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## Higher Additional Fees for delayed filings of Form PAS-3 and INC-22 Background

Section 403 deals with the filing fees to be paid on any document required to be submitted, filed, registered or recorded under the Companies Act, 2013 ('the Act'). Before Companies (Amendment) Act, 2017 (CAA, 2017), proviso to Section 403 mentioned that after the time specified in the relevant section under the Act for filing a particular document, it may be filed by companies within 270 days from the date on which it should have been filed by payment of additional filing fees specified in Rule 12 of the Companies (Registration Offices and Fees) Rules, 2014 ('Rules').

However, post Companies (Amendment) Act, 2017, this proviso was deleted. This led to an ambiguity that if a company missed to file any document within the time specified in relevant section, whether it be filed in delay or not!!! It may be noted that the Table B of these Rules (fees prescribed for documents other than increase in authorised share capital, charge related filings and filing of financial statements and annual returns) mentioned about additional filing fees for documents filed after the timeline prescribed for filing in relevant section(s).

Now, Ministry of Corporate Affairs (MCA) vide notification dated 11<sup>th</sup> January, 2022 notified amendments w.r.t. Section 403 which were proposed in Companies (Amendment) Act, 2017 and Companies (Amendment) Act, 2020 w.e.f. 1<sup>st</sup> July, 2022, pursuant to which 2<sup>nd</sup> Proviso and 3<sup>rd</sup> Proviso to Sec. 403(1) is made effective.

The 2<sup>nd</sup> Proviso to Sec. 403 enables Central Government ('CG') to allow Companies to file returns or documents after due date prescribed in relevant section(s), with payment of additional fees as prescribed in above mentioned Rules. This proviso also mentions that this shall be without prejudice to any other legal action or liability under the Act. Hence, it clarifies that even after payment of additional fees under the Rules, any legal action may be taken for delay in said filing.

Further 3<sup>rd</sup> proviso to Sec. 403 inserted by Companies (Amendment) Act, 2020 states about charging of higher additional fees as may be prescribed in case of default on two or more occasions in filing of certain document(s) as MCA will prescribe.

Accordingly, Annexure I (Part B – Fees for Forms other than forms related to Increase in Authorised Capital, Charges and Annual Filing forms) to Rule 12 of Companies (Registration officers and Fees) Rules is substituted w.e.f. 1<sup>st</sup> July, 2022 to prescribe higher additional fees for certain forms (as explained below) on which such higher additional fees will be charged.

In brief the impact of amendment is as follows:

### Impact of Amendment

- **Forms prescribed for levy of Higher Additional Fees** – Form INC-22 (Shifting of Regd. Office) and Form PAS-3 (Return of Allotment)
- **When higher additional fees will be charged** – If Company fails to file prescribed Forms within due date on two or more occasions within a period of 365 days from the date of filing of the last such belated e-form for which such fees are payable
- **Forms which are excluded from the purview of higher additional fees** – Form related to Increase in Nominal Share capital, all Charge related forms, all Annual Filing Forms (filed u/s 92 and 137) are excluded
- **Whether additional Fees prescribed for other forms will also be leviable?** – No, it is clearly mentioned that existing additional fees as applicable for other delayed forms shall not be charged for forms where higher additional fee is payable.
- **Applicable from the period:** As effective date of notification is 1<sup>st</sup> July, 2022, higher additional fees will be applicable for the forms filed in delay on or after 1<sup>st</sup> July, 2022.

Although Ministry has prescribed only 2 forms for the time being for higher additional fees, it may come up with list of more forms for which higher additional fees may be levied in above-mentioned cases.

Therefore, it is utmost important to file all pending forms on priority basis and in future too.

**Link of relevant Notifications:**

<https://www.mca.gov.in/bin/dms/getdocument?mids=%252F1gywEL3uai%252Fowv0QtPAKw%253D%253D&type=open> (Notification CAA, 2020)

<https://www.mca.gov.in/bin/dms/getdocument?mids=O7YNA0Zg2jiii0fhNar4%252Bw%253D%253D&type=open> (Notification CAA, 2017)

<https://www.mca.gov.in/bin/dms/getdocument?mids=%252FwqhpSXC6%252BFxaMTdJJWnnA%253D%253D&type=open> (Notification amending Rules)

## Non-compliance with provisions relating to continuous disclosures – Securities and Exchange Board of India Circular dt: December 29, 2021

Securities and Exchange Board of India ('SEBI') had vide its circular dt: November 13, 2020 prescribed a uniform structure for levying fines and taking action for non-compliance with continuous disclosure requirements ['LODR SOP 2020'] specified under Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ["SEBI LODR Regulations"] by the issuers of listed Non-convertible Debt securities, Non-convertible Redeemable Preference Shares ("NCRPS") and Commercial Paper.

SEBI vide its notification dt: August 9, 2021 notified Securities and Exchange Board of India (Issue of Non-Convertible Securities) Regulations, 2021 for issue and listing of non-convertible securities which lead to repealing of Securities and Exchange Board of India (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 and Securities and Exchange Board of India (Issue and Listing of Non-Convertible Debt Securities) Regulations, 2008. Further SEBI vide its Fourth and Fifth Amendments to SEBI LODR Regulations in 2021, amended the compliance framework for entities that have listed their non-convertible securities. Due to these amendments, the LODR SOP 2020 became redundant to some extent.

Pursuant to this, SEBI has vide its circular dt: December 29, 2021 notified revised penal provisions for **non-compliance** with continuous disclosure requirements specified under **SEBI LODR Regulations by issuers who have listed their non-convertible securities**. A brief analysis of SEBI circular dt: December 29, 2021 is given below:

### 1. Penalty enhanced:

Regulation	Penalty as per SEBI circular November 13, 2020	Penalty as per SEBI circular December 29, 2021
Regulation 50(1): Delay in prior intimation to stock exchanges about board meeting for matters prescribed in Regulation 50(1)	Rs 1000 per ISIN	Rs 5000 per instance of non compliance per item

## 2. New penalties added:

<b>Regulation</b>	<b>Penalty as per SEBI circular November 13, 2020</b>	<b>Penalty as per SEBI circular December 29, 2021</b>
Regulation 50(2): Delay in intimation to stock exchanges about meeting of shareholders or holders of non-convertible securities with regard to certain matters in Regulation 50(1)	No penalty	Rs 5000 per instance of non compliance per item
Unaudited financial results submitted without limited review report under Regulation 52(2)(a)	No penalty	Rs 5000 per day
Non-submission of annual audited financial results within 60 days from end of financial year under Regulation 52(2)(d)	No penalty	Rs 5000 per day
Non-submission of statement of assets & liabilities and cash flow statement along with financial results for half year, as required under Regulation 52(2)(f).	No penalty	Rs 5000 per day
Regulation 53(2): Non-submission of annual report within the period prescribed under this regulation.	No penalty	Rs 2000 day
Regulation 57(4): Non-submission of details of interest/dividend/principal obligations payable, within 5 working days prior to beginning of quarter.	No penalty	Rs 1000 per ISIN
Regulation 57(5): Non-submission of certificate and details confirming the payment of interest/dividend/principal obligations due in the quarter within seven working days from the end of the quarter.	No penalty	Rs 1000 per ISIN

### 3. Penalty remains same but scope of penalty enhanced in line with the amendment.

Regulation	Penalty as per SEBI circular November 13, 2020	Penalty as per SEBI circular December 29, 2021
<p>Regulation 52(7) / (7A): Non-submission of statement indicating the utilization of issue proceeds of non-convertible securities/ material deviation in the use of proceeds as compared to objects of the issue .</p>	<p>Rs 1000 per day</p>	<p>Rs 1000 per day</p> <p>[Penalty has been enhanced for non-submission of details of material deviations as well as statement of utilization of issue proceeds]</p>
<p>Regulation 54(2): Non -disclosure of extent and nature of security created and maintained with respect to secured listed non -convertible debt securities in the quarterly, half-yearly, year-to-date and annual financial statements.</p> <p>Regulation 54 (3): Non -disclosure of asset cover in the financial results.</p> <p><b>Note:</b> Till now penalty was levied for violation of Regulation 54(2) only. Now as Regulation 54(3) is newly inserted w.e.f September 7, 2021 and hence, non-disclosure of asset cover in financial results will also attract penalty.</p>	<p>Rs 1000 per day</p>	<p>Rs 1000 per day</p>

### Penalties prescribed as per SEBI Circular dt: December 29, 2021 will be effective from February 1, 2022.

SEBI in its circular dt: December 29, 2021 has stated that where a listed entity has **listed equity shares and non-convertible securities**, then with respect to common obligations

under Chapter III of SEBI LODR Regulation and for violation of provisions relating to submission of financial results viz. non-submission of cash flow statement, non-submission of limited review report etc. **penalty will be levied once only and not under both Standard Operating Procedure.**

But the point here that needs to be noted is that SEBI LODR Equity Standard Operating Procedure provides penalty only for non-submission of financial results. It does not provide penalty for non-submission of limited review report or cash flow statement. So if a listed entity has listed equity shares and non-convertible securities and fails to submit cash flow statement and / or limited review report then it seems that penalty will be levied by Stock Exchange. But in same manner if listed entity has only its equity shares listed then will it be adjudicated by SEBI as there is no SOP based penalty prescribed by SEBI? This might be looked upon by SEBI in near future.

Further it should be noted that there is no change in penalties in respect of issuers having listed commercial papers and also there is no change in procedure for taking action against non-compliance by such issuers. Those issuers will continue to be governed by the earlier Circular of SEBI dated November 13, 2020.

Copy of circular dated December 29, 2021 can be accessed at below mentioned link: [https://www.sebi.gov.in/legal/circulars/dec-2021/non-compliance-with-provisions-related-to-continuous-disclosures\\_55070.html](https://www.sebi.gov.in/legal/circulars/dec-2021/non-compliance-with-provisions-related-to-continuous-disclosures_55070.html)



## Scheme of Arrangement by Listed Entities

Schemes of Arrangements generally form a routine part of activities for listed entities in terms of growth mainly inorganic growth, but some schemes might be quite complex & might attract the focus of Regulators. Securities and Exchange Board of India ('SEBI') from time to time has inculcated regulations & issued circulars/ notifications for listed entities who wish to undertake such schemes of arrangements. SEBI (Listing Obligations & Disclosure requirement) Reg 2015 ('LODR'/ 'Listing Regulations') sheds light on compliances to be done by listed entity concerning Schemes of Arrangements.

Regulation 11 of the Listing Regulations, inter-alia, provides that listed entities shall ensure that any scheme of arrangement/amalgamation/merger/reconstruction/reduction of capital, etc. to be presented to any Court or Tribunal does not in any way violate, override, or limit the provisions of securities laws or requirements of the Stock Exchanges. **Regulation 37 of Listing Regulations** provides that the listed entities desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement shall **file the draft scheme with Stock Exchange(s) for obtaining the No-objection Letter**, before filing such scheme with any court or Tribunal. Regulation 94 of the Listing Regulations require Stock Exchanges to forward such draft schemes to SEBI in the manner prescribed by SEBI and thereafter to issue No-objection letter to the listed entity within seven days of receipt of comments from SEBI after suitably incorporating the same in the letter.

SEBI vide its Circular No. CFD/DIL3/CIR/2017/21 dated: March 10, 2017 laid down the framework for Schemes of Arrangement to be filed by listed entities and relaxation under Rule 19(7) of the Securities Contracts (Regulation) Rules, 1957. SEBI vide its circular dt: November 3, 2020 amended its circular dt: March 10, 2017. This amendment was aimed at ensuring that the recognized stock exchanges refer draft schemes to SEBI only upon being fully convinced that the listed entity is in compliance with SEBI Act, Rules, Regulations and circulars issued thereunder. SEBI vide its circular dt: December 22, 2020 brought out a Master Circular giving a compilation of all circulars issued by SEBI pertaining to schemes of arrangement to enable the users to have access to all applicable circulars at one place ('Master Circular').

Now **SEBI vide its circular dt: November 16, 2021** amended the Master Circular inter-alia stating that **Audit Committee & Independent Directors shall certify** that eligible shareholders arising out of the scheme have been compensated by listed entity & a report within 7 days of such compensation payment shall be submitted to stock exchange. Further it also stated that listed entity while submitting documents with stock exchange shall also **submit No Objection Certificate ('NOC')** from the lending scheduled commercial bank / financial institutions. Further **SEBI vide its November 18, 2021 circular amended** the clause relating to NOC and stated that **NOC will be required** from Scheduled Commercial Bank / Financial Institution / **Debenture Trustees**. [i.e., debenture trustees have been added in this clause]

Further SEBI probably felt the need to clarify exact timing when NOC needs to be submitted to stock exchange? In this regard **SEBI vide its circular dt: January 3, 2022** stated that **NOC** as required in terms of Circular dated November 16, 2021 and November 18, 2021, **shall be submitted before the receipt of the No-objection letter from stock exchange** in terms of Regulation 37(1) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. By perusing the above referred circulars it can be seen that SEBI is trying to take one more step to ensure that the shareholders and lenders interest is not compromised in the entire process of Scheme of Arrangement.

A copy of above referred circulars can be accessed at below mentioned link:

1. Master Circular on (i) Scheme of Arrangement by Listed Entities and (ii) Relaxation under Sub-rule (7) of rule 19 of the Securities Contracts (Regulation) Rules, 1957 dt December 20,2020-

[https://www.sebi.gov.in/legal/master-circulars/dec-2020/master-circular-on-i-scheme-of-arrangement-by-listed-entities-and-ii-relaxation-under-sub-rule-7-of-rule-19-of-the-securities-contracts-regulation-rules-1957\\_48531.html](https://www.sebi.gov.in/legal/master-circulars/dec-2020/master-circular-on-i-scheme-of-arrangement-by-listed-entities-and-ii-relaxation-under-sub-rule-7-of-rule-19-of-the-securities-contracts-regulation-rules-1957_48531.html)

2. Scheme of Arrangement by Listed Entities dt November 16,2021-

[https://www.sebi.gov.in/legal/circulars/nov-2021/scheme-of-arrangement-by-listed-entities\\_53967.html](https://www.sebi.gov.in/legal/circulars/nov-2021/scheme-of-arrangement-by-listed-entities_53967.html)

3. Addendum to SEBI Circular dated November 16, 2021 relating to Schemes of Arrangement by Listed Entities dt November 18,2021 –

[https://www.sebi.gov.in/legal/circulars/nov-2021/addendum-to-sebi-circular-dated-november-16-2021-relating-to-schemes-of-arrangement-by-listed-entities\\_54056.html](https://www.sebi.gov.in/legal/circulars/nov-2021/addendum-to-sebi-circular-dated-november-16-2021-relating-to-schemes-of-arrangement-by-listed-entities_54056.html)

4. Schemes of Arrangement by Listed Entities - Clarification w.r.t. timing of submission of NOC from the lending scheduled commercial banks/ financial institutions/ debenture trustee dt January 03,2022 –

[https://www.sebi.gov.in/legal/circulars/jan-2022/schemes-of-arrangement-by-listed-entities-clarification-w-r-t-timing-of-submission-of-noc-from-the-lending-scheduled-commercial-banks-financial-institutions-debenture-trustee\\_55166.html](https://www.sebi.gov.in/legal/circulars/jan-2022/schemes-of-arrangement-by-listed-entities-clarification-w-r-t-timing-of-submission-of-noc-from-the-lending-scheduled-commercial-banks-financial-institutions-debenture-trustee_55166.html)

## Claim against Corporate Guarantee

In the matter of M/s Edelweiss Asset Reconstruction Company Ltd – Appellant Vs. M/s. Vasan Health Care Pvt. Ltd (Corporate Debtor) through V Mahesh Interim Resolution Professional (IRP) Mr. Rajendran Shanmugam Resolution Professional - Respondents at National Company Law Tribunal, Chennai (NCLAT) dated 13<sup>th</sup> December, 2021

### Facts of the Case

- The present appeal is filed aggrieved by part of the order of the National Company Law Tribunal (NCLT), whereby the NCLT rejected the claim of the M/s Edelweiss Asset Reconstruction Company Ltd., (Appellant) in respect of Corporate Guarantee issued by M/s. Vasan Healthcare Pvt. Ltd. (Corporate Debtor) for the amounts borrowed by the Vasan Dental Hospitals Pvt. Ltd – Subsidiary of Corporate Debtor.
- The Appellant filed claim of approx. Rs.507 crores. The claim of the appellant was verified by the IRP. The Committee of Creditors (COC) was constituted and the Appellants voting share percentage was worked out to around 40.03%. The IRP raised various queries vide multiple E-mails and the Appellant duly responded to the same and provided all necessary clarifications to all the queries.
- The IRP vide E-mail dated 6<sup>th</sup> February, 2020 informed the appellant that the claims worth approximately Rs.206 Crores have been rejected and Rs.180.92 Crores have been kept in abeyance, and claims worth approximately Rs.119.72 Crores have only been admitted thereby reducing the appellants admitted claims from approximately Rs.507 Crores to Rs.119.72 Crores. **And accordingly, the voting share of the Appellant has been reduced unilaterally from 40% to a mere 13%.**
- The main grounds for rejection of the claim of the Appellant by NCLT is that the Corporate Guarantee was not produced in Claim Form and **Corporate Guarantee was not reflected in the Books of Accounts of Corporate Debtor as a contingent liability and the Corporate Guarantee has not been invoked till date.**
- **The Appellant has requested to reinstate the claims of the Appellant in full to the extent of Rs.507 Crores.**

### Arguments on behalf of the Appellant

- A Financial Creditor is allowed to file its claim and is allowed to file supplementary documents or clarifications in support of the Claim before the constitution of the Committee. The entire claim was accepted by IRP including the Corporate Guarantee and later on objections were raised via emails.
- They further shared a copy of the Corporate Guarantee along with the Board Resolutions from both the Corporate Debtor and the Borrower which were passed while sanctioning the subject loan to the Corporate Debtor.
- The Corporate Guarantee was also filed before the NCLT through convenience volume. This copy was shared much before passing of the order rejecting the claim of the Appellant. However, NCLT failed to take note of the same before rejecting the claim of the Appellant.
- The fact that the Corporate Guarantee is not reflected in the books of Corporate Debtor the said lapse if made by the Corporate Debtor by itself will not invalidate the Guarantee. The Assignor Bank obtained requisite Board Resolutions from both the Corporate Debtor and the Borrower while sanctioning the subject loan to the Borrower. The same was submitted at NCLT by way of additional typed set of papers.
- Further, it is settled law that the term 'claim' which is independent of debt and default would only include a 'matured claim'. The right of the Creditor to file a claim would be as per the definition of claim. The IRP/RP cannot examine as to whether there has been a

default in respect of the claim being made by the Creditor.

The Respondent filed a detailed Counter Affidavit to the above application.

**Questions for Consideration:**

**Whether Corporate Guarantee not reflecting in Debtor's books, invalidates Creditor's claim?**

**Decision at NCLAT:**

- From the perusal of documents, it was evident that there is no dispute with regard to the Corporate Guarantee issued by the Corporate Debtor for the loans borrowed by the VDHL a subsidiary of Corporate Debtor.
- Further, observed that –
  - the Appellant has provided all information to the IRP/RP prior to rejection of claim,
  - after rejection of the claim, the Appellant addressed a detailed reply to the objections raised by IRP, however IRP did not consider the documents produced before it and without going into detail, rejected the claim, and
  - even the NCLT merely affirmed the stand taken by the IRP/RP, without verifying the documents placed before it;
- Also stated that the non-recognition of Corporate Guarantee by the Vasan Healthcare Pvt. Ltd. in its annual report cannot be the basis of absolution of its obligations and the same cannot be rejected on the said reason
- Also noted that the Corporate Guarantee not reflected in the Books of the Corporate Debtor, this lapse in itself will not invalidate the Guarantee.
- NCLAT set aside NCLT order to the extent it rejected Appellant's claim in respect of Corporate Guarantee issued by Corporate Debtor for amounts borrowed by its subsidiary, on finding that the existence of Corporate Guarantee is not in question either by fact or in law, rules that the claim cannot be invalidated on the ground that said Guarantee is not reflected in the Books of Corporate Debtor
- Also, noted that the claim defined in Section 3 (6) of the Insolvency and Bankruptcy Code, 2016 means 'a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured'
- Also, relied on Export Import Bank of India v Resolution Professional of JEKPL Pvt. Ltd. (NCLAT, Delhi) Company whereby the NCLAT held that
  - Stand taken by the respondents that the claim has not been matured cannot be ground to reject the claim
  - The Resolution Professional is required to maintain an updated list of all the claims. Aforesaid fact also suggests that the maturity of a claim or default of debt are not the guiding factors to be noticed for collating or updating the claims.
  - It does not mean that the persons whose debt has not been matured cannot file claim. The Financial Creditors or Operational Creditors or secured or unsecured creditors all are entitled to file claim
  - It was held that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim. It is the duty of the Resolution Professional to collate all the claims and to verify the same from the records of assets and liabilities maintained by the Corporate Debtor.
- Relying on above referred case, NCLAT also held that the Resolution Professional is required to maintain an updated list of all claims. The maturity of a claim or default of debt, are not the guiding factors to be noticed for collating or updating the claims.
- While concluding NCLAT allowed the appeal and held that the Corporate Guarantee was made available with IRP and NCLT. The IRP and the Adjudicating Authority cannot take the unsustainable and unsound technical stand and reject the claim.

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