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Is monthly business update or operational update provided to stock exchanges by listed companies a UPSI or not?

I. Introduction:

SEBI vide its recent adjudication order dated October 28, 2022 has held that **monthly business update or operational updates given to stock exchanges is Unpublished Price Sensitive Information ('UPSI')** as per Reg. 2(1)(n) of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 ['SEBI PIT'].

II. Background:

Sobha Ltd ['Company'] provided real estate operational updates for quarter ended September 2017 vide its press release dt: October 6, 2017 to Bombay Stock Exchange ('BSE') and National Stock Exchange ('NSE'). This real estate operational update depicted that Company had registered an increase of 5.3 % and 14.4% in sales value as compared to preceding quarter and year-on-year basis respectively. The sales volume was up by 5.6% as compared to preceding quarter. On October 7, 2017 i.e., next trading day, price of the Company increased by 17.43% and 17.39% on BSE and NSE respectively. Trading Window was not closed by Company while submitting this disclosure.

III. Company argued it was not UPSI:

The Company submitted that real estate operational updates are neither financial results nor they are part of financial results, but they are mere sales figures. They were submitted to BSE and NSE for providing transparent and timely information to the market/general public. The Company further submitted that these sales figures are pre-construction and post construction both, and are disclosed based on the booking done by the Customers during a particular period. Sales/revenue from the said sales are not necessarily recognised/formulated as revenue for the quarter. Revenue from these sales will be recognized in the quarterly financial statements based on certain revenue recognition guidelines.

IV. SEBI argued it was UPSI:

SEBI had a different view as compared to submissions made by Company. SEBI in this regard stated that sales performance of a listed entity during the financial year/quarter is a critical information taken into consideration by an investor for deciding whether to invest in a company or not. News/information indicating good sales performance by a listed entity in ordinary course would influence the decision of investors and attract the investors to the scrip of listed entity and vice versa. Therefore, information relating to sales performance of company for a quarter will have the potential to materially affect the price of the scrip. So, real estate operational updates which contain sales performance of the Sobha for the financial quarter has the potential to materially affect the price. SEBI further stated that definition of "UPSI" under Regulation 2(1)(n) of PIT Regulations is an inclusive one and is not restricted to financial results. This means that if the information relating to company or its securities is not generally available and has

the potential to materially impact the price of securities, the same would be termed as "UPSI". Even if Company has not recognized real estate operational update dated October 06, 2017 as UPSI that does not take away the fact that Real estate operational update dated October 06, 2017 is an UPSI.

V. Conclusion:

There are listed entities like Bajaj Auto, Hero Motors Ltd, Vedanta Ltd, Karnataka Bank Ltd, IDFC First Bank Ltd etc which are consistently providing business updates to the stock exchanges at the start of every month. In this case of Sobha Ltd., SEBI has held that information relating to sales performance of company will have the potential to materially affect the price of the scrip. Hence, an inference can be taken from this case that whenever any listed entity is disclosing the business updates to stock exchange, it is necessary to relook whether this update can have a material affect on the stock prices on stock exchanges, whether any element of UPSI is present in this business update and if yes, then are we complying with PIT Regulations or not !!!!



Guidance from SEBI on creation of 'Suspense Escrow Demat Account' while processing service requests

I. Introduction:

The Securities and Exchange Board of India ('SEBI') has vide its circular dt: December 30, 2022 issued guidance with regard to procedural aspects of Suspense Escrow demat account in cases where requests for transmission, issue of duplicate security certificate, split certificate are received from shareholders holding shares in physical form.

II. Background:

SEBI has vide its circular dt: January 25, 2022 had directed listed entities to process all service requests in demat form. Service requests here would mean transfer, transmission, issue of duplicate security certificate, split certificate etc.

SEBI had also provided a procedure for processing of investor service requests in demat form. As per this procedure listed entities will have to process the service request received and instead of sending physical certificates it will have to send a 'Letter of Confirmation ('LOC')'. This LOC is valid for 120 days from the date of issuance. Investor in whose name it is sent shall produce LOC to depository participant and then Depository participant shall credit shares as against this LOC. Listed entities are also mandated to send reminders on expiry of 45 and 90 days of sending of LOC.

III. Need for Suspense Escrow demat Account:

Although the above SEBI Circular explains the procedure for dealing with service requests from shareholders holding shares in physical form. But there might be a situation where the investor is unable to produce the LOC to the depository participant and get his entitlement (shares) credited to his demat account due to some reason within a period of 120 days from the date of issuance of LOC and hence the LOC gets lapsed. In that case, SEBI had stated that such shares shall be credited to 'Suspense Escrow Demat Account'.

IV. Need for new / additional guidance from SEBI with regard to Suspense Escrow demat Account:

In the above mentioned SEBI Circular, there was no clarity on how and when to open this demat account? Whether opening of this account is mandatory etc. The Registrar and Share Transfer Agents (RTAs) had been following consistently with SEBI for guidance on this. Now SEBI has provided guidance in this regard as follows:

A. Opening of Suspense Escrow Demat Account:

1. Companies are required to open a separate demat account with the nomenclature "Suspense Escrow Demat Account" for the purpose of this circular
2. Companies which have not yet opened "Suspense Escrow Demat Account" and are currently using "Suspense Escrow Demat Account/unclaimed Suspense Account" as provided under Schedule VI of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 for the purpose of Letter of Confirmation cases, shall move securities pertaining to Letter of Confirmation cases to newly opened "Suspense Escrow Demat Account" latest by January 31, 2023.

B. Process to credit shares to Suspense Escrow Demat Account:

1. In cases where securities holder/claimant fails to submit the demat request to the depository participant within the period of 120 days from the date of issuance of letter of confirmation, RTA shall move the said securities to a physical folio "Suspense Escrow Demat Account" and issue a consolidated letter of confirmation to the Company for the said securities in the "Suspense Escrow Demat Account" on monthly basis.
2. Thereafter, the listed entity shall dematerialise these securities in "Suspense Escrow Demat Account" with one of the depository participants within seven days of receipt of such LOC from RTA.
3. The listed entity shall maintain details of security holding of each individual securities holder(s) whose securities are credited to such "Suspense Escrow Demat Account"
4. "Suspense Escrow Demat Account" shall be held by the listed entity purely on behalf of the securities holders who are entitled to the securities and the securities held in such account shall not be transferred in any manner whatsoever except for the purpose of moving the securities from "Suspense Escrow Demat Account" to the security holder's claimant's demat account as and when the security holder/claimant approaches the listed entity

C. Process for claiming securities from Suspense Escrow Demat Account

1. Securities which have been moved to 'Suspense Escrow Demat Account' may be claimed by the security holder / claimant on submission of following documents to RTA:
 - a. Duly filled in and signed form ISR-4
 - b. Client master list ('CML') of the demat account for crediting the securities to the security holder's / claimant's account provided the details in the CML should match with the details recorded with the RTA / issuer company.

V. Impact:

On the notifying of SEBI Circular dt: January 25, 2022 whereby SEBI had directed to open 'Suspense Escrow Demat Account' many companies will be skeptical whether it is necessary to open this account separately ? or whether it is mandatory to open this account even when listed entity has not issued LOC? or on issue of LOC whether it is necessary to open 'suspense escrow demat account'.

If we refer Point A.1 it states that , "*Companies are required to open a separate demat account with the nomenclature "Suspense Escrow Demat Account" for the purpose of this circular*" This makes it clear that listed entities will have to open separate demat account for the purpose of January 25, 2022 SEBI circular and listed entities cannot use 'demat suspense account' created pursuant to Reg. 39(4) of SEBI LODR for the purpose of crediting shares unclaimed under public issue or other issue and lying in escrow account, as applicable.

Further the wording '*for the purpose of this circular*' would mean that listed entities will have to open this account only when they have received service requests viz, issue of duplicate share certificate, transmission, transposition, claim from unclaimed suspense account, endorsement, sub-division/splitting of securities, consolidation of securities certificate, and renewal / exchange of securities folios as are mentioned in

the SEBI circular January 25, 2022.

So, in case if any listed entity has not received such request till now they are not required to open 'suspense escrow demat account'.

VI. More guidance needed from SEBI:

After crediting the shares to 'suspense escrow demat account', still there is no clarity as to what treatment will have to be given for dividends or corporate benefits accrued on these shares?

As per regulation 39(4) read with Schedule VI of SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015 once shares unclaimed during public issue are transferred to 'demat suspense account' or unclaimed suspense account corporate benefits shall be credited to that demat account and on completion of seven years such shares shall be transferred to IEPF.

SEBI still need to provide clarity as to what will happen to corporate benefits in respect of securities credited to 'suspense escrow demat account'.



Is the Company Secretary solely liable to ensure compliance with Secretarial Standards?

The Company Secretary of a Company plays a crucial role in ensuring various compliances applicable to the company, in that process he must also be diligent in fulfilling his duties and functions as prescribed u/s 205 of the Companies Act, 2013 (the Act) or else might face regulatory actions.

In a recent order in case of *M/s Madras Fertilizers limited (company)* it was observed that the **Company Secretary was solely held liable and responsible for non-compliance of Secretarial Standards-2**. The subject company had violated with the compliance of section 118 (10) read with clause 14 of secretarial standards- 2 which prohibited the company from distributing gifts, gift coupons or cash in lieu of gifts to its members at or in connection with the General Meeting.

The Company had a practice of giving refreshments to its shareholders who attended the Annual General Meetings of the company physically. But in the year 2020, the company had to conduct its 54th AGM via Video Conferencing due to Covid-19 restrictions and thus it was first such occasion when the company had to conduct the AGM through electronic means.

Thus to continue its practice the company this time in lieu of refreshments and as a humanitarian approach had distributed complimentary SBI gift cards to all its 53 minority shareholders for participating in its 54th AGM dated 29.12.2020.

Examining the above mentioned default, Registrar of Companies (ROC), Chennai had via its order dated 30.06.2022 had imposed a penalty of Rs 25,000/- (Twenty five thousand) upon the company and a penalty of Rs 5,000/- (five thousand) each upon the Managing Director and the Whole Time Director of the company.

Aggrieved by the order passed by ROC, Chennai the subject **company had made an appeal** to the Regional Director (southern region) on 10.08.2022 citing that **the non-compliance occurred due to unavoidable circumstances and such default was unintentional**.

The company submitted that there was no mala-fide intention, nor any detrimental interest vested with the company in such non-compliance.

The Appellate Authority - Regional Director (RD) (Southern Region) observed that the Adjudication order passed by ROC, Chennai suffers from an incurable illegality as the Company, Managing Director and the Whole Time Director were held liable for the said default and the Company Secretary was excluded who was actually the officer in default.

The RD made reference to the provisions of section 205 (1) (b) of the Act which provides that; one of the **functions of the company secretary is to ensure that the company complies with the applicable Secretarial Standards**. In the given case, the Company had a whole time company secretary who is a Key Managerial Personnel (KMP) in terms of section 203 of the Act, thus it was the primary duty of the Company

Secretary to ensure that the General Meetings including the AGMs and Board Meetings are held in accordance with law.

The RD further concluded that in cases where company is having a whole time company secretary in accordance with section 203 of the Act, he must be identified as an officer in default in terms of section 2 (60) of the Act and thus shall be held liable for non-compliances under the Act.

Also it was observed that when a company secretary is appointed , the managing Director and the Whole Time Director can be ***expected to assume that the Company Secretary would take care of the compliances with Secretarial Standards and are expected to not to intervene in those matters.***

Hence, RD sat aside the ROC, Chennai order ***imposing penalty on the Company, Managing Director and the Whole Time Director and directed ROC, Chennai to initiate action against the Company Secretary alone***, the reason being that section 205 subsection (2) shall not affect the duties and functions of the Board of Directors, Chairperson of the Company, Managing Director or the Whole Time Director.

Is interest Component part of Financial debt irrespective of principal amount is due or not?

In the matter of Base Realtors Private Limited (Appellant/Financial Creditor) Ltd. Vs. Grand Realcon Private Ltd (Respondent /CD) passed at National Company Law Appellate Tribunal dated 15 November, 2022

Facts of the case:

- The Grand Realcon Private Limited (Respondent/Corporate Debtor/CD) allotted 5,60,000-optionally convertible debentures with a coupon rate of 6% p.a payable on face value plus securities premium on quarterly rests to **Base Realtors Private Limited** (Appellant) on 31 April, 2021.
- The debentures had the maturity date of 31 March, 2026. As the debenture certificate was issued on 13 April, 2021, it was agreed that the debentures could be redeemed after expiry of one year from the said date and interest was to be calculated from the said date.
- At the end of quarters ending June, September and December 2021, interest aggregating to an amount over INR 2,39,00,000 accrued in favour of the Appellant. However, the Respondent did not pay the Appellant the amount which accrued at the end of each of the mentioned quarters, despite the Appellant issuing default notices at the end of each quarter.
- The Appellant filed an application u/s 7 of the Insolvency and Bankruptcy Code, 2016 (Code/IBC) in respect of interest of three quarters which accrued and became payable as a debt. The application filed u/s 7 of the Code was dismissed by the National Company Law Tribunal (NCLT) on the ground that only the interest amount would not fall within the definition of financial debt until and unless principal amount became due and payable.
- Aggrieved by the order of NCLT, the Appellant filed an appeal before the National Company Law Appellate Tribunal (NCLAT).

Question for Consideration

Whether an application u/s 7 of the Code be filed and maintained in respect of the component of interest which became due and payable without asking for the principal amount which has not yet become due and payable?

Arguments of the Appellant:

- It was argued that the application u/s 7 of the Code would be maintainable even on the component of interest if it crossed the threshold limit being part of the financial debt.
- It was submitted that the **financial debt was a debt with interest if any, disbursed against the consideration for the time value of money and included debentures.**
- It was further submitted that the Hon'ble Supreme Court in the case of *M/s Orator Marketing Pvt. Ltd. Vs. M/s Samtex Desinz Pvt. Ltd.*, held that interest free loan was a financial debt and the application under u/s 7 of the Code was held to be maintainable.
- It was argued that same analogy the interest which became due and payable would attract the provisions of section 7 of the Code.

Arguments of the Respondent:

- It was argued that as per the scheme of the Code, the financial debt means the debt along with interest and not the interest independently and further submitted that there is no error in the approach of the NCLT.
- It was also argued that the decision in the case of *M/s Orator Marketing Pvt. Ltd.* (Supra) was not applicable as it was a case wherein the principal amount which was advanced without interest was considered as a financial debt and the application was maintainable u/s 7 of the Code, whereas in the given case the application filed u/s 7 of the Code could be maintained only in respect of the component of interest which had become due and payable, without asking for the principal amount which had not yet become due nor had become payable.

HELD:

- After referring to various definition appearing in Part I and Part II of the Code specially debt, default etc and after relying on *Innovative Industries Ltd. V. ICICI Bank and Orator Marketing Private Limited v. Samtex Desinz Private Limited* wherein it was held that in order to maintain an application u/s 7 of the Code, the Financial Creditor has to show the default as a condition precedent.

NCLAT finally held that an application filed u/s 7 of the Code could be maintained in respect of the component of interest which became due and payable without asking for the principal amount which has not yet become due and payable.

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