemicals* v. *Union of India, 2nd April 2019, (Supreme Court of India)]***

## 4) THE NCLAT WAS ASKED TO DECIDE ON THE ISSUE OF WHETHER PROMOTER WAS ENTITLED TO FILE SCHEME OF COMPROMISE/ARRANGEMENT APPLICATION EVEN AFTER APPOINTMENT OF OFFICIAL LIQUIDATOR.

The promoter- director had filed a scheme of compromise in winding up proceedings before the Hon'ble Bombay High Court where Liquidator was already appointed. But the matter got transferred to NCLT, Mumbai on the basis of Notification dated December 7, 2016. This Appeal has been filed by the Appellant – Ex. Chairman and shareholder of Amar Dye Chem Limited (In Liquidation) (Company) being aggrieved by Order delivered (Impugned Order) whereby the National Company Law Tribunal, Mumbai Bench (NCLT) dismissed TCSP 1 of 2017 which had been filed by the Appellant for approval of the scheme of compromise/arrangement propounded by him between the Company, its creditors and members under Sections 391/394 read with Sections 80, 81, 100 and 103 of The Companies Act, 1956 (old Act). The Petition was dismissed on the ground of locus standi, without going into the material facts of the case. NCLT, Mumbai bench, had held that the application filed under Section 391 of the Companies Act 1956 (corresponding to Section 230(1), Companies Act 2013) could not have been moved by the shareholders after the appointment of Official Liquidator. The NCLT reasoned that only the Official Liquidator was entitled to represent the company under liquidation. According to the Appellant, NCLT misinterpreted the law.

Therefore the issue before the appellate tribunal was whether promoter was entitled to file Section 391 application even after appointment of official liquidator.

The NCLAT found the holding of NCLT, Mumbai bench to be erroneous. Referring to judgments of Supreme Court and several High Courts especially *National Steel & General Mills Versus Official Liquidator 1989 SCC OnLine Del 118*, NCLAT held that liquidator is only an additional person and not exclusive person who can move application under Section 391 of the old Act when the company is in liquidation. Looking to these Judgements, NCLAT was unable to support the view taken by NCLT that the Appellant could not have filed the Petition under Section 391 of the old Act.

The NCLAT held that the proceedings should continue in High Court, based on the judgment of Bombay High Court in *Sunil Gandhi and Ors. Vs. A.N. Buildwell Private Limited and Ors 203CompCas330(Delhi)*, which held that *"In the proceedings relating to winding up, as in the present case, applications under the provisions of section 391 of the Companies Act, 1956, for the revival of the company in provisional liquidation, would constitute an exception, and would a fortiori fall outside the purview of independent proceedings which ought to be transferred to the National Company Law Tribunal, under clause 3 of the subject notification".*

NCLAT further held that considering the facts of the present matter, the NCLT could not exercise jurisdiction for adjudicating the application for scheme of compromise/arrangement which had

been moved by the Appellant, in liquidation proceeding on being divorced from the liquidation/winding up proceeding. NCLAT held that the present proceedings in NCLT should remain stayed giving opportunity to the Appellant to move the Hon'ble High Court to ensure that Scheme filed in Liquidation/winding up proceeding and Liquidation/winding up proceeding should be before same forum. NCLAT had no doubt that a scheme of compromise and arrangement can be filed even when liquidation proceeding is pending but if such application/petition is filed, it would be a proceeding relating to the winding up going on and the same has to be in the same forum. **–/Rasiklal S. Mardia v. Amar Dye Chem Limited, *Company Appeal (AT) No.337 of 2018 NCLAT Decided on 8th April, 2019]***

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## SECURITIES

### 1) SEBI LAYS DOWN PROCEDURE FOR EMPANELMENT OF INSOLVENCY PROFESSIONALS (IPS) AS ADMINISTRATORS UNDER THE SEBI (APPOINTMENT OF ADMINISTRATOR AND PROCEDURE FOR REFUNDING TO THE INVESTORS) REGULATIONS, 2018.

SEBI notified the Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018 ("Administrator Regulations) on October 3, 2018 which provide for appointment of an Administrator and procedure for refund to the investor. Reg. 5(1) requires that the Administrator shall be a person registered with IBBI as an Insolvency Professional ("IP") and empanelled with the Board from time to time. Pursuant to the Guidelines for Appointment of IPs as Administrators issued by IBBI on March 26, 2019, SEBI has now laid down the following:

(a) The Board is empowered to fix the eligibility criteria, the terms of appointment including remuneration of an Administrator and issue clarifications and guidelines in respect of the application of the Administrator Regulations.

(b) The Administrator would be selected from a Panel of IPs prepared by IBBI under the Administrator Regulations. The details of such appointments would be shared with IBBI. An Administrator, who is selected from a Panel of IPs, shall not withdraw his consent to act as an Administrator or refuse to act as an Administrator, if appointed by the Board under the Administrator Regulations or surrender his registration to the IBBI Board or membership to his Insolvency Professional Agencies (IPA) during the pendency of the assignment. In case of such withdrawal or refusal, the matter will be referred to IBBI for suitable action in this regard.

(c) The remuneration payable to the Administrator shall be in accordance with Reg. 4(3) and (4) of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Process Regulations) with suitable modifications been laid down in Table 1 and 2 in Part-I of the Schedule to the Circular. Fee for distribution as given in Table 2 in Part-I of the Schedule to the Circular shall not apply in cases of recovery of fees, penalties and disgorgement. In addition to the fees under sub-regulation (3) of Regulation 4 of the Liquidation Process Regulations, the fee payable to the entities such as chartered accountant (Table 3 and 4), registered valuer (Table 5), registrar and share transfer agent or such other agency (Table 6), etc. in Part-II of the Schedule to the Circular, appointed by the Administrator under the Administrator Regulations and incidental expenses as given in

Part-III of the Schedule to this Circular would be payable to the Administrator and the same would be part of the overall remuneration payable to the Administrator.

(d) The Administrator shall appoint chartered accountant from the list of empanelled chartered accountants with SEBI while registered valuer and registrar and share transfer agent or such other agency shall be appointed through open tender.

(e) The tender for registrar and share transfer agent or such other agency shall be published in an English daily newspaper having nationwide circulation. However, if the investors to whom refund needs to be made is very few and total refund amount is small making newspaper publication not feasible in terms of cost-effectiveness, such publication shall be made only on the website of the Board. An officer of SEBI nominated by the Recovery Officer shall be part of the Tender Opening Committee in such matters.-

***[SEBI/HO/RRD/RD1/CIR/P/2019/46, 2nd April, 2019, (SEBI)]***

## 2) SEBI EXTENDS TIMELINE FOR IMPLEMENTATION OF USE OF UPI AS A PAYMENT MECHANISM WITH ASBA.

In its Circular of November 1, 2018, SEBI had introduced 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 w.e.f January 1, 2019. Implementation of the same was to be carried out in a phased manner to ensure gradual transition to UPI with ASBA. Based on the representations received from the various market intermediaries like Self Certified Syndicate Banks (SCSBs), National Payments Corporation of India. (NPCI) and the Association of Investment Bankers of India (AIBI), SEBI has decided to extend the timeline for implementation of Phase I of the aforesaid Circular by 3 months i.e., **till June 30, 2019**. The implementation of Phase II and III shall continue unchanged as per the aforesaid Circular from the date of completion of Phase I as above. –

***[SEBI/HO/CFD/DIL2/CIR/P/2019/50, 3rd April, 2019 (SEBI)]***

## 3) SEBI (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) (SECOND AMENDMENT) REGULATIONS, 2019

Pursuant to its decisions in the board meetings of December 12, 2018 and March 1, 2019, SEBI has amended the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 as follows:

(a) In Reg. 2(1)(x) the definition of "institutional trading platform" has been replaced with the definition of "innovators growth platform" (IGP). Similarly, the words "institutional trading platform" have been substituted with "innovators growth platform" in Reg.2(1)(y), 3(i), heading of Chapter X, 284(6), 290, 291(2) and Schedule V, Form A, paragraph (13).

(b) Reg. 283(1) & (2) regarding eligibility of an issuer to list on IGP (earlier ITP) have been substituted to provide that an issuer which is intensive in the use of technology, information technology, intellectual property, data analytics, bio-technology or Nano-technology to provide products, services or business platforms with substantial value addition shall be eligible for listing on the innovators growth platform, provided that as on the date of filing of draft

information document or draft offer document 25% of the pre-issue capital of the Issuer Company for at least a period of two years, should have been held by qualified institutional buyers or family trusts with over ₹500 crore net worth or a Category III foreign portfolio investor (FPI) or a pooled investment fund with minimum assets of $150 million or an accredited investor.

(c) Accredited investor shall mean any individual with total gross income of fifty lakhs rupees annually and who has minimum liquid net worth of five crore rupees or any body corporate with net worth of twenty five crore rupees. Not more than ten per cent of the pre-issue capital may be held by Accredited Investors. The investor will make an application to the stock exchanges or depositories in the prescribed manner for recognition as an accredited investors (AI) for the purpose of the Innovators Growth Platform (IGP).

(d) New Reg. 285A has been inserted which provides that the issuer shall be in compliance with minimum public shareholding requirements specified in the Securities Contracts (Regulation) Rules, 1957. The minimum offer size shall be ten crore rupees.

(e) Reg. 286 has been amended to reduce the minimum application size to Rs. 2 lakh and in multiples thereof from the existing Rs. 10 lakh. Similarly, Reg. 289 has been amended to reduce the minimum trading lot to Rs. 2 lakh and in multiples thereof from the existing Rs. 10 lakh.

(f) Reg. 287(1) has been amended reducing the requirement of minimum number of allottees in the initial public offer to 50 from the existing 200. Reg. 287(2) has been substituted to provide that the allotment to institutional investors as well as non-institutional investors shall be on a proportionate basis. Sub-regulations (3), (4) and (5) have been omitted and the existing sub-regulation (6) has been renumbered as sub-regulation (3). ***–[No.SEBI/LAD-NRO/GN/2019/08, 5th April, 2019 (SEBI)]***

## 4) SEBI REVISES STRUCTURE OF CHARGES FOR DEBT SECURITIES

SEBI by its Circulars dated August 27, 2012 and December 11, 2015, introduced the facility of "Basic Services Demat Account" (BSDA) with limited services for eligible individuals with the objective of achieving wider financial inclusion and to encourage holding of demat accounts. In order to further boost participation in Debt Market and based on representation received from market participants, in partial modification of the abovementioned SEBI Circulars, it has now been decided to revise the structure of charges for debt securities as follows:

(a) No Annual Maintenance Charges (AMC) shall be levied in case the value of holdings of debt securities is up to Rs. 1 lakh and a maximum AMC of Rs. 100 shall be levied if the value of holdings of debt securities is between Rs. 1,00,001 and Rs.2,00,000; and

(b) No AMC shall be levied in case the value of holdings other than debt securities is below Rs. 50,000 and a maximum AMC of Rs. 100 shall be levied if the value of holdings other than debt securities is between Rs.50,001 and Rs.2,00,000. **–*[MRD/DoP2DSA2/CIR/P/2019/51, 10th April, 2019, (SEBI)]***

## 5) SEBI (REAL ESTATE INVESTMENT TRUSTS) (AMENDMENT) REGULATIONS, 2019

Pursuant to the decision in its Board meeting of March 1, 2019, SEBI has amended the SEBI (Real Estate Investment Trusts) Regulations, 2014 as under:

Reg. 14(14) shall be substituted to provide that the minimum subscription from any investor in initial and/or public offer shall be rupees fifty thousand.

Reg. 16(4) has been amended to provide that trading lot for the purpose of trading of units of the REIT shall consist of 100 units (earlier one lakh rupees). ***–[No. SEBI/LAD-NRO/GN/2019/09, 22nd April, 2019 (SEBI)]***

## 6) SEBI (INFRASTRUCTURE INVESTMENT TRUSTS) (AMENDMENT) REGULATIONS, 2019

Pursuant to the decision in its Board meeting of March 1, 2019, SEBI has amended the SEBI (Infrastructure Investment Trusts) Regulations, 2014 (InvIT Regulations) as under:

Reg. 14(4)(c) amended to reduce minimum subscription from any investor in initial and follow-on offer to one lakh rupees from the earlier ten lakh rupees.

Reg. 16(9)(b) amended to provide that with respect to listing of publicly offered units - trading lot for the purpose of trading of units on the designated stock exchange shall consist of 100 units (earlier five lakh rupees).

Reg. 17(1)(e) amended to provide that the investment manager shall apply for delisting of units of the InvIT to the Board and the designated stock exchanges if the trustee and investment manager requests such delisting and such request has been approved by unit holders in accordance with Regulation 22.

New sub-clause (ea) added to Reg. 17(1) providing that the investment manager shall apply for delisting of units of the InvIT to the Board and the designated stock exchanges if the trustee and the Investment Manager of a privately placed and listed InvIT chooses to convert InvIT to a privately placed unlisted InvIT and such request has been approved by unit holders in accordance with Regulation 22. However, exit shall be provided to dissenting unitholders.

Reg. 17(6) provides that after delisting of its units, the InvIT shall surrender its certificate of registration to the Board and shall no longer undertake activity of an InvIT. A non-obstante clause shall be added stating that *"Notwithstanding the above, in case the delisting is done in terms of clause (ea) of sub regulation (1), the InvIT may retain its certificate of registration and continue to undertake the activity of a privately placed and unlisted InvIT as specified in Chapter VIA."*

Reg. 20(2) amended to provide that the aggregate consolidated borrowings and deferred payments of the InvIT, holdco and the SPV(s), net of cash and cash equivalents shall not exceed 70% (earlier 49%) of the value of the InvIT assets.

Reg. 20(3)(a) & (b) substituted to provide that if the aggregate consolidated borrowings and deferred payments of the InvIT, holdco and the SPV(s), net of cash and cash equivalents exceed 25% of the value of the InvIT assets, for any further borrowing,
(a)up to 49%, an InvIT shall obtain credit rating from a credit rating agency registered with the Board; and seek approval of unitholders in the

specified manner (b)above 49%, an InvIT shall obtain:- (i) a credit rating of "AAA" or equivalent for its consolidated borrowing and the proposed borrowing, from a credit rating agency registered with the Board; (ii) utilize the funds only for acquisition or development of infrastructure projects; (iii) have a track record of at least six distributions, in terms of Reg. 18(6) on a continuous basis, post listing, in the years preceding the financial year in which the enhanced borrowings are proposed to be made; (iv) obtain the approval of unitholders in the specified manner

In Reg. 21(5) which deals with half yearly valuation of the assets of the InvIT, a proviso has been added stating that in case the consolidated borrowings and deferred payments of an InvIT is above 49%, the valuation of the assets of such InvIT shall be conducted by the valuer for quarter ending June, September and December, for incorporating any key changes in the previous quarter and such quarterly report shall be prepared within one month from the date of the end of such quarter.

Reg. 22(4) & (5) regarding rights and meetings of unit holders has been amended. Further new sub-regulations 5A and 5B have been added providing that in case of any borrowing by an InvIT in terms of the limit specified in Reg. 20(3)(b), the approval from 75% of the unit holders by value shall be obtained. For delisting of units of InvIT in terms of Reg. 17(1)(ea), approval from not less than 90% of the unit holders by value shall be required and exit shall be provided to dissenting unitholders.

A proviso has been added to Reg. 23(4) which requires submission of half yearly report, providing that for any InvIT, whose units are listed and whose consolidated borrowings and deferred payments, in terms of Regulation 20, is above 49%, such InvIT shall also submit a quarterly report to the designated stock exchange within thirty days from the end of every quarter ending June and December. Further, sub-regulation (5) has been substituted whereby the annual/ half yearly /quarterly reports shall contain disclosures as specified under Part-A, Part-B and Part-C, respectively, of Schedule IV.

A separate framework for privately placed unlisted InvITs has been introduced by hapter VIA – "Framework For Private Placement of Units Of InvITs Which Are Not Listed" providing:
(a) An InvIT raising funds by way of a private placement in terms of the provisions of this Chapter. (i) shall do it through a placement memorandum; (ii) shall raise funds only from institutional investors and body corporates, whether Indian or foreign. However, in case of foreign investors, such investment shall be subject to guidelines as may be specified by the RBI and the Government from time to time; (iii) shall not accept from an investor, an investment of value less than rupees one crore; (iv) shall not raise funds from more than twenty investors; (v) shall file a placement memorandum with the Board at least 5 days prior to opening of the issue; (vi) shall file the final placement memorandum with the Board within 10 working days from the date of allotment of the units to the investors; (vii) invest not less than 80% of the value of the InvIT assets in eligible infrastructure projects either directly or through holdcos or through SPVs. However, an un-invested fund may be invested in instruments as provided under Reg. 18(5) (ii), (iii), (iv) and (v); (viii). It also prescribes the disclosures to be given by an investment manager to the trustee and unitholders having bearing on the operation or performance of the InvIT; and (ix) The investment manager of the InvIT shall submit annual report, half-yearly report and valuation report to the trustee and unit holders of the InvIT, either electronically or through physical copies.

In Schedule IV new Part -C regarding mandatory disclosures in the quarterly report has been added. –*[No. SEBI/LAD-NRO/GN/2019/10, 22nd April, 2019 (SEBI)]*

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## COMPETITION

### 1) CCI APPROVES ACQUISITION OF 66.15% STAKE IN MINDTREE BY L&T

Larsen and Toubro (L&T) has secured the approval of Competition Commission of India (CCI) to acquire 66.15 per cent stake in Mindtree. The Company will have to approach Anti-Trust authorities in Germany and the US as well since Mindtree operates in these markets. –***[Competition Commission of India, 6th April, 2019 reported in Business Today]***

### 2) CCI CLEARS BARING PE-NIIT TECHNOLOGIES DEAL

The Competition Commission of India (CCI) cleared 30% stake purchase by Baring Private Equity Asia in mid-sized IT services firm NIIT Technologies in a deal worth Rs. 2,627-crore. The acquisition will trigger an open offer under which Baring Private Equity Asia (BPEA) will make an offer to public shareholders of NIIT Technologies for purchasing up to 26 per cent additional shareholding, taking the total deal value to up to Rs. 4,890 crore. ***–[Competition Commission of India, 26th April, 2019 reported in Hindu Business Line]***

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## INDIRECT TAXES

## a. CUSTOMS

### 1) EXTENSION OF EXEMPTION PROVIDED TO THE LIGHT COMBAT AIRCRAFT PROGRAMME

Notification No. 39/96-Customs dated 23.07.1996 amended so as to extend the exemption provided to the Light Combat Aircraft Programme of the Ministry of Defence till 31.06.2019. – ***[Notification No. 12/ 2019-Customs, dated 11th April, 2019]***

### 2) INCREASE OF BCD ON WHEAT

Notification No. 50/2017- Customs dated 30.06.2017 amended so as to increase BCD on wheat from 30% to 40%. – ***[Notification No. 13/2019-Customs, dated 26th April, 2019]***

### 3) ICD KHEDA DENOTIFIED

Notification No. 12/97-Customs (N.T), dated 2.04.1997 has been amended so as to denotify ICD Kheda. – ***[Notification No. 28/ 2019-Customs (N.T), dated 01st April, 2019]***

### 4) SHIPPING BILL (ELECTRONIC INTEGRATED DECLARATION AND PAPERLESS PROCESSING) REGULATIONS, 2019 NOTIFIED

The CBIC has notified the Shipping Bill (Electronic Integrated Declaration and Paperless Processing) Regulations, 2019 in supersession of the Shipping Bill (Electronic Integration Declaration) Regulations, 2011, except as respects things done or omitted to be done before such supersession. They shall apply to export of goods from all customs stations where the Indian Customs Electronic Data Interchange System is in

operation. – ***[Notification No. 33 /2019-Customs (N.T.), dated 25th April, 2019]***

### 5) ADD ON CAST ALUMINIUM ALLOY WHEELS OR ALLOY ROAD WHEELS USED IN MOTOR VEHICLES

Definitive Anti-Dumping duty imposed on Cast Aluminium Alloy Wheels or Alloy Road Wheels used in Motor Vehicles originating in or exported from China PR, Korea RP and Thailand for a period of five years. – ***[Notification No. 17 /2019-Customs (ADD), dated 9th April, 2019]***

### 6) PHASE OUT PHYSICAL COPIES OF MEIS AND SEIS DUTY CREDIT SCRIPS ISSUED WITH EDI PORT AS PORT OF REGISTRATION

In order to enhance the ease of doing business for exporters, DGFT has decided to phase out physical copies of MEIS and SEIS Duty Credit Scrips issued with EDI port as port of registration. DGFT has issued Public Notice No. 84/2015-2020 dated 03.04.2019 and Trade Notice No. 03/2015-2020 dated 03.04.2019 notifying this change. This shall come into effect for MEIS/SEIS duty credit scrips issued by DGFT from 10.04.2019 onwards for cases where the port of registration is an EDI port. DGFT has also created a facility *vide* Trade Notice No. 42/2015-2020 dated 11.01.2019 regarding mandatory recording of information on DGFT website about transfer and current ownership details of MEIS/SEIS scrips issued from 14.01.2019 onwards. In this regard, the CBIC has now issued this present Circular regarding discontinuation of physical copies of MEIS / SEIS Duty Credit Scrips issued with EDI port as Port of registration. – ***[Circular No. 11/2019-Customs, dated 09th April, 2019]***

## b. CENTRAL EXCISE

### 1) PROCEDURE FOR UTILISATION OF PAPERLESS MEIS AND SEIS SCRIPS

Notification Nos. 20/2015-Central Excise and No. 21/2015-Central Excise both dated 08.04.2015 amended so as to incorporate procedure for utilisation of paperless MEIS and SEIS scrips. – ***[Notification No. 01/2019-Central Excise, dated 9th April, 2019]***

## c. GST

### 1) CENTRAL GOODS AND SERVICES TAX (THIRD AMENDMENT) RULES, 2019

The CBIC has issued the Central Goods and Services Tax (Third Amendment) Rules, 2019 amending the Rules 23 and 62 along with Form GST REG 01 under the CGST Rules, 2017. Also, Form GST CMP 08 has been inserted. – ***[Notification No. 20/2019 – Central Tax, dated 23rd April, 2019]***

### 2) PROCEDURE FOR QUARTERLY TAX PAYMENT AND ANNUAL FILLING OF RETURN BY COMPOSITION TAXPAYERS

The CBIC has notified the procedure for quarterly tax payment and annual filing of Return by registered persons paying tax under the provisions of composition scheme under Section 10 of the CGST Act, 2017, or availing the benefit of

Notification No. 02/2019– Central Tax (Rate) dated March 7, 2019 [prescribes composition scheme for supplier of services with a tax rate of 6% having annual turnover in preceding year upto Rs. 50 lakhs]. – ***[Notification No.21 /2019 – Central Tax, dated 23rd April, 2019]***

## 3) PROVISIONS OF RULE 138E OF THE CGST RULES APPLICABLE W.E.F 21ST JUNE, 2019

The CBIC has notified that the provisions of Rule 138E of the CGST Rules would be applicable w.e.f 21st June, 2019. Rule 138E prescribes restriction on furnishing of information in PART A of FORM GST EWB-01 in certain circumstances. – ***[Notification No.22 /2019 – Central Tax, dated 23rd April, 2019]***

## 4) CLARIFICATION REGARDING EXERCISE OF OPTION TO PAY TAX UNDER NOTIFICATION NO. 2/2019-CT(R) DT 07.03.2019

In order to clarify the issue and to ensure uniformity in the implementation of the provisions of the law across field formations, the Board, in exercise of its powers conferred by Section 168 (1) of the said Act, hereby clarifies the issues raised as below:–

i. a registered person who wants to opt for payment of Central Tax @ 3% by availing the benefit of the said Notification, may do so by filing intimation in the manner specified in sub-rule 3 of Rule 3 of the said rules in FORM GST CMP-02 by selecting the category of registered person as "Any other supplier eligible for composition levy" as listed at Sl. No. 5(iii) of the said form, latest by 30th April, 2019. Such person shall also furnish a statement in FORM GST ITC03 in accordance with the provisions of sub-rule (3) of Rule 3 of the said Rules.
ii. any person who applies for registration and who wants to opt for payment of Central Tax @ 3% by availing the benefit of the said Notification, if eligible, may do so by indicating the option at serial no. 5 and 6.1(iii) of FORM GST REG-01 at the time of filing of application for registration.
iii. the option of payment of tax by availing the benefit of the said Notification in respect of any place of business in any State or Union territory shall be deemed to be applicable in respect of all other places of business registered on the same Permanent Account Number.
iv. the option to pay tax by availing the benefit of the said Notification would be effective from the beginning of the financial year or from the date of registration in cases where new registration has been obtained during the financial year. – ***[Circular No. 97/16/2019-GST, dated 05th April, 2019]***

## 5) CLARIFICATION IN RESPECT OF UTILIZATION OF INPUT TAX CREDIT POST INSERTION OF THE RULE 88A OF THE CGST RULES

The CBIC *vide* present Circular clarifies issues relating to Order of Utilization of Input Tax Credit (ITC) under GST, especially in view of accumulation of unutilized ITC of Central tax/ State tax in the Electronic Cash Ledger due to utilisation of IGST first as prescribed under newly enacted Sections 49A (Utilisation of input tax credit subject to certain conditions) & 49B (Order of utilisation of input tax credit) of the CGST Act, 2017 w.e.f. 1st February, 2019. – ***[Circular No. 98/17/2019-GST, dated 23rd April, 2019]***

6) **CLARIFICATION REGARDING FILING OF APPLICATION FOR REVOCATION OF CANCELLATION OF REGISTRATION IN TERMS OF REMOVAL OF DIFFICULTY ORDER (ROD) NUMBER 05/2019-CENTRAL TAX DATED 23.04.2019**

The CBIC *vide* present Circular clarifies the extension in time under sub-section (1) of Section 30 of the Act to provide a one-time opportunity to apply for revocation of cancellation of registration on or before the 22nd July, 2019 for the specified class of persons for whom cancellation order has been passed up to 31st March, 2019. – ***[Circular No. 99/18/2019-GST, dated 23rd April, 2019]***

7) **GST EXEMPTION ON THE UPFRONT AMOUNT PAYABLE IN INSTALLMENTS FOR LONG TERM LEASE OF PLOTS, UNDER NOTIFICATION NO. 12/2017, CENTRAL TAX (RATE), S.NO. 41, DATED 28.06.2017**

The CBIC received representations seeking clarification regarding admissibility of GST exemption on the upfront amount which is determined upfront but is paid or payable in installments for long term (thirty years, or more) lease of industrial plots or plots for development of financial infrastructure under Notification 12/2017 – Central Tax (R) S. No.41 dated 28.06.2017.

It is clarified that GST exemption on the upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for long term lease (of thirty years, or more) of industrial plots or plots for development of infrastructure for financial business under Entry No. 41 of Exemption Notification 12/2017 – Central Tax (R) dated 28.06.2017 is admissible irrespective of whether such upfront amount is payable or paid in one or more instalments, provided the amount is determined upfront. – ***[Circular No. 101/20/2019-GST, dated 30th April, 2019]***

8) **EXTENSION OF TIME LIMIT FOR FILING AN APPLICATION FOR REVOCATION OF CANCELLATION OF REGISTRATION FOR SPECIFIED TAXPAYERS**

The CBIC has allowed businesses whose GST registration has been cancelled due to non-filing of tax returns up to March 31, 2019 to apply for its revocation by July 22 2019, provided they file their pending returns and pay due taxes. – ***[Order No. 5/2019-GST, dated 23rd April, 2019]***

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## INTELLECTUAL PROPERTY RIGHTS

1) **MARKS 'CONCRETO' AND 'CONCRETA' FOUND TO BE VISUALLY AND PHONETICALLY SIMILAR**

The present suit was filed by the Plaintiff alleging that the Defendants have adopted a mark 'CONCRETA' which is visually and phonetically similar of its registered mark 'CONCRETO' and hence amounts to infringement. The Court held that as the only difference between the Plaintiff's mark 'CONCRETO' and the impugned Defendants' mark 'CONCRETA' is that the alphabet 'o' has been replaced with an 'a' by the Defendants, the court was of the view that the

most essential part of the Plaintiff's registered mark is visually and phonetically similar to the Defendants' mark and the same constitutes infringement.

The court also observed that merely because there are a few other parties using a mark which is deceptively and confusingly similar to that of the Plaintiff's mark, the Plaintiff is not estopped from taking action against the Defendants – ***[Nuvoco Vistas Corporation Limited* v. *JK Lakshmi Cement Limited & Anr., dated 15.04.2019 (Delhi HC)]***

2) **DELHI HIGH COURT DESPITE FINDING THAT THE DEFENDANT'S MARK 'AADHAR SHILA' IS DECEPTIVELY SIMILAR TO THE PLAINTIFF'S MARK 'AADHAR SHREE', DISMISSED THE SUIT DUE TO LACK OF TERRITORIAL JURISDICTION**

The present suit was filed by the Plaintiff alleging that the Defendants mark 'AADHAR SHILA' (label) is deceptively similar to the mark of the Plaintiff and constitutes infringement and passing off of the Plaintiff's registered trademark "AADHAR SHREE" (label).

Though the court observed that the noticeable differences in the Defendant's mark 'AADHAR SHILA', are unimportant and would still cause confusion or deception on account of the similarities of the mark, the Court dismissed the suit holding that the Court does not have the territorial jurisdiction. – ***[M/S Paridhi Udyog* v. *Jagdev Raj Sarwan Ram Dhiman, dated 29th April, 2019 (Delhi HC)]***

3) **DELHI HIGH COURT AWARDS COMPENSATORY DAMAGES TO THE TUNE OF RUPEES 2.15 CRORES AND AGGRAVATED DAMAGES TO THE TUNE OF RUPEES 1 CRORE TO THE PLAINTIFF**

Present two suits (Koninklijke Philips N.V. & Anr. vs Amitkumar Kantilal Jain & Ors., CS (COMM) 1170/2016 and Koninklijke Philips N.V. & Anr. vs Amaze Stores &Ors., CS (COMM) 737/2016) have been filed by the Plaintiff seeking decree of damages as well as permanent injunction restraining violation of multiple statutory and common law rights, namely Piracy of registered design numbers and Infringement of copyright and passing off of the trade-dress.

The Court granted an ex-parte permanent injunction restraining the Defendants from engaging in piracy of the Plaintiffs' registered design of beard trimmers, and from further infringing the copyright and trade dress in the trimmers' packaging. The Court observed that on a close comparison of the products, it appeared that the Defendants' products very closely resembled the aesthetics of those of the Plaintiffs'. It was also noted that such imitation on part of the Defendants was mala fide with an intent to operate in the same industry as that of the Plaintiffs. The Court observed in relation to copyright and trade dress that the Defendants had engaged in brazen reproduction of the Plaintiffs' packaging in order to create deception among the buyers. Furthermore, the Court awarded compensatory damages to the tune of Rupees 2.15 crores in favour of the Plaintiffs for their repeated infringements, as well as aggravated damages to the tune of Rupees 1 crore, in light of the Defendants' conduct of contempt in respect of the interim injunction. – ***[Koninlijke Philips N.V. & Anr.* v. *Amazestore & Ors., dated 22nd April, 2019 (Delhi HC)]***

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## CONSUMER

### 1) SUPREME COURT WAS ASKED TO DECIDE ON WHETHER ONE-SIDED CLAUSES IN A BUILDER-BUYER AGREEMENT CONSTITUTED AN UNFAIR TRADE PRACTICE.

The Appellant/ Builder launched a residential project in Gurugram. The Respondent/Flat Purchaser entered into an Apartment Buyer's Agreement with the Builder to purchase an apartment in the said project. As per clause 11.2, the Builder was to make all efforts to apply for the Occupancy Certificate within 39 months from the date of excavation (with a grace period of 180 days) and offer possession of the flat to the Purchaser. The Builder failed to apply for the Occupancy Certificate as per the stipulations in the Agreement and subsequently the Purchaser approached the National Consumer Disputes Redressal Commission (NCDRC). The NCDRC passed an *ex parte* Interim Order restraining the Builder from cancelling the allotment made in favor of the Purchaser. During the pendency of the complaint, the Builder obtained the Occupancy Certificate and issued a Possession Letter to the Purchaser. While the Builder sought direction to the Purchaser to take possession of the flat, the Purchaser's case was that due to inordinate delay of almost 3 years, it had already taken an alternate property and was no longer interested in taking possession. The NCDRC opined in favor of the Purchaser and held that, keeping in view the delay of 3 years in procuring the Occupancy Certificate, the Purchaser could not be compelled to take possession at such a belated stage. Moreover, the grounds urged by the Builder for delay were not justified and clauses in the agreement were held to be wholly one sided, unfair and not binding on the Purchaser.

The issue framed before the apex court was whether incorporation of one-sided clauses in a builder-buyer agreement constituted an unfair trade practice as per Section 2 (r) of the Consumer Protection Act, 1986.

The Court found that the Builder obtained the Occupancy Certificate almost 2 years after the date stipulated in the Apartment Buyer's Agreement. There was a failure to hand over possession of the flat to the Purchaser within a reasonable period. The Purchaser made out a clear case of deficiency of service on the part of the Builder. The Purchaser was justified in terminating the Apartment Buyer's Agreement by filing this Complaint, and could not be compelled to accept the possession whenever it was offered by the Builder. The Purchaser was legally entitled to seek refund of the money deposited by him along with appropriate compensation. The NCDRC also had found that the Clauses relied upon by the Builder were wholly one-sided, unfair and unreasonable, and could not be relied upon. The Court also referred to Law Commission of India 199th Report which recommended that legislation be enacted to counter such unfair terms in contracts. The draft report provided that "a contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties." The Court observed that the Apartment Buyer's Agreement revealed stark incongruities between the remedies available to both the parties. For interest rate, the Builder was not required to pay equivalent Interest to the Purchaser for delay in handing over possession. The purchaser was entitled to Interest @9% p.a. only. However, Builder could charge Interest @18% p.a. from the Purchaser for

delayed payments. Similarly, the Purchaser had to wait for a period of 12 months after the end of grace period, before serving termination notice of 90 days on the Builder, and even thereafter, the Builder got 90 days to refund only the actual instalment paid by Purchaser. In any case of delay, interest remained at 9% only. Whereas the Builder could cancel the allotment and terminate the Agreement if any instalment remained in arrears for more than 30 days. Therefore, the terms of a contract will not be final and binding, if it was shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement were declared ex-facie one-sided, unfair, and unreasonable. Therefore, the appeals were dismissed accordingly. The builder was granted a period of three months to refund the amount to the Purchaser. ***–[Pioneer Urban Land & Infrastructure Ltd* v. *Govindan Raghavan, Civil Appeal No. 12238 of 2018, 2nd April, 2019, (Supreme Court of India)]***

## 2) THE AEPX CONSUMER COMMISSION WAS ASKED TO DECIDE ON WHETHER AFTER THE COMMENCEMENT OF RERA, THE CONSUMER COMPLAINT WAS NOT MAINTAINABLE, AND WHETHER THE ARBITRATION CLAUSE IN THE AGREEMENTS EXCLUDES JURISDICTION OF CONSUMER FORUM

Individual Consumer Complaints have been filed by the allottees of Residential Flats/Apartments (Complainants) in a project, namely, "Canary Greens" (Project), to be developed and constructed by the M/s Today Homes and Infrastructure Private Ltd. (Developer/Opposite Party) on a plot of land in Gurgaon, Haryana, seeking injunctive relief and compensation for the losses suffered by them on account of unfair and restrictive trade practices adopted and the deficient services rendered by the Opposite Party in not handing over the possession of the allotted Flats/Apartments within the stipulated time. The Complainants have alleged deficiency in service and unfair trade practice on the part of the Developer in not handing over the physical possession of the Flats/Apartments in question to the Complainants within the committed period, which has caused immense pressure and financial burden upon them.

Twin issues were framed before the National Consumer Disputes Redressal Commission (NCDRC)- (i) Whether after the commencement of RERA, the consumer complaint was not maintainable, as Section 79 of RERA bars jurisdiction of civil courts. (ii) Whether the arbitration clause in the agreements excludes jurisdiction of consumer forum.

Analyzing and reviewing the various provisions of the RERA and the Consumer Protection Act and a catena of judgments, the Commission held that Consumer Protection Act was a special enactment, which provided a special remedy to an aggrieved consumer. The authorities under Consumer Protection Act cannot be regarded as "civil courts" and hence Section 79 of RERA did not apply. So far as to grant injunction is concerned, only that power has been taken away by Section 79. But, it does not, in any manner, effect the jurisdiction of the Consumer Fora in deciding the Complaints. Both, the Consumer Protection Act, 1986 and the Real Estate (Regulation and Development) Act, 2016 are supplemental to each other and there is no provision in the Consumer Protection Act which is inconsistent with the provisions of

RERA. The Key conclusions arrived to by the Commission are:

The Consumer Protection Act, 1986 is a supplement Act and not in derogation of any other Act and the Consumer Fora constituted under the Act are not Civil Courts.

(i) A Consumer cannot pursue two remedies for the same cause of action. However, if a Consumer has not approached for redressal of its grievance under the particular Statute, the Consumer can approach the Consumer Fora under the Consumer Protection Act. But, if the Consumer had already approached the Authority under the relevant Statute, he cannot simultaneously file any complaint under the Consumer Protection Act.

(ii) Mere availability of a right to redress the grievance in a particular Statute will not debar the Complainant/Consumer from approaching the Consumer Fora under the Act.

(iii) Section 71 of RERA which gives power to adjudicate, does not expressly or impliedly bar any person from invoking the provisions of the Consumer Protection Act. It has also given a liberty to the person whose Complaint is pending before the Consumer Fora to withdraw it and file before the RERA Authorities.

(iv) Even though under Sections 14, 15, 18 and 19 of RERA, various provisions have been made which are to be followed by the Developer/Promoters and the rights and duties and the return of amount as compensation as also rights and duties of Allottees, yet same cannot mean to limit the right of the Allottee only to approach the Authorities constituted under the RERA, he can still approach the Consumer Fora under the Consumer Protection Act.

Referring to the recent Supreme Court decision in *Emaar MGF Land Ltd. vs. Aftab Singh – I (2019) CPJ 5 (SC)*, the Commission held that the fact that Arbitration can be proceeded under the Arbitration and Conciliation Act, 1986 is not a ground to restrain the Consumer Fora from proceeding with the Complaints. ***–[Ajay Nagpal v. Today Homes & Infrastructure Pvt. Ltd. Consumer Case No. 1764 of 2017, 15th April, 2019 (NCDRC)]***

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## ENVIRONMENT

### 1) NGT FINES ANDHRA PRADESH GOVT RS. 100 CRORE OVER FAILURE TO STOP SAND MINING

The NGT has slapped an interim penalty of Rs. 100 crore on the Andhra Pradesh Government for inaction to prevent illegal sand mining in the state. The NGT said it is the duty of the Government to provide complete protection to the natural resources as a trustee of the public at large. – ***[The Business Standard, dated 07th April, 2019]***

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