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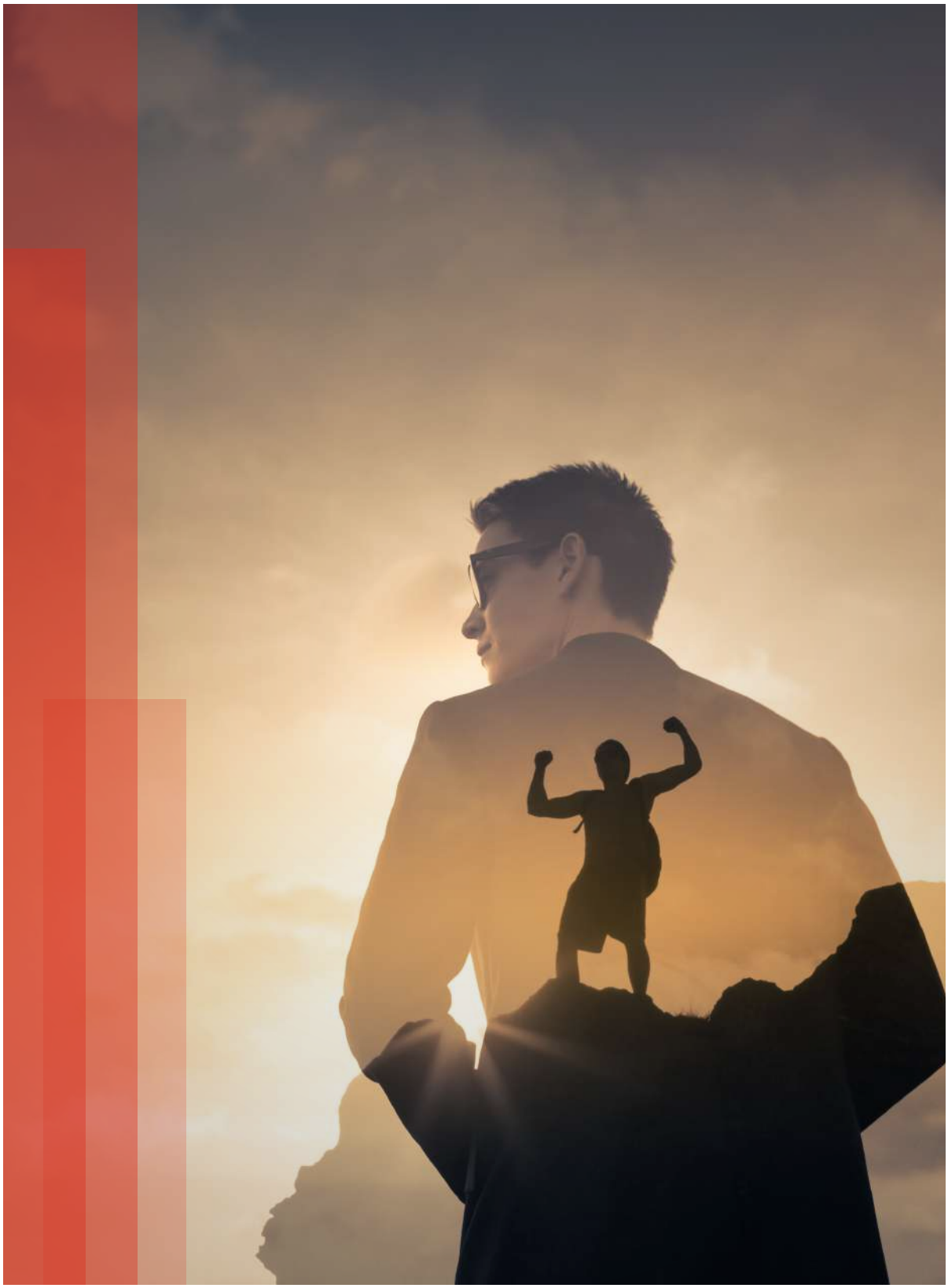

MCA starts enforcement for Register of Contracts or Arrangements (MBP-4) miss-outs

I. Background:

Section 188 of the Companies Act 2013 ('Act') converses about contracts or arrangements for related party transactions ('RPTs'). In simple terms RPT is nothing but transactions undertaken between two or more related parties' as per Act. RPTs by nature are not illegal; however, such transactions have an element of conflict of interest and hence they are regulated under the Act. Section 184 is another section of the Act which deals disclosure of interest of directors and contracts or arrangements with parties in which directors may have direct or indirect interest.

II. Register of Contracts or Arrangements:

As per Section 189 of the Act, the contracts or arrangements to which sections 188(1) or 184(2) are applicable are required to be recorded in the statutory register in form MBP-4 and entries are to be made in the register need to be authenticated by the directors at the next board meeting and needs to be kept open for inspection by shareholders at the annual general meeting.

The obligation to maintain the required documentary evidence and making the records available for inspection to board of directors and shareholders is company's responsibility. Therefore, the onus is on the company and its officials to maintain appropriate and adequate documentation in this regard about price, terms of supply and such other details relating to the contracts or arrangements for related party transactions.

Let us now understand the impact of non-compliance of provisions relating to maintenance of statutory register relating to RPTs and non-maintenance of adequate records by the company for entering such transactions.

III. Some Precedents:

A. ROC Adjudication Order – Adani Power Limited:

Recently on May 16, 2023, Registrar of Companies ('ROC') Ahmedabad passed an adjudication order in the matter of Adani Power limited ('APL'). The Registrar of Companies ordered inquiry under Section 206(4) of the Act.

During the course of inquiry, the presenting officer pointed out that APL was in violation of Section 189 read with Section 188 of the Act. The financial statements of APL for the financial years pertaining to 2017-18, 2018-19 and 2019-20 showed that it entered various contracts with parties covered under section l84(2) and contracts with related parties for transactions covered under section 188 of the Act.

However, APL did not enter the details of said contracts in the register of contracts which is to be maintained in form MBP-4 under section 189 of the Act. Hence ROC alleged that APL and its directors have committed a default and are in violation of section 188 read with section 189 of the Act.

Besides, APL was unable to produce the required documents to the investigating officer as required under section 189 of the Act. Hence with no supportive documents being available on record and no entry was made in the register of contract as per section 189 of the Act, ROC had sent the show cause notice.

The Authorised Representative on behalf of APL argued that all the transactions disclosed in financial statements were at arm's length basis and in the ordinary course of business and thus not covered under the provisions of Section 188 of the Act, hence no penalty should be levied and penal provisions under section 189(6) should not be levied on company.

APL argued that the contracts or arrangements entered with related parties were not covered under section 188(1), but it is not clear whether adequate justification was presented before ROC as to why these contracts or arrangements were in ordinary course of business and arm's length transaction for APL? It is also not clear that whether it was presented before ROC about applicability of section 184(2) to these contracts or arrangements, as this is also a section which triggers the requirement to make entries in the Register of Contracts as per Section 189.

The Presenting Officer stated that as the company was unable to produce the required documents to the inspecting officials under section 189 of the Act hence every director of the company was liable for penalty under the provisions of section 189(6) of the Act for each financial year separately. Penalty was therefore imposed on APL's Chairman and Director, Managing Director, and Whole-time director - Rs.75,000 each (25,000*3 years – each year when default was committed).

This adjudication order is a classic example of how important it is to record proper justification in agenda and minutes of audit committee as to why and on what basis, a particular transaction with a related party is in ordinary course of business and arm's length transaction and in the best interest of the Company. This rationale, if recorded in audit committee meetings minutes, can be a good ground for not taking such contracts or arrangements to board of directors for their approval, as they would be getting exempted from section 188(1) in that case.

Further this Order also highlights the importance of maintaining the statutory register relating to contracts or arrangements with related parties / parties in which director may have direct / indirect interest, which gets covered under section 184(2), even though it may get exempted from section 188(1).

B. ROC Adjudication Order – Teleone Consumer Products Private Limited:

Going further let us discuss another adjudication order passed by ROC NCT of Delhi and Haryana on May 25,2023 in the matter of Teleone Consumer Products Private Limited ('TCPPL').

The Registrar of Companies, NCT of Delhi & Haryana ('ROC') received the report from the inspecting officials pertaining to TCPPL after the inspection of the books of accounts and inquiry conducted pursuant to Section 206(4) of the Act.

The presenting officer identified non-compliance with section 189 of the Act in the inspection report. The same was TCPPL did not furnish a copy of the MBP-4 register required to be maintained pursuant to section 189 of the Act relating to contracts and arrangements in which directors are interested.

Upon examining the financial statements of the company for three financial years (i.e., 2015-16, 2016-17 and 2017-18) it was observed that TCPPL reported related party transactions in the financial statements. It was further found that such related party transactions were not bought to the desk of directors in board meeting and no mentioning with respect to the same was done in minutes book as well.

The regulator noted that the particulars of such related party transactions were required to be entered in the register for each of these financial years as per the provisions of the Act.

The ROC, after taking into consideration the above facts of the case concluded that the company and its directors violated the provisions of section 189 of the Act for the financial years 2015-16, 2016-17 and 2017-18. The show cause notice was then issued to the directors and the company.

However pertinently unlike in case of APL, no reply was submitted by the company and directors to the show cause notice issued.

Since the company and its directors did not respond to the show cause notice issued to them, the ROC, then decided to pass an ex-parte order of adjudication based on the documents and evidence available. The penalty was imposed under Section 189(6) of the Act on the Company and two directors amounting to Rs.75,000 each (25000*3 years of default).

IV. Conclusion:

From the above-mentioned precedents, it can be seen that conscious effort must be taken to maintain sufficient documentary evidence of RPT transactions and entering the details of contracts or arrangements with related parties / parties in which director may have direct / indirect interest in MBP-4 register and the compliance to be done post entering the details of contracts in MBP-4 register.

It can be witnessed that if the company fails to maintain appropriate, adequate records/ documentation, the directors will lose opportunity to represent adequately before the Regulator and end up paying penalties. This is where the Company Secretary needs to play a major role and ensure that all relevant documents are prepared and maintained in the most appropriate manner. This can go a long way in supporting directors to prove that the decisions taken by them were always taken in the best interest of the Company and thereby enabling them to prove that they definitely fulfilled all their duties as a director as prescribed under Section 166 of the Act!!!!

This article is also published in Taxmann. The link to the same can be accessed as follows: -

https://www.taxmann.com/research/company-and-sebi/top-story/105010000000023131/mca-starts-enforcement-for-register-of-contracts-or-arrangements-mbp-4-miss-outs-experts-opinion

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External Commercial Borrowings from countries sharing land border with countries

India has been rapidly emerging as one of the preferred countries for foreign Investment. The inflow of Foreign Direct Investment has increased 20-fold in last 20 years. As per Ministry of Commerce and Industry, India gets the highest annual FDI inflow of USD 83.57 billion in FY21-22.[i]

The year 2020 - 21 was few of the best year for private equity and venture capital industry as it had witnessed the post pandemic overhaul for the foreign investors. The same period had also witnessed one of the most significant restrictions on the receipt of Foreign Direct Investments (FDI) from countries sharing land border with India being notified.

The Government had amended FDI policy vide Press Note 3 (2020) dated 17.04.2020 because of which an entity of a country, sharing land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under Government approval route. The said press note was enforced through Foreign Exchange Management (Non-Debt Instruments) Amendment Rules 2020 dated 22.4.2020.

While Foreign Investment from Pakistan or Bangladesh were considered under approval even before the press release, the amendment has brought the Foreign Direct Investment from Afghanistan, China, Nepal, and Bhutan and Myanmar too under the approval route.

While foreign investment in equity instruments by countries sharing land border with India was restricted under automatic route, investment in debt instruments of an Indian Company by person resident outside India (other than Foreign Portfolio Investors, Non-resident Indians) is not permitted under the Foreign Exchange Management (Debt Instrument) Regulations, 2019. Due to the mentioned restrictions for investment in equity and debt instruments, the investors or parent entities to existing Indian entities are left with only option for receiving quick funding i.e. External Commercial Borrowing.

What is External Commercial Borrowing?

"External Commercial Borrowings" (ECB) are commercial loans from overseas raised by eligible resident entities. Transactions on account of External Commercial Borrowings (ECB) and Trade Credit (TC) are governed by sub-section 2 of section 6 of the Foreign Exchange Management Act, 1999 (FEMA).

Further, ECB can be either Foreign Currency denominated, or Indian Rupee denominated. Both Foreign Currency and Indian Rupee denominated ECBs can be issued in any of the following forms:

1. Loans including bank loans
2. Floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments)

3. Trade credits beyond 3 years
4. Financial Lease

ECB in the form of preference shares (other than fully and Compulsorily Convertible Preference shares) shall be INR denominated only.

Recognised lenders:

Following shall be considered eligible lender:

1. Multilateral and Regional Financial Institutions where India is a member country
2. Individuals (only if they are foreign equity holders or for subscription to bonds/ debentures listed abroad)
    a. Foreign equity holder means:
        - direct foreign equity holder with minimum 25% direct equity holding in the borrowing entity,
        - indirect equity holder with minimum indirect equity holding of 51%, or
        - group company with common overseas parent.
3. Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs). Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.

Eligibility for ECB:

All *entities eligible*[ii] to receive Foreign Direct Investment shall be considered eligible Borrowers for the purpose of availing Foreign Currency denominated ECB including:

1. Port Trusts;
2. Units in SEZ;
3. SIDBI; and
4. EXIM Bank of India.

Further all entities eligible to avail foreign currency denominated ECB shall be eligible for availing INR denominated ECB.

FED Master Direction No.5/2018-19 on External Commercial Borrowings provide that all entities eligible to receive FDI shall be eligible to receive FCY denominated ECB and further that all entities eligible to raise FCY denominated ECBs shall be eligible to receive INR denominated ECB. The Criteria for eligibility considers whether the entity is eligible to receive FDI or not, however it does not clarify whether FDI shall be allowed under automatic or approval route.
This could also mean that entities not prohibited to receive FDI shall be eligible to raise funds by way of ECB.

Present Situation for Investment by land border sharing countries:

- The Reserve Bank of India through Authorised Dealer Banks are considering the applications for ECB from countries sharing land border with India (provided the lenders are from FATF and IOSCO countries).
- While the equity participation by person resident or situated in land border sharing countries is under the tight scrutiny of the relevant ministries, the Reserve Bank of India seems to be lenient for considering applications for External Commercial Borrowing. One of the reasons for allowing ECB from land border sharing countries is non transfer of ownership thus preventing the opportunistic takeovers and acquisition of the Indian Companies. Further ECB shall also allow the Indian Companies to meet the urgent funding requirements without providing ownership to entities/ investors situated in countries sharing land border with India.
- The time taken by Reserve Bank of India for considering applications for ECB under automatic route is generally much lesser than the time taken for receiving approval from the ministry for obtaining approval for equity investment thus encouraging the investor and investee to choose the ECB route to meet the funding requirements on urgent and timely basis.
- ECB from equity holder shall be allowed in case the lender holders 25% of the direct equity or 51% of the indirect equity of the borrower. Thus, while ECB could be an option for the existing entities having prescribed equity investment by the non-residents from countries sharing land border with India, new entrants/ investors will have to recourse to the government approval route only.
- The object of the ministry seems to monitor the existing and new equity investments from the countries sharing land border with India but not to restrict the fundings for existing Companies carrying of legitimate business. Also the funds availed by way of ECB, Interest payments, parking of the proceeds and the utilisation is closely monitored by the AD bank/ RBI through monthly returns to be submitted by the borrower entity.

This article has been published in Taxguru. The link for the same can be accessed as follows: -

https://taxguru.in/rbi/external-commercial-borrowings-countries-sharing-land-border-countries.html

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[i] Source: Press information by Ministry of Commerce and Industry

[ii] Entities eligible to receive FDI: Indian Companies, LLP are considered to be eligible entities to receive FDI as per Schedule I of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.Foreign Investment in Investment Vehicle shall be as per Schedule VIII of the Rules. Foreign Investment in proprietary concern/ partnership firm not engaged in real estate business shall be allowed to non-resident Indians on non-repatriation basis only.

Extending framework for restricting trading by Designated Persons ("DPs") by freezing PAN at security level to all listed companies in a phased manner

I. Background:

1. Securities Exchange Board of India vide Circular SEBI/HO/ISD/ISD-SEC-4/P/CIR/2022/1071 dated August 05, 2022 ['August 2022 Circular'] laid down a framework for developing a system to restrict the trading by Designated Persons (DPs) by way of freezing the PAN at security level during Trading Window closure period.
2. The said circular was applicable for listed companies that fall under Nifty 50 or Sensex 30 commencing from trading window closure period for declaration of financial results for quarter ending September 30, 2022.
3. SEBI, with this circular, provides mandatory freezing of PAN at security level and technology was used to restrict the trading in those securities by DPs during the window closure period.

II. Recent stock exchange Circulars for extending applicability to other listed entities:

1. Bombay Stock Exchange ('BSE') and National Stock Exchange ('NSE') (Stock Exchanges) vide their circulars dt: June 28, 2023 ('June 2023 Circular') further extended applicability of "August 2022 Circular" to other listed entities in a phased manner as mentioned in the table mentioned below.
2. Now SEBI vide its Circular SEBI/HO/ISD/ISD-PoD-2/P/CIR/2023/124 dt: July 19, 2023, has re-iterated the same and also clarified on the applicability in case of companies getting listed newly (as mentioned in 5th point of table mentioned below: -

Sr. No.	Companies to be covered	PAN Freeze Start Date for declaration of financial results for quarter ended on previous date
1	Listed companies that are part of benchmark indices i.e., NIFTY 50 and SENSEX	Already applicable as on date
2	Top 1,000 companies in terms of BSE Market Capitalization as of June 30, 2023 (excluding companies' part of benchmark indices)	October 1, 2023
3	Next 1,000 companies in terms of BSE Market Capitalization as of June 30, 2023	January 1, 2024
4	Remaining companies listed on BSE, NSE & MSEI	April 1, 2024
5	Companies getting listed on Stock Exchanges post issuance of this circular	1st day of the second quarter from the quarter in which the company gets listed

Considering the integrities of the circular and the report to be submitted by depositories for implementation of framework for restricting trading by designated persons by freezing PAN at security level this will be very diligently monitored.

III. Process for implementation of this circular:

The detailed process for implementation of the system for freezing of PAN was prescribed in August 2022 circular. Further in the circulars released by stock exchanges on June 28, 2023 i.e., June 2023 Circular, as referred in above para, the stock exchanges had given a guidance that the process to be followed for the extended lot of listed entities shall be same as prescribed in the August 2022 circular.

However, the August 2022 Circular was rescinded and superseded vide section 3.4.2 of Master Circular on Surveillance of Securities Market SEBI/HO/ISD/ISD-PoD-2/P/CIR/2023/039 dated March 23, 2023. Therefore, questions were raised on the applicability of the procedure mentioned in August 2022 circular for future purposes.

To resolve this ambiguity, SEBI issued this fresh circular dated July 19, 2023, and it has prescribed the detailed process for implementation of the system along with Process Flow chart and the reporting which shall be done by the Depositories to stock exchanges. It may be noted that SEBI has not made change in the procedure mentioned in this latest SEBI circular dated July 19, 2023. Hence the actionable on the part of the listed entities remains the same as was under the August 2022 circular, for entities covered in Nifty and Sensex.

IV. Actionable arising for listed entities:

On reading above circulars of SEBI and BSE following can be actionable for listed entities:

a. **Finalising board meeting due date:** Pursuant to provisions of these Circulars, Compliance Officers of Listed Entities will have to update on designated depository's portal, the starting and ending dates for which, the trading window would remain closed. This necessitates listed entities to specify exact date of board meeting that would be held for considering financials of quarter end or year end at the start of trading window closure only. Although Regulation 29 of SEBI LODR Regulations requires listed entities to intimate date of board meeting for consideration and approval of financial results only five working days in advance, the listed entities will need to decide the date of this board meeting before the beginning of quarter. This further helps in identifying exact date on which trading window will open. Some companies have a practice of fixing yearly calendar of board meetings in advance, but lot many companies may not be doing so. But going forward, the date of board meeting will have to be decided at least at the beginning of the quarter.

b. **NSE Consultation Paper and window closure intimation:** Further it needs to be highlighted here that NSE had released a consultation paper dt: June 14, 2023 on *'Seeking of comments / feedback on the XBRL being introduced for submission of Announcements pertaining to Loss of Share Certificate/ Issue of Duplicate Share Certificate and Closure of Trading Window'*. Pursuant to this consultation paper NSE is proposing to make intimations of trading window closure given at the end of every quarter in XBRL form as against .pdf form currently. Currently when intimation for trading window closure is given in .pdf form specific date of board meeting is not intimated as there is no specific requirement for same and also there is no format for it. But if as proposed XBRL utility are brought for intimation of trading window closure for quarter end, then mentioning board meeting date would become mandatory. This will also mandate the listed entities to decide the date of this board meeting before the beginning of quarter.

c. **Whether opening of trading window 48 working hours after the financial result or 48 hours after the financial result:** As per the Minimum points to be covered in Code of Conduct for regulating and monitoring insider trading as per Regulation 9 of SEBI PIT Regulations, 2015 as per Schedule B therein, in Point 5, the **timing for re-opening of trading window** closure shall be **determined by compliance officer** taking into account **certain factors** including the

unpublished price sensitive **information becoming generally available and** capable of being **assimilated by the market**. It further states that timeline for re-opening of trading window cannot be earlier than 48 hours from the information becoming generally available. This Schedule B Point 5 highlights that trading window shall be re-opened only when unpublished price sensitive information is made generally available and assimilated by the market. It further states that timeline for opening of trading window cannot be earlier than 48 hours from information becoming generally available. In order **to assimilate the UPSI, the market should be functioning. So, ideally speaking it can be recommended that 48 hours timeline for opening of trading window should ideally cover at least 2 trading days of stock exchange.** Otherwise if at least 2 trading days are not available after disclosure of financial results and trading window is opened after 48 hours, then market may not have sufficient time to assimilate the UPSI. These points would now require consideration while fixing the date of board meeting for consideration and approval of financial results, which will, going forward, have to be mandatorily done as early as when actual trading window closure starts.

d. **Identification of Designated Persons at the end of every quarter**: Further demat accounts list shall be identified by the depositories based on the PAN of the DP of Sole / joint holder which would have been provided to the designated depositories as per the requirement of System Driven Disclosure requirements under SEBI PIT Regulations. Accordingly, the DP list should be updated on 28th of every month so that it can be updated on the designated depository portal before closure of trading window starts.

Therefore, it can be seen that there is lot of actionable on the part of listed entities pursuant to this circular and all professionals (be it on the compliance side or be it on the audit side) will need to gear up to get along and ensure compliance pursuant to this amendment.

SEBI Circular Notification Link: -
https://www.sebi.gov.in/legal/circulars/jul-2023/trading-window-closure-period-under-clause-4-of-schedule-b-read-with-regulation-9-of-sebi-prohibition-of-insider-trading-regulations-2015-pit-regulations-extending-framework-for-restricting-t-_74120.html

The article is published in Taxmann. The link of same is:
https://www.taxmann.com/research/company-and-sebi/top-story/105010000000023096/actual-closure-of-trading-window-becomes-mandatory-for-all-listed-entities-%E2%80%93-bse-and-nse-experts-opinion

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Search and Seizure of records of Corporate Debtor and issuance of summons to Resolution Professional by GST Department during CIRP are violative of moratorium under section 14 of Insolvency and Bankruptcy Code, 2016.

In the matter of Mr. K. Easwara Pillai -Resolution Professional - Applicant vs. Goods and Service Tax Department Respondent at National Company Law Tribunal Kochi Bench dated 26 July 2023.

Facts of the Case:

- M/s Mangomeadows Agricultural Pleasure Land Private Limited - Corporate Debtor (CD), engaged in business of amusement park was admitted into Corporate Insolvency Resolution Process (CIRP) on 25 January 2023 by National Company Law Tribunal (NCLT) u/s 7 of Insolvency and Bankruptcy Code, 2016 (IBC) against the petition filed by Kosamattam Finance Limited - the Financial Creditor (FC).
- The applicant Mr. K. Easwara Pillai was appointed as Resolution Professional (RP) and made a public announcement inviting claims from the creditors.
- An intimation regarding initiation of CIRP against the CD was sent to the Goods and Service Tax Department – the respondent on 1 March 2023.
- The respondent submitted its claim for a sum of Rs.36,56,077.51/- on 6 March 2023.
- In pursuance of the CIRP order, moratorium u/s 14 of IBC came into operation/effect from 25 January 2023. As the CD was going concern, its management vested with the applicant.
- The respondent after submitting its claim, suddenly on 10 March 2023 raided the premises of the CD and issued summon dated 10 March 2023 to Mr. N.K. Kurian, suspended Managing Director of the CD and obtained the statement. Also, seized the all the accounts and documents.
- The Respondent also sent a summon dated 13 March 2023 to the applicant to appear for an inquiry on 20 March 2023.
- The applicant in gross violation of moratorium order – filed the petition u/s section 60(5) of the IBC.

Arguments of the Applicant:

- Search and seizure done by respondent on 10 March 2023 are against the moratorium order.
- Further, u/s 236 (2) of IBC, cognizance of the offence can be taken only on the compliant of IBBI or Central Government.
- Hence, the applicant approached to proceed against the Respondent's erred officials in this regard.

Arguments of the Respondent:

- The above referred facts were admitted by the respondent submitted that the CD was engaged in business of amusement park and was registered with Goods and Service Tax Act, 2017 (GST).

- It was claimed that proceedings for determination of tax liability is not against moratorium order passed u/s 14 of IBC but proceedings to recover tax alone prohibited u/s 14 of IBC.
- It was further submitted that - on receipt of specific intelligence information of Tax evasion by the CD the search was conducted u/s 67(2) of GST. On the search, tax evasion was detected, and the respondent seized the seven registers.
- Thereafter, summons dated 13 March 2023 and 28 March 2023 were issued to the applicant to produce the Books of account and to record statement, but the applicant did not appear instead the application was filed.
- The search was conducted to gather evidence for determination of tax u/s 74 of the GST.
- The summon were also issued to erstwhile directors of CD to gather documents and to record their statements. There was no bar in the IBC to issue summon to erstwhile directors of the CD.
- The CD is presently under the management of applicant hence summon were issued to gather evidence and to record statements to determine tax liability of CD under section 74 of the GST.
- To arrest the leakage of revenue to the exchequer the search was conducted u/s 67(2), the summons issued u/s 70 of the GST, for determination tax u/s 74 of the GST were unavoidable.
- The search and seizure of records made by the respondent were not against the moratorium order of section 14 of IBC.

Questions for Considerations before NCLT:

Whether the search and seizure of records of the CD and issuance of summons to are violative of mortarium order passed u/s 14 of IBC?

Observations of the NCLT:

- The respondent conducted raid in the premises of CD on 10 March 2023 during moratorium period and seized the documents in the presence of suspended Board of Director. And they justified the actions stating that the actions came under the purview of part of assessment proceeding.
- Further, it was submitted by the respondent that irrespective of mortarium they were empowered to raid the premises of any person registered with under the GST, inclusive of CD under the management of resolution professional u/s 67 of the Kerala State Goods and Services Tax Act 2017.
- And in support reliance was placed upon the Apex court judgments:
  i. M/s Embassy Property Development Pvt Ltd vs State of Karnataka and Others- In this case the respondent observed that to enforce any public law NCLT cannot be approached through resolution professional. There, the subject involved is of the Government of Karnataka and rejected the request of Resolution professional to extend the lease agreement beyond the period of agreement. Against the said rejection order - the Resolution professional approached the NCLT, in such circumstances it is observed that right not to be dispossessed found in section 14 (1) (d) will have

nothing to do with the rights conferred by a mining lease especially on a government land. ***It was held that NCLT did not have jurisdiction to give direction to Government to execute supplement lease deed. The question of initiating proceeding against the CD during the period of moratorium was not discussed in this citation hence this was not strengthening the case of the respondent.***

ii. Further, in Sundaresh Bhatt Liquidator of ABG shipyard vs Central Board of Indirect Taxes and customs - the Apex court observed that the custom authorities under the customs Act during the period of moratorium can only take steps to determine the tax, interest, fine or any penalty which was due. However, the authority cannot transgress such boundary and proceed to initiate recovery in violation of section14 or 33(5) of IBC. ***In this case the respondent took the shelter that the raid conducted by the respondent on 10 March 2023 was only part of proceeding to determine the tax due and it was not a proceeding to recover the dues.***

Held

- The Government of India, Ministry of Finance, Finance Ministry – had issued a Circular No. 134/04/2020-GST under **Central Goods and Services Tax** and stated that no coercive action can be taken in respect of a Corporate Debtor under CIRP. The GST Department despite the supra guidance taken the coercive action.
- *The acts of the Respondent undermined the authority of Resolution Professional and because of seizure of Books of accounts of the Corporate Debtor causes much inconvenience and paralysed the resolution process, the same shall be completed in time bound manner.*
- *It was concluded that the search and seizure of the records of the CD and issuance of summons to the applicant are violative of the provision of the order passed u/s 14 of the IBC.*
- NCLT directed the respondent to return all the documents seized from the premises of the CD to the applicant and directed to pay a compensatory cost of Rs.50,000/- (Rupees fifty thousand only) to the applicant towards the CIRP.

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Memorandum of Understanding – Result of a 'one size fits all' approach !

What transpires from a Memorandum of Understanding [**MOU**] that is not followed by a detailed and acquiesced definitive agreement or an MOU that is not acted upon by the Parties thereof can be well explained after studying the alleged claim of Ms. Sugandha Hiremath, daughter of Neelkanth Kalyani, founder of $2.5 billion Kalyani Group, and her husband Jaidev Hiremath over Kalyani Group's holding in Hikal Ltd.[1]

Below mentioned are our learnings from the aforementioned alleged dispute:

1. A MOU is advisable to be followed by definitive agreements, especially in familial matters. If so, the MOU should be a pre-cursor to the proposed definitive agreements.
2. The definitive agreements must cover all the points contained in the MOU.
3. The parties to the MOU must concur with the definitive agreements to avoid any dispute in future. After such concurrence, the definitive agreements must be signed by all the parties to the MOU.
4. If the MOU comprise two or more separable transactions related to the parties to the MOU, then one need to check whether these two different transactions are interconnected with each other. If these two separable transactions are not interconnected, then each of such transaction should be treated as different transaction and the Parties to the MOU need to honour their respective obligations. Breach of any such separable transaction in the MOU cannot constitute a ground to challenge the validity or legality of the MOU.
5. The validity of the MOU can be questioned only on the ground that either of the parties are found to be of unsound mind, incompetent to contract and incapable of suing and being sued at the time of entering such contract. A party cannot challenge the validity of the MOU on the ground of breach of any underlying transaction in the MOU.
6. Clauses like severability, waiver, termination, survival in the MOU should be drafted considering such separable transactions, specifically in family business matters.
7. The complainant should come with cleaner hands in familial disputes.
8. In the event of litigation in such matters, the conduct of the parties following the execution of the MoU is also a pertinent factor in determining the enforceability of the MoU. If, either of the Parties do not act in accordance with the terms of the MOU, then such act can be construed as their breach of the MOU or the definitive agreements. In *Jyoti* Brothers *v. Shree Durga Mining Co. AIR 1956,* the Calcutta High Court held that the Court would rely upon the degree to which such understanding is signed between the parties and whether any of them has acted in reliance on such understanding. Similarly, the Supreme Court held in *Jai Beverages Pvt. Ltd. v. State of Jammu and Kashmir and Ors. [2006 (4) SCJ 401]* that if the conditions of the Memorandum of Understanding are therefore complied with, the parties to the MoU will receive the profit resulting from the MoU. This leads to the conclusion that binding nature of the parties to the MOU is dependent on the intention of the parties, language used and the nature of the agreement.
9. The parties need to be vigilant about their rights, duties, and obligations in the MOU. Any silence by either of the Parties can be construed as acceptance of the status quo of the transaction at the time of entering such transaction. Any challenge at a later stage to the status quo of the transaction will not hold water in the event of any litigation in such

transaction. A party cannot escape from its responsibilities by keeping mum at the time of agreeing to such clauses in the MOU.

10. Any issue relating to title or claim on the underlying property or security should be brought to the notice of all concerned parties within the prescribed limitation period.
11. Despite taking all the above precautions, if a party wants to rake up dispute, such party may raise disputes and create a longstanding bitterness by finding gaps and loopholes in the MOU.

[1]Source: *Mint Article titled 'A familial Dispute, Forged in the Past' dated 9.5.2023.*

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Breach of Confidence in Contracts: Understanding the Legal Implications

While some contracts may not include confidentiality clauses, parties are not exempt from protecting the secrecy of their agreements. The principle of breach of confidence can be invoked to safeguard the interests of the aggrieved party. This article explores the concept of breach of confidence, its definition, and its significance in contractual disputes.

Breach of Confidence:

The word "Breach" in simple words means – an act that break an agreement, a law etc. The Law Lexicon defines "Breach" as *violation, infringement, the act of breaking.*[1] "Confidence" refers to trust or strong belief in somebody/something. The Law Lexicon defines "Confidence" as an extraordinary trust and involves communication of a man's mind to another, but trust is confined to matters of action. A breach of confidence betrays more than ordinary share of baseness and depravity.[2] Breach of Confidence in simple words means the information concerned must: have the necessary quality of confidence; have been communicated to a recipient in circumstances imparting on obligation of confidence; and been used in an unauthorised manner.

A breach of confidence can be resorted to by a party in the event of violation of secrecy of the contract or agreement. There lies an inherent obligation on the parties to the agreement to preserve the confidentiality of the agreement. The aggrieved party gets a right to sue the defaulting party for not observing the secrecy of the agreement.

We need to understand here that the fundamental aspect in such information is element of ***confidentiality.*** The person sharing the confidential information trusts the other person to keep such information confidential and shares the same in good faith. Any breach of this trust and good faith will amount to breach of the contract and shall be subject to recourse of law.

What precisely will be confidential information will depend upon the nature and purpose of the contract and the intent of the parties. The factor of protection of secrecy will form the essence of the confidential information. Such contract will then stand as evidence in a breach of confidence.[3]

When the information being shared is a public information, then there cannot lay a claim for breach of confidence.[4]

Governing Law:

The principle of Breach of Confidence is governed by the rule of equity and not under any legislation. The Rule of Equity, in the context of confidential information, can be understood *as not to allow the other person, to whom the confidential information is being disclosed, to take undue advantage from the confidential information*. This undue advantage will be detrimental to the labour and intelligence put in by the person who originally possessed such Confidential Information. The communicator of the information gets a *right in personam* against the person who becomes aware of such information in confidence.[5]

This principle can be best explained by the decision of High Court of Justice ("Chancery Division") in *Saltman Engineering Company Ltd ("Saltman") v. Campbell Engineering Company Ltd*

("Campbell") (1948). In this case, Saltman and Campbell entered a contract to manufacture leather products. Saltman shared certain drawings with Campbell for the purpose of the Contract. Later, Campbell started using the drawings for his own purpose despite knowing that the drawings in his possession belonged to Saltman and were for a strictly limited purpose. The Chancery Division Judge held that though there was no contract between Saltman and Campbell to maintain confidentiality of the Contract, Campbell's act of using the drawings for his own purpose is a breach of confidence by Campbell.[6]

Legal Position in India:

The Indian Courts have largely upheld the rule of equity in such contracts and followed the decision of English Courts. The Indian Courts have dealt heavily with any unauthorised use of confidential information and undue advantage obtained from such confidential information.

In *John Richard Brady v. Chemical Process Equipments Pvt Ltd, 1987, the Hon'ble Delhi High Court* followed the *Saltman Engineering case principle* and held that the law of breach of confidence depends on the broad principles of equity and that who has received information in confidence shall not take unfair advantage of it. In this case, the Plaintiff made a Fodder Production Unit ("FPU") to develop green grass as food throughout the year irrespective of the climate. The Plaintiff also entered into a confidentiality agreement with the defendant which stated that defendant will not manufacture panels used in manufacture of FPU for anyone during the currency of the agreement nor will he disclose any confidential information details or specifications to any other person. After some days, the Plaintiff found that defendant made a machine with the same design, specifications that Plaintiff had used for developing the FPU. The Plaintiff alleged that this was a false representation of this FPU, and defendant had caused a breach of confidence by misusing the information, drawings and specifications provided by the Plaintiff. The Defendant wrongfully converted his information regarding FPU and took an unfair advantage of the Plaintiff's work.

The Court also rejected Defendant's argument that there were many other firms in the world that produced similar machines. The Defendant's contention that Plaintiff only provided the defendant with the information and specifications of the thermal panels for making quotations was also not tenable. The Hon'ble Delhi High Court decided the case in favour of plaintiff citing breach of confidence by defendant in this case and restrained the defendant from producing machines made from using Plaintiff's information of FPU.[7]

In *Bombay Dyeing and Manufacturing Co. Ltd Vs. Mehar Karan Singh 2010*, the *Hon'ble Bombay High Court* held that "*a person, who obtained information in confidence, is not allowed to use it as a "springboard" for activities detrimental to the persons who made the confidential communication, it was held that breach of confidential information depended upon the broad principle of equity that he who receives information in confidence shall not take unfair advantage of it."*[8]

Any relationship involves a duty of confidence and a party to the relationship knows or ought to know that the other party can reasonably expect his privacy to be protected. Any breach of this duty of confidence will amount to breach of confidence. This inaccessibility element of confidentiality should be present in all forms of confidential information whether shared in oral or in written form. To establish any information as confidential, the following three elements are essential –

1. the information should be secret to the public at large.
2. the communication of the information should bring a responsibility of confidence.
3. there must be an unauthorised use of the information to the disadvantage of the communicator of the information. [9]

Conclusion:

From the above, it can be concluded that non-availability of a confidentiality clause in any agreement or the contract shall not deprive an aggrieved party of their rightful claim of legal recourse in a dispute.

In the event of dispute, the aggrieved party has to prove that the disclosure of the confidential information was made for purpose other than the intended purpose and the alleged defaulting party has used the information without the communicator's prior consent and obtained undue advantage from such illegal disclosure. As a relief, the aggrieved party can plead to the court for injunction order restraining the defaulting party from using the confidential information.

However, it is prudent to have a confidentiality clause, particularly in commercial contracts. This will help to avoid any dispute between the parties to the agreement and forge strong and cordial relationships between the Parties to the agreement or the contract.

Reference –

[1] Justice Y V Chandrachud, The Law Lexicon, Reprint 2006, 240
[2]Justice Y V Chandrachud, The Law Lexicon, Reprint 2006, 382
[3]Anushree Soni, Clause of Confidentiality: The Consequences in a Commercial Contract, https://www.scconline.com/blog/post/2021/01/30/clause-of-confidentiality-the-consequences-in-a-commercial-contract/#ftn5, accessed 30.6.2023
[4] Anushree Soni & Ors., *Supra*
[5]Aditi Chaudhury & Ors., *Supra*
[6]Saltman Engineering Co Ltd v. Campbell Engineering Co Ltd (1948)
[7]John Richard Brady v. Chemical Process Equipments Pvt Ltd, AIR 1987, https://blog.ipleaders.in/undisclosed-information-ipr/ accessed 30.6.2023, Aditi Chaudhury & Ors, *Supra*
[8]Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh 2010 (112) BomLR 3759
[9]Coco v. AN Clark (1968), Aditi Chaudhury & Ors. *Supra*

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