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5.	Minority Debenture Holders can invoke necessary action/remedy against the Corporate Debtor in case of any event of default without waiting for any action initiated by the Majority Debenture Holder and the Debenture Trustee. In the matter of Clearwater Capital Partners Singapore Fund IV Private Limited and Anr - Appellants vs Rajesh Estates and Nirman Private Limited - Respondent at National Company Law Tribunal (NCLT) Mumbai dated 24th March 2023.

Balancing Act: The Importance of Insider Trading Regulations in promoting Fairness and Prosperity.

Insider trading has been rampant in stock exchanges across the country. This involves misuse of confidential information tantamounting to betrayal of fiduciary position. This has been one of principal causes of excessive speculative activity. Hence curtailing them was on watchdog's priority list which led to regulations being introduced solely to curtail greed for multiplying money via trading when possessing privileged information and manipulating the stock markets.

Price manipulation and price rigging[1] activities were common in stock markets without regulations in place. The increase was due to data not being easily available. Hence "**Data is the new oil**" for businesses and investors tend to react on this proactively and intentionally when the same starts being available.

Therefore, India Inc is in a dilemma caught between the crossfire of insider trading regulations with competitive information to be shared in public domain on one end while securing and safeguarding unpublished price sensitive information (UPSI) on the other end.

A case in point is when recently a diversified conglomerate acquired a media company where the information had percolated with insiders and hence investors were not able to derive the value benefit. On the contrary, when a private sector bank amalgamated a housing finance company, the UPSI was secured, and the investors were beneficiaries at large.

The regulator has been absolutely voicing it loud that if anybody indulges and advocates manipulative trading activities it shall spare nobody. The list comprehensively covers everyone ranging from a common retail investor to independent directors[2], CXOs, CEOs, judicial authorities, trade union leaders, entities like banks, NBFCs, intermediaries like stockbrokers,

[1]Some companies are seen rigging stock prices by exploiting the absence of timelines in certain issues.

[2] Infosys stated that there had been an "inadvertent trade" by the portfolio management services of Bela Parikh, spouse of company's independent director Bobby Parikh. Following the same penalty of Rs 2 lakh has been imposed on Bobby Parikh

portfolio managers, employees. The regulator has come down heavily on perpetrators leading to over 100 plus professionals being debarred from securities market and around Rs 260 crore monetary penalty being levied.

While the exclusive purpose of PIT regulations is to protect investor interests along with flamboyant securities market, more often possessors of UPSI are tempted to share the same not for the purpose of insider trading but to flaunt it as status symbol or sometimes just to share because it may get overwhelming or as a

matter of mental pressure. Adversaries of PIT regulations also argue that ESOPs[3] are granted to employees who are usually in senior positions to provide them with a sense of ownership. But these cannot be exercised as they possess UPSI. Hence, the purpose for which the same was granted stands unachieved. All thanks to PIT.

Despite these reasons, the regulator has not been considerate, and there is an aftermath which isn't just restricted to disproportionate penalties by way of monetary risk but also reputational risk leading to compromising CXOs positions, research analysts and directorships.

Fear/Dilemma prevails at India Inc with respect to undue advantage taken by peers if UPSI is shared in public domain and the regulator might switch on the penalty meter if not disclosed in time therefore ***encouraging a debate – Disclose or not disclose! If disclosed advantage taken, if undisclosed -Penalty meter.***

Irrespective of such ruthless assaults by PIT regulations and to solve the dilemma, SEBI emphasizes adherence to these for achieving the ultimate purpose of investor protection. These are regulations are pills to the insider trading disease and hence it is necessary to have them in place. The ASIC[4] report 2016 suggest that entities protecting UPSI tend to perform better in stock markets.

To my mind, the stock markets are barometers of economy and for them to strengthen, solve the ethical dilemma entities face, they are advised to protect UPSI via following mechanisms: -

1. Exercising cyber hygiene to avoid inadvertent cyberattack & unauthorised access to UPSI.

[3] ESOPs – Employee Stock Option Plans

[4] ASIC – Australia Securities & Investments Commission Report

2. Recapitulate and widen blackout periods.
3. Preclearance of trades for designated persons and people in possession of UPSI
4. Monitor information leakage optimally using the data leakage prevention tools.
5. Restrict circulation of UPSI and adhere to highest possible standards of data security and confidentiality.
6. Chinese Wall Policies[5] and maintenance of structural digital database.

Fiduciaries and designated persons having access to & in possession of UPSI are responsible to ensure that it is sheltered in larger context of economy and vibrant

stock market. Stability, investor faith and confidence can be imbibed when UPSI is secured. While the Securities and Exchange Board of India (SEBI) has taken measures to combat insider trading and regulate the dissemination of UPSI, there is still a long way to go. Greater vigilance combined with compliance by market participants, as well as strong enforcement mechanisms will ensure the integrity and transparency of Indian Capital Markets.

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[5] Chinese walls are policies and procedures intended to prevent the misuse of inside information in securities trading by limiting the availability of material, non-public information to departments of the firm that might misuse such information.

FAQS on SEBI PIT Regulations

With an objective to provide greater clarity on several concepts related to the SEBI (PIT) Regulations, 2015, as also to shed more light on the ambiguities of various requirements of the regulations, SEBI had issued comprehensive Frequently Asked Questions (FAQs) on April 29, 2021, which consolidated all the FAQs and guidance notes issued earlier.

In the light of the new queries and suggestions received, and consultations with market participants, the FAQs have now been revised and updated, more particularly, with regard to structured digital database and contra-trade.

These FAQs are further explained subject-wise below:

1. Structured Digital Database

FAQ 2021 (now repealed w.e.f from March 31, 2023)	**FAQ 2023** **Effective from March 31, 2023**
7. Question If the structured digital database is maintained on Amazon, Google or cloud server hosted outside India, will it be considered as outsourced or internal? **Ans:** Databases/servers provided by third party vendors whether within India or outside India will be considered as outsourced.	**7. Question** If the structured digital database is maintained on Amazon, Google or cloud server hosted outside India, will it be considered as outsourced or internal? **Ans:** The SDD has to be maintained in compliance of Regulation 3 (5) and 3(6) of PIT regulations. The Board is solely accountable for all aspects related to the maintenance of data on cloud or any other method. The Board and the compliance officer have to ensure the confidentiality, integrity and security of its data and logs, and ensure compliance with the laws, regulations, circulars, FAQs etc. issued by SEBI/ Exchanges from time to time. The Board / Compliance Officer shall be responsible and accountable for any violation of the same.

Background: Reg. 3(5) of SEBI (Prohibition of Insider Trading) Regulations, 2015 requires the board of directors or head(s) of the organisation of every person required to handle unpublished price sensitive information to ensure that a structured digital database is maintained containing the nature of unpublished price sensitive information and the names of such persons who have shared the information and also the names of such persons with whom information is shared under this regulation along with the Permanent Account

Number or any other identifier authorized by law where Permanent Account Number is not available. Such database shall not be outsourced and shall be maintained internally with adequate internal controls and checks such as time stamping and audit trails to ensure non-tampering of the database. SEBI pursuant to above provision read with FAQ no. 7 of April 2021 had clearly stated that Structured Digital Database [`SDD'] shall not be outsourced and shall be maintained internally.

Change: Now SEBI has vide its FAQ dt: March 31, 2023 stated that SDD shall be maintained as per Reg 3(5) and 3(6). Further SEBI has also stated that the Board is solely accountable for all aspects related to the maintenance of data on cloud or any other method. It must be noted that SEBI had earlier expressly said that databases/servers provided by third party vendors will be considered as outsourced, and this has been withdrawn by SEBI now. Pursuant to the amendment made to the FAQs, the Board of Directors / Compliance Officer is made responsible to ensure the compliance of regulation 3 (5) & 3 (6) of SEBI PIT, i.e., to ensure that any third party does not have accessibility to the entries in structured digital database. Rest SEBI is silent on whether such servers will be considered as outsourced or internal.

2. Nominee Director sharing information with bank or financial institution he is representing

FAQ 2021	**FAQ 2023 (change effective from 31st March, 2023)**
Q 11. Nominee directors sharing information to their bank or financial institution for legitimate purpose, will it be covered as communication of UPSI? **Ans:** "If the directors fall under the list of designated persons or as an insider, then sharing of UPSI by them for legitimate purpose with the Bank/FIs, would be considered as communication of UPSI. Accordingly, the same would be recorded in the SDD of the company."	Q 11. Nominee directors **of a bank or financial institution** sharing information to their bank or financial institution for legitimate purpose, will it be covered as communication of UPSI? **Ans: The nominee directors on an entity,** falling under the list of designated persons or as an insider, sharing UPSI with the Bank/FIs, for the legitimate purpose of the entity, would be considered as communication of UPSI. Accordingly, the same would need to be recorded in the SDD of the company.

Change: FAQ no. 11 of FAQ 2021 was not elaborating with respect to Nominee Director of bank or financial institution. Also, the earlier answer to Q. 11 was referring to directors in general. This might have created confusion. Now SEBI has vide new FAQs effective from 31st March, 2023 clarified that nominee directors, be it of a bank or a financial institution, if he is a designated person or as an insider, then sharing UPSI will be covered

under sharing of UPSI and compliances pertaining to SEBI (Prohibition of Insider Trading) Regulations, 2015 shall be done.

3. Off market transfer of shares

FAQ 2021	FAQ 2023 (Insertion w.e.f from 31st March, 2023)
Q24. Whether transfer of shares from one Demat account to another Demat account of the same person will trigger the disclosure requirements? **Ans:** Since beneficiary ownership remains the same, the transfer of shares will not qualify as trading. Hence, disclosure requirements for the same will not be required.	Q24. Whether transfer of shares from one Demat account to another Demat account of the same person will trigger the disclosure requirements? **Ans:** Since beneficiary ownership remains the same, the transfer of shares will not qualify as trading. Hence, disclosure requirements for the same will not be required. **However, the disclosure requirements shall be applicable in cases where one of the demat accounts has more than single ownership.**

The change in this FAQ can be explained by way of below example:-

- **If Mr A has a demat account with 'Motilal Oswal Ltd' where he is the single owner ['First Demat account']. There is another demat account which is held by Mr. B and Mr. A which is with 'Zerodha' ['second demat account']. Now if there is transfer of shares from first demat account to second demat account then it would be considered as 'Trading'?**
  Yes, it would be considered as trading. Further as it is considered as trading compliances pertaining to preclearance, trading window closure and disclosure would also be applicable.

- **If in second demat account as mentioned in above referred question, Mr A would have been the first holder and Mr B as second holder would the answer be different?**
  No. The answer would not change. As the second demat account is jointly owned by Mr A and Mr B, so on transfer of shares from first demat account to second demat account would result in change in ownership. SEBI has also in one adjudication order[1] relating to violation of SEBI PIT Regulations has stated as follows, *"……Thus, I do not find any merit in the contention of the Noticee that the transactions undertaken by him were merely in the nature of correction of name in the records from the name of the Noticee to the name of SDM, as the transfer from one demat account to another demat account which does not solely belong to the*

[1] https://www.sebi.gov.in/enforcement/orders/dec-2021/adjudication-order-in-respect-of-satish-kumar-agrawal-in-the-matter-of-sanwariya-consumer-ltd-_54953.html

Noticee indicates change in the ownership of the shares. To further elaborate the aforesaid reasoning, in the aforesaid two transactions, the ownership of shares was transferred from the Noticee to the Noticee, Gulab Chand Agrawal and Geeta Devi Agrawal (being the other partners of SDM) …." Further SAT[2] in the matter of Bharat G Patel and Ors vs SEBI had also stated that, *"It is an admitted fact that the beneficial ownership in the shares was transferred at the various points of time which required to be disclosed by the appellant either to the Company or to the stock exchanges as per the regulations. Having failed in this, they would be liable for penalty"*

Hence this change in FAQ is to bring more clarity with regard to such transactions being considered as trade and incidental compliance for that.

4. Contra Trade in the context of ESOP

FAQ 2021 **Substituted w.e.f 31st March, 2023**	**FAQs 2023** **Effective w.e.f 31st March, 2023**
Q36. Does the contra trade restriction (for a period not less than six months) under clause 10 of Schedule B of the Regulations also apply to the exercise of ESOPs and the sale of shares so acquired? **Ans:** Exercise of ESOPs shall not be considered to be "trading" except for the purposes of Chapter III of the Regulations. However, other provisions of the Regulations shall apply to the sale of shares so acquired. For Example: i. If a designated person has sold/ purchased shares, he can subscribe and exercise ESOPs at any time after such sale/purchase, without attracting contra trade restrictions. ii. Where a designated person acquires shares under an ESOP and subsequently sells/pledges those shares, such sale shall not be considered as contra trade, with respect to exercise of ESOPs. iii. Where a designated person purchases some shares (say on August 01, 2015), acquires shares	**Q36. Does the contra trade restriction (for a period not less than six months) under clause 10 of Schedule B of the Regulations also apply to the exercise of ESOPs and the sale of shares so acquired?** **Ans:** Any buy/sell trade, undertaken by a Designated Person (DP) and their immediate relatives, within 6 months of an earlier sell/buy trade, respectively, where both the trades have been done in **open market**, will tantamount to contra trade. SEBI has added a note that what shall be meant by "open market" as "*Any acquisition/disposal of shares undertaken through any corporate action i.e. Rights Issue, FPO, OFS, Bonus, Split, Exit offers, Buyback offer, Open offer, Merger/ Amalgamation, Demerger etc. shall be considered as Non-open market trade, rest all kinds of transactions will be considered as Open Market trade.*" In respect of ESOPs, subscribing, exercising and subsequent sale of shares, so acquired by exercising ESOPs (hereinafter "ESOP shares"),

[2] //sat.gov.in/english/pdf/E2019_JO2018185.PDF

later under an ESOP (say on September 01, 2015) and subsequently sells/pledges (say on October 01, 2015) shares so acquired under ESOP, the sale will not be a contra trade but will be subject to other provisions of the Regulations, however, he will not be able to sell the shares purchased on August 01, 2015 during the period of six months from August 01, 2015. iv. Where a designated person sells shares (say on August 01, 2015), acquires shares later under an ESOP (say on September 01, 2015) the acquisition under ESOP shall not be a contra trade. Further, he can sell/pledge shares so acquired at any time thereafter without attracting contra trade restrictions. He, however, will not be able to purchase further shares during the period of six months from August 01, 2015 when he had sold shares.	shall not attract contra trade restrictions. Further, if the ESOP shares are sold in multiple transactions, it will not attract contra trade restrictions. Further, it is to be noted that other provisions of the Regulations shall apply to the sale of shares so acquired through exercising ESOPs.

Sl. no	Transaction date – January 1, 2021 (A)	Transaction date – February 1, 2021 (B)	Transaction date – March 1, 2021 (C)	Transaction date – August 1, 2021 (D)	Transaction date – September 1, 2021 (E)	Contra Trade (F)
1	-	ESOP acquire#	*ESOPs - Dispose$*	-	-	No
2	-	ESOP acquire#	*ESOPs - Dispose$*	*ESOPs - Dispose$*	-	No
3	-	ESOP acquire#	*Market - Acquire@*	*ESOPs - Dispose$*	-	*Yes, Transaction D is contra to C*
4	-	ESOP acquire#	*ESOPs - Dispose$*	*Market - Acquire@*	-	*Yes, Transaction D is contra to C.*
5	*Market - Dispose@*	ESOP acquire#	*ESOPs - Dispose$*	-	-	No
6	*Market - Acquire @*	ESOP acquire#	*ESOPs - Dispose$*	-	-	*Yes, Transaction C is contra to A.*

7	*Market - Acquire@*	**ESOP acquire#**	*ESOPs - Dispose$*	*Market - Acquire@*	*ESOPs - Dispose$*	*Yes, Transaction C is contra to A, D is contra to C and E is contra to D.*
8	Non –open Market – Acquire%	**ESOP acquire#**	*ESOPs - Dispose$*	-	-	**No**

*- **ESOPs – Acquire**: Shares acquired through exercising ESOPs*
$ *- **ESOPs – Dispose**: Shares disposed, which were acquired through exercising ESOPs.*
@ *- **Open Market - Acquire/Dispose**: Shares acquired or disposed in open market*
% *- **Non-Open Market – Acquire** - Shares acquired through corporate actions like Rights Issue, FPO, OFS, Bonus, Split, etc.]*

Change: On perusing the above table, it becomes clear that acquisition of shares through ESOP and then disposal of those shares within a period of six months would not be considered as Contra Trade but if the individual disposing of ESOP shares had earlier acquired the shares through open market, within a period of six months, then it would be considered as Contra Trade.

5. Contra Trade in the context of corporate action

FAQ 2021 **Substituted w.e.f 31st march, 2023**	**FAQ 2023** **Effective w.e.f 31st March, 2023**
Q39. Whether the restriction on execution of contra trade in securities is applicable in case of buy back offers, open offers, rights issues FPOs etc by listed companies?	Q39. Whether the restriction on execution of contra trade in securities is applicable in case of buy back offers, open offers, rights issues, FPOs**, OFS, share split, bonus, exit offers**, **merger/amalgamation**, **demerger,** etc. by/of listed companies?
Ans: Buy back offers, open offers, rights issues, FPOs, bonus, 13[exit offers] etc. of a listed company are available to designated persons also, and restriction of 'contra-trade' shall not apply in respect of such matters. Provided the initial transaction of buy/sell have been completed in accordance with PIT Regulations.	**Ans:** Any acquisition of securities by way of Rights issue, Follow-on Public Offer (FPO), **Offer for Sale (OFS), Bonus issue, Share Split, Merger/Amalgamation, Demerger**, would not attract restriction of 'contra-trade', provided the initial transaction of disposal was completed in accordance with PIT Regulations. **Similarly, any disposal of securities by way of Buy-back, Open offer, exit offer, Merger /Amalgamation etc. would not attract restriction of 'contra-trade', provided the initial**

	transaction of acquisition was completed in accordance with PIT Regulations.

Change: SEBI has elaborated the list of corporate actions where restrictions on contra trade would not be applicable. SEBI has now stated that any acquisition of securities pursuant to OFS, bonus issue, share split, merger/amalgamation, and demerger would not attract contra trade restrictions, provided the initial transaction of acquisition/sale was in accordance with PIT Regulations.

1. Date of purchase for contra trade:

FAQ 2021 **Substituted w.e.f 31st March, 2023**	**FAQs 2023** **Effective w.e.f 31st March, 2023**
Q40. In case shares are acquired pursuant to any corporate action by the company such as rights issue/FPO, whether the contra trade restrictions would apply if such shares are sold before completion of 6 months from the date of acquisition? **Ans:** If the first trade is an acquisition by way of rights issue/FPO, then subsequent sale of shares before 6 months from the date of acquisition would be considered as a contra trade.	Q40. In case securities are acquired/disposed of pursuant to rights issue, FPO, buy back offers, open offers, bonus, OFS, share split, merger/amalgamation, demerger etc., whether the contra trade restrictions would apply if such securities are disposed/acquired through open market trade, before completion of 6 months from the initial date of acquisition/disposal? **Ans:** If the initial transaction is an acquisition by way of Rights issue, Follow-on Public Offer (FPO), Offer for Sale (OFS), Bonus issue, Share Split, Merger/Amalgamation, Demerger, then subsequent disposal of securities within 6 months from the date of initial transaction would be considered as a contra trade. Similarly, if the securities are disposed through Buy-back or Open offer, then subsequent acquisition of securities within 6 months from the date of initial transaction would be considered as a contra trade. However, for the transactions involving merger/amalgamation, demerger, bonus and split, the period of 6 months shall be calculated as under: **a) Merger/amalgamation** – For securities received subsequent to a **merger/ amalgamation,** period of 6 months is to be calculated from the

	date of acquisition of securities of the entity(ies), **which were merged/amalgamated**. However, if an **unlisted entity gets merged/amalgamated** with the listed entity, the employees of the unlisted entity who are now the Designated Persons of the listed entity as a result of merger/ amalgamation, the period of six (6) months for such Designated persons shall be counted from the first transaction in the entity, post-merger/ amalgamation. **b) Demerger -** For **securities received** subsequent to a **demerger**, **period of 6 months** is to be calculated **from the date of acquisition** of the securities **of the entity, which was demerged**. **c) Bonus and share split** – For securities received subsequent to bonus or share split, **six months to be calculated from the date of acquisition of original securities,** on which bonus/split shares were received.

Change: SEBI has now provided clarity on timeline for calculation of six months on corporate action pertaining merger, demerger, bonus and share split. Further SEBI has stated that in case an unlisted entity gets merged into listed entity the employees of unlisted entity who would now be considered as designated persons of listed entity, six months for such designated persons would be counted from first transaction in the listed entity.

6. Contra Trade and linking of PAN

FAQ 2021 **(no such FAQ was there)**	**FAQ 2023** **(effective w.e.f 31st March, 2023)**
	Q42A. If Designated Person (DP) is holding shares under his PAN in different capacities viz. in his personal capacity, in the capacity of trustees, in the capacity of an executor of will, etc., will the restrictions of contra trade be applicable to all the shares held in all the capacities collectively or individually?

	Ans: The restriction to engage in contra trade as provided under the provisions of the PIT Regulations would be applicable to all the shares held under the PAN of the Designated Person, irrespective of the capacities in which such Designated Person holds such shares in the Company.

Remarks: It has been clarified that such restrictions on Contra trade is applicable for all shares held under his/her PAN and not depending upon the capacities in which he holds such shares. This was earlier clarified by SEBI in an Informal Guidance dated June 3, 2019 issued to Arvind Mills Ltd wherein similar reply was given by SEBI. Now this has been added as FAQ also.

7. Trading in Rights Entitlement and Contra Trade

FAQ 2021 **(no such FAQ was there)**	**FAQ 2023** **(effective w.e.f 31st March, 2023)**
	Q44A. Whether the Designated Person can trade in the Rights Entitlement if he/ she has earlier acquired the shares of the Company (within the six (6) months period)? **Ans:** Trading in Rights Entitlements tantamount to open market trade in the Company securities and contra trade provisions are applicable on them. Thus, if the Designated Person has earlier acquired the shares of the Company and if they sell the Right Entitlement within a time span of six (6) months, it will attract contra trade provisions.

Remarks: SEBI allowed trading in rights entitlement in demat form w.e.f. January 22, 2020. SEBI has now clarified that trading in rights entitlement would be considered as trading in open market. So, for trading in rights entitlement shall be in accordance with provisions of SEBI PIT Regulations, 2015.

8. Insider Trading in the context of CIRP

FAQ 2021 **(no such FAQ was there)**	**FAQ 2023** **(effective w.e.f 31st March, 2023)**
	Q59. Whether entities who have participated as a prospective bidder in the bidding process of a listed company, under the Corporate Insolvency Resolution Process (CIRP), can buy/sell the listed securities of the said company, either on Exchange/on preferential basis/through any bidding process?

	Ans: Regulation 4(1) of the PIT Regulations requires that no insider shall trade in securities that are listed or proposed to be listed on a stock exchange when in possession of unpublished price sensitive information. Thus, an entity, if had access to the UPSI during the bidding process of the company under CIRP, then the requirements under the PIT Regulations need to be abided with.

Remarks: SEBI has now clarified with regard to secondary market trade for a company under CIRP.

The detailed FAQ issued by SEBI is available on the below link:- https://www.sebi.gov.in/sebi_data/faqfiles/apr-2023/1680758865899.pdf

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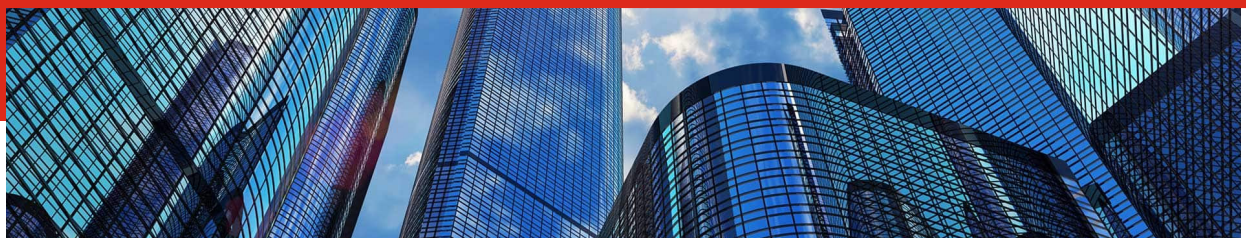

NEED AND RELEVANCE OF 'OMNIBUS APPROVAL' IN CASE OF RELATED PARTY TRANSACTIONS-

1. Background:

Related Party Transactions ["RPT"]are being regulated under Companies Act, 2013 ["CA 2013"] under section 177 and section 188 read with section 2(76) and also under Regulation 23 of SEBI (Listing Obligations and Disclosure Requirements), 2015 ["SEBI LODR"] and there is an approval framework requiring approval of Audit Committee, Board of Directors and shareholders, depending on the thresholds. In case of approval of Audit Committee, there is a concept of 'omnibus approval' under CA 2013 as well SEBI LODR. In this article, we shall deliberate upon the need and relevance of this 'omnibus approval'.

2. Concept of 'omnibus approval':

Section 177 of CA 2013 as well as Regulation 23 of SEBI LODR which prescribes requirement of audit committee approval for RPTs has reference of word "Transaction" between related parties. However, Section 188 of CA 2013 which prescribes requirement of approval of board of directors in case of certain RPTs and also shareholders if the value is exceeding certain thresholds refers to the words "Contracts or arrangements" with related parties.

If we see dictionary meaning of these terms, it can be seen that:

- As per the Cambridge English dictionary, "**transaction**" is a completed agreement between a buyer and a seller to exchange goods, services, or financial assets in return for money.

- As Per The Indian Contract Act 1872, Agreement enforceable by law is a "**contract**".
  Further, the definition of term "agreement" under Competition Act, 2002 includes any arrangement. Such arrangement may be formal or informal, or written and may also be a concerted practice.

- The Hon'ble Division Bench of Karnataka High Court, in the case of KV Kuppa Raju v. Government of India (1997) 224 ITR 169 (Mad), has noted that the report of an Expert Group to rationalize and simplify Income Tax law had given "**Arrangement**" means any scheme, trust, grant, understanding, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect.

So, from above definitions it can be understood that every purchase or sale or instance of service is a different 'transaction', whereas a 'contract' or

'arrangement' may cover multiple transactions. An activity which happens on 'one to one' basis can be a transaction, whereas an activity which happens on 'one to one' basis OR 'one to many' basis can be said to be a contract, and further an activity which happens on 'one to many' basis OR 'many to many' basis can be said to be an arrangement. Hence it can be said that **Contracts/arrangements are a set of transactions, and transactions are sub-sets of 'contract / arrangement'**.

3. **Frequency of approval and need for 'omnibus approval':**

As mentioned above, the approval of the board of directors or shareholders is prescribed under section 188 of CA 2013 and that section speaks about 'contract / arrangement'. Hence that approval is to be taken whenever any new contract / arrangement is entered

or renewed or modified. It is not required for each transaction under such contract / arrangement. However, in respect of approval of audit committee, all related party

transactions requires prior approval of audit committee, i.e., approval is needed for each and every transaction.

Further, the company may enter into some related party transactions frequently, wherein it may not feasible for audit committees to meet every time for approvals and hence, law has introduced the concept that audit committee may grant 'omnibus approval' to the related party transactions proposed to be entered by the companies.

In fact, SEBI has vide its circular dated 08th April 2022, introduced the concept of 'omnibus approval of shareholders' also under Regulation 23 of SEBI LODR, because under SEBI LODR, the approval of shareholders is also required for **each and every transaction** with related party, if the overall value of transactions during the year are crossing materiality thresholds mentioned in SEBI LODR. It will not be feasible to convene shareholders meeting for approval of each transaction and SEBI LODR does not use the word 'contract or arrangement', and hence the shareholders may also grant omnibus approval for omnibus RPTs.

4. **Minimum conditions for an 'omnibus approval' to be valid:**

Regulation 23 (3) of SEBI LODR as well as Rule 6A of The Companies (Meetings of Board and its Powers) Rules, 2014 states the minimum requirements and criteria required by Audit Committee for providing omnibus approval to related party transactions. If the omnibus approval fulfills all conditions mentioned under these provisions, only then the approval of audit committee can be considered as valid.

For eg: as per Rule 6A of the above-mentioned Rules, the minimum contents of omnibus approval (especially where value of transactions is Rs. 1 crore or more) are:-

(a) name of the related parties;
(b) nature and duration of the transaction;
(c) maximum amount of transaction that can be entered into;
(d) the **indicative base price** or current contracted price and the formula for variation in the price, if any; and
(e) any other information relevant or important for the Audit Committee to take a decision on the proposed transaction:

Generally omnibus approval is sought for repetitive transactions. In many cases, the indicative base price of transactions for entire year may not be foreseen and hence companies tend to skip this disclosure in the omnibus approval. However, altogether skipping this in the resolution can make the entire approval invalid. Hence, in such cases, there can be different methods of mentioning the indicative base price, for eg: mentioning previous year's minimum and maximum price charged and percentage of variation in current year OR mentioning a range of indicative price OR mentioning market price for such transactions and stating that the price charged shall not be lesser than the market price, and so on.

Similarly under SEBI LODR, SEBI has issued a Circular dated 22 November 2021, wherein minimum contents to be placed before the audit committee while approving RPTs has been prescribed. This circular is applicable even for audit committee approvals sought through omnibus approval. Hence if any one or more contents are not placed before the audit committee, then the entire approval can have risk of being challenged in future.

5. **Conclusion:**

The aforesaid details are important for omnibus approval by audit committee for the transactions with related parties. If any of them is missing then omnibus approval and audit committee approval cannot be said to be valid. Further as per section 166(5) of CA

2013 which mentions about duties of directors states that *"A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company."*

Hence it is important to ensure complete disclosure before the approving forum and complete disclosure in the resolutions passed in order to avoid any complications in future.

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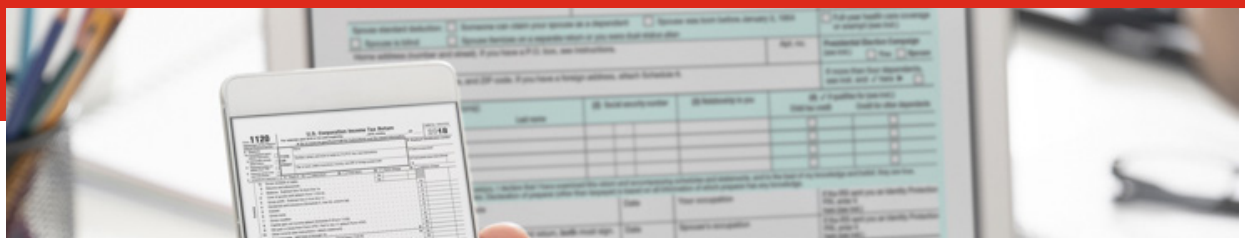

ROC faces brunt for not approving e-form in time

Background

As per Section 77 (1) of Companies Act, 2013 companies are required to register charge with Registrar of Companies ('ROC') by filing form CHG-1 within a period of thirty days from the date of creation. As per Section 77 (2) ROC would then register the charge in their records and issue a certificate of registration of charge. Rule 10 (1) of Companies (Registration Offices and Fees) Rules, 2014 states as follows, "*The Registrar shall examine or cause to be examined every application or e-Form or document required or authorised to be filed or delivered under the Act and rules made thereunder for approval, registration, taking on record or rectification by the Registrar, as the case may be:*

Provided *that save as otherwise provided in the Act, the Registrar shall take a decision on the application, e-form or documents within thirty days from the date of its filing excluding the cases in which an approval of the Central Government or the Regional Director or any other competent authority is required:….*". So, Rule 10 (1) states that ROC shall revert on forms or documents filed with them within a period of thirty days. Rule 10(1) further states that delay in revert to form is allowed only if there is approval of Central Government or Regional Director or competent authority is required. Further, Rule 10(2) provides for time limit within which ROC can call for additional information or ask company to rectify defects. Rule 10 (3) provides that additional information sought by ROC has to be provided within a period of 15 days. Rule 10(4) states that if information is not provided or defects are not cleared within time provided then ROC has the power to reject the document or treat the document as invalid.

In a recent case it was alleged that ROC violated provisions of Rule 10 (1) of Companies (Registration Officers and Fees) Rules, 2014. This was in case of Adventz Finance Private Limited ("Adventz" / "Company") & Anr vs. Union of India & Ors. This matter was challenged before Hon'able Calcutta High Court by way of Writ Petition somewhere in March 2023. Facts of the case and decision thereat are summarised as follows:

Facts of the case:

Adventz had filed two CHG-1 forms viz. July 8th and July 9th 2021 respectively for registration of charges with ROC. Both these forms filed were put up for resubmission by ROC, Kolkata. Adventz accordingly re-submitted both CHG-1 forms on 4th August and 30th October 2021 respectively. Post this resubmission ROC Kolkata sent a communication to Company on July 29, 2022 i.e. one year from the date of resubmission. Vide this communication ROC Kolkata stated that form re-submitted on 4th August 2021 has been rejected as per Rule 10(4) of Companies (Registration Offices and Fees), Rules, 2014. Rule 10(4) of Companies (Registration Offices and Fees) Rules says that, if the applicant does not provide proper information or provides incomplete information on being asked by ROC, the ROC may reject the form. No communication was received regarding CHG-1 form resubmitted on October 30, 2021 by Adventz. This issue was then challenged by Adventz before Hon'able Calcutta High Court by way of Writ Petition.

Decision

On hearing both sides honourable Calcutta High Court held that, ROC Kolkata can delay the revert to any form only if permission of any other authority is required for approving the said form. Further, applicability of Rule 10(4) will only arise if the applicant has failed to furnish further information called for under Rule 10(3) of Companies (Registration Offices and Fees) Rules, 2014. Both these situations are not applicable to facts of the present case. Honourable Calcutta High Court ordered that, Adventz should re-submit form CHG-1 again (earlier re-submitted on 4th August 2021) within a week from the date of order and ROC should register the form CHG-1 resubmitted on 30th October 2021. Further, since there is palpable and unexplained delay on the part of the ROC which is also contrary to the proviso under Rule 10(1) of the 2014 Rules, the ROC shall pay costs of Rs. 25,000/- to the petitioner within a fortnight from date.

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Minority Debenture Holders can invoke necessary action/remedy against the Corporate Debtor in case of any event of default without waiting for any action initiated by the Majority Debenture Holder and the Debenture Trustee.

In the matter of Clearwater Capital Partners Singapore Fund IV Private Limited and Anr - Appellants vs Rajesh Estates and Nirman Private Limited - Respondent at National Company Law Tribunal (NCLT) Mumbai dated 24 March 2023.

Facts of the Case:

- Rajesh Estates and Nirman Private Limited (Corporate Debtor/CD) was engaged in the business of real estate construction. The CD has issued 432 unrated, unlisted, secured redeemable, non-convertible Debentures (NCD's) having a face value of Rs.1,00,00,000/- each out of which 19 NCD's were issued to Clearwater Capital Partners Singapore Fund IV Private Limited and 110 NCD's were issued to Clearwater Capital Partners Singapore Fund V Private Limited (Financial Creditors/FC's) amounting to Rs 19,00,00,000/-and Rs.110,00,00,000/- respectively. The NCD's were issued in pursuance of a Debenture Trust Deed (DTD) dated 19 March 2018 with Vistra ITCL (India) Private Limited as the debenture trustee.
- The CD had defaulted in fulfilling the payment obligation with respect to NCD's on account of which 2 acceleration notices were issued dated 31 May 2021 by FC's demanding the redeeming the NCD's.
- There was no acknowledgement of the acceleration notices by the CD, due to which the FC invoked personal and corporate guarantees.
- The FC called upon Rajesh Constructions and personal guarantors (Corporate Guarantor) to pay the entire accelerated amount by way of a Guarantee Notice dated 2 June 2021 which was also returned unclaimed.
- Hence, Corporate Insolvency Resolution Process (CIRP) was initiated by the FC`s by invoking the provisions of section 7 of Insolvency and Bankruptcy Code ,2016 (IBC) r/w rule 4 of IBC (Application to Adjudication Authority) Rules, 2016 for a resolution of an unresolved financial debt of Rs. 208 crores. .

Arguments of the Corporate Debtor:

- It was argued that that section 10-A of IBC explicitly envisages that no application for initiation of CIRP can be filed for any default by a CD which default has occurred from 25 March 2020 to 24 September 2020. Further, the legislature strategically imposed a blanket

suspension of initiation of CIRP (which is a very strict measure as the management loses control, IRP/RP is given control and is essentially an irreversible process etc.) for all defaults occurring from 25 March 2020 till 24 March 2021. In fact, the legislature has gone ahead and imposed a total prohibition on ever initiating CIRP against corporate persons, for the defaults which have occurred between 25 March 2020 and 24 March 2021. The legislature has provided an express bar from initiating CIRP, ever in time, for defaults committed between the aforesaid periods. This means that when a default has been committed by a borrower during this suspension period, the creditor will never be able to initiate CIRP against the borrower. This position of law is undisputed, and the FC's cannot have any different view on the same.

- The alleged default by the CD in payment of the principal amount under the DTD was on 31 December, 2020. Such date of 31 December, 2020 admittedly falls within the suspension period for initiation of CIRP under the Code.
- The FC`s were aware that they will be unable to initiate CIRP against the CD since the default is on 31 December, 2020, therefore, the FC's have intentionally sought to hide the date of default as per their own case in the application and with mala-fide sought to portray the date of default as the date on which the FC's issued the notice dated 31 May 2021, which was labelled as the 'Facility Acceleration Notice' which was not only unreasonable but a clear indication of the ill-intended tactics of the FC`s.
- Under the 'Facility Acceleration Notice' the FC`s provided no details and granted one day's time to the CD to repay a total sum of Rs. 208 Crores
- Further, it was claimed that the Facility Acceleration proceeded on the assumption that an 'Event of Default' as occurred as per the terms of the DTD however, the said notice makes no mention of the date on which such 'Event of Default' came to have occurred. The schedule annexed to the Facility Acceleration Notice crystallises an amount allegedly due and payable by the CD as of 31 May, 2021 without referring to the date on which such amount/s was or were due and payable. The interest amount has been crystallised without any specifics of the amount allegedly in default, the date from which the interest is calculated as well as the rate of interest which has been applied by the FCs.
- Acceleration Notice is against the provisions of the DTD as the Acceleration Notice can only be issued by the debenture trustee and

the debenture trustee can only act on instructions issued by majority of the NCD holders.

- The FC were minority of NCD holders and this they cannot declare an event of default without following the provisions of DTD.
- The Application needs to be rejected due to malafide intention.

Held:

- It was noted that a separate clause in DTD gave unqualified rights to both the debenture trustee and debenture holders separately wherein they can act under various policies, schemes etc under the applicable laws whenever required.
- Further, section 71 (6) of the Companies Act 2013 construes debenture trustee as one who protect the interests of debenture holders. It was observed that even though FC`s are minority debenture holders the debenture trustee is not the only person empowered to initiate action.
- Reliance was placed on NCLT judgement *Reliance AIF Management Company Limited & Ors vs Bharucha & Motivala Infrastructure Private Limited* wherein it was held that the presence of a trustee does not limit any right of a debenture holder under any circumstances .Another case law *of National Company Law Appellate Tribunals judgement of Mr. T Prabhakar v. Mr. S Krishnan* wherein it was held that there is no fetter in law for the debenture holder to file an application seeking to initiate CIRP without adding debenture trustee.
- NCLT admitted the application with an observation that no repayment of the NCDs, principal and interest amount has been made by the CD. NCLT highlighted the fact that section 10A was inserted taking into consideration the extraordinary situation prevalent all over the world, including India impacting the business, financial markets and economy which had created uncertainty and stress for business for reasons beyond the control of corporate persons and it provided relief only for the default occurring during the pandemic period.
- NCLT also mentioned that in this case no payment has been made till date which suggested that there had been a default on the part of the CD. Further, the protection of the newly inserted Section 10A will not come into play only as 10% of the amount fell due under the suspension period and 90% was not covered as the default being of a continuous nature. Therefore, the CD cannot seek shelter of section 10 A for the entire claim of Rs. 208 crores and thus the present petition was not barred by section 10A.
- Accordingly, the petition was allowed to be admitted.

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