Devadhaantu Insights – June 2021

Dear Reader,

Greetings!

We are happy to present the Devadhaantu Insights highlighting important legislative updates in direct taxes and regulatory updates in SEBI, IBC, FEMA and Corporate laws.

We hope that we are able to provide an insight into various updates that you would find to be informative as well as useful. For any deeper discussion as to how the updates covered in this document could affect your transactions, please do not hesitate to contact Devadhaantu.

Happy Reading!
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DIRECT TAX UPDATES

JUNE 2021

Direct tax updates (1/4)

Corporate restructuring involving genuine amalgamation is not a colorable device 1 (1/3)

Facts of the case:

The Investment Trust of India Ltd ('Old ITI') is a company engaged in the business of finance, investment, hire purchase, etc and is a listed company on the recognized stock exchange in India. On July 23, 2002, Old ITI sold its investment in Kothari Pioneer AMC Limited ('Kothari AMC') for a consideration of INR 121.18 crores to Templeton Assets Management (India) Private Limited. Accordingly, Old ITI was a cash surplus company having substantial profits and reserves and intended to diversify into sunshine industries having bright future prospects.

On the other hand, HFCL Infotel Ltd ('Old HFCL') is a unlisted public company engaged in the telecom services business under a license received in 1997. Old HFCL is an infrastructure company as defined in section 10(23G) of the Income Tax Act, 1961 ('the Act'). Considering Old HFCL is a capital intensive infrastructure company, it possessed huge loss and unabsorbed depreciation in the initial years of operation. Thus, it was in very bad need of capital base and access of capital market.

Accordingly, the shareholders of Old ITI and Old HFCL found synergy in their needs and objects and decided for a scheme of amalgamation whereby Old HFCL was amalgamated with Old ITI w.e.f September 1, 2002 ('Scheme'). As a part of this Scheme itself, Old ITI transferred its NBFC business to its wholly owned subsidiary viz. Rajam Finance and Investments India Limited ('Rajam Finance') by way of slump sale. Old ITI was renamed as HFCL Infotel Ltd ('New HFCL') and Rajam Finance was renamed as Investment Trust of India Ltd ('New ITI').

For the financial year 2002-03, while filing return of income,

- New HFCL set off losses of Old HFCL against the long term capital gains made on sale of shares of Kothari AMC; and
- New ITI filed its return of income by reporting income as under:
  - Original business for entire financial year 2002-03; and
  - From NBFC business from September 1, 2002 to March 31, 2003 without considering income from sale of shares of Kothari AMC.

1 The Investment Trust of India Ltd [TS-418-ITAT-2021(CHNY)] dt. 4 June, 2021

Direct tax updates (1/4)

Corporate restructuring involving genuine amalgamation is not a colorable device (2/3)

Transaction and the scheme of arrangement is depicted as under:

Direct tax updates (1/4)

Corporate restructuring involving genuine amalgamation is not a colorable device (3/3)

The Assessing Officer of New ITI held that the Scheme of Amalgamation and consequent merger of Old HFCL into Old ITI was a "colorable device" perpetrated with a view to avoid payment of tax on the profit made on sale of shares of Kothari AMC. He, further, held that New ITI was not Rajam Finance and was in fact Old ITI as its NBFC business was housed in New ITI. And further AO held that profit from sale of shares of Kothari AMC was assessable in the hands of New ITI. Accordingly, additions towards capital gain in the hands of New ITI was made.

Upon making an appeal to CIT (A), the ld. CIT(A) dismissed the addition made by AO and relied upon the decision of Hon'ble Supreme Court in the case of Azadi Bachao Andolan vs UOI(supra)[2] whereby it was held that each and every tax planning within four corner of tax laws, although leads to payment of less taxes, cannot be termed as colorable devise. Accordingly, CIT(A) held the amalgamation as genuine transaction and concluded that AO has erred in taxing the income of holding company i.e. Old ITI/ New HFCL in the hands of its subsidiary i.e. New ITI, even though transaction took place before the business was hived off to New ITI.

Aggrieved by order of CIT(A), revenue made an appeal to Income Tax Appellate Tribunal, Chennai Bench (‘Tribunal’). Revenue argued that such capital gains were taxable in the hands of New ITI, i.e., in the hands of the wholly owned subsidiary, where the finance business was transferred, since effectively New ITI was carrying out the business of the Old ITI and the entire exercise of amalgamation was a colourable device intended for avoiding tax arising from transfer of shares of Kothari AMC. The Hon’ble Tribunal ruled that transfer of shares was done prior to the amalgamation and was not an afterthought as contented by the Revenue and thus, will be taxable in the hands of the Old ITI. ITAT observed that the Scheme of Amalgamation was approved by two High Courts, shareholders, creditors and bankers of both the companies, RoC and Regional Directors, after giving due notice of publication in newspaper. The purpose and intent of the Scheme was put in place and it was highly incorrect to opine that the scheme of amalgamation was arranged to avoid payment of taxes on capital gain arising out of sale of shares; **it rejected the revenue’s argument of ‘colourable device’ by placing reliance on the SC decision in the case of Azadi Bachao Andolan that each and every tax planning within four corner of tax laws, although could lead to payment of less taxes, cannot be termed as colorable device.**

2 Union of India vs. Azadi Bachao Andolan (263 ITR 706) (SC)

Direct tax updates (2/4)

Write off of investment in loss making subsidiary/(ies) is allowable as business loss[1]

Maneesh Pharmaceuticals Limited ('the assessee'), is a company engaged in manufacturing and distribution of pharmaceutical products. It had made investments in two companies, one in Netherlands and the other in Brazil. Due to uncertain market conditions, the subsidiaries could not achieve the targets and accumulated heavy losses which ultimately wiped off their net worth. Accordingly, such investments were written off and the assessee claimed a business loss for such write-off under section 37(1) of the ITA.

The Assessing Officer denied the business loss by treating the same as capital investments. Upon making an appeal to the CIT(A), ld. CIT(A) allowed write-off of investment made in the Netherlands company, but disallowed it for the Brazilian company by holding that there was no proximate direct nexus of the investment and business of the assessee.

The ITAT observed that the investments were in furtherance of business of the assessee and were made out of commercial expediency. The main purpose of investment was to boost assessee's sale and not to acquire any manufacturing capacity or any infrastructural capacity. Therefore, the investments could not be said to be in capital field rather the same were meant to improve the top line of the business by way of higher revenue profits. The ITAT also observed that the net-worth of the investee entities were eroded to a greater extent and was duly supported by their financial statements as submitted by the assessee during appellate proceedings. Relying on the decision of the Karnataka High Court in the case of ACE Designers vs ADIT[2] and Mumbai Tribunal in the case of Camlin India Pvt Ltd[3], the Hon'ble ITAT held that since the investments were made out of commercial expediency and in furtherance of assessee's business, thus any losses arising therefrom would be an allowable 'business loss'.

1 Maneesh Pharmaceuticals Ltd [TS-462-ITAT-2021(Mum)] dt June 17, 2021

2 ACE Designers vs ADIT (120 Taxmann.com 321) (HC- Karnataka)

3 Camlin India Pvt Ltd (ITA No.928/Mum/1988) (Mum- ITAT)

Direct tax updates (3/4)

Foreign Exchange gains on repayment of loan under LRS scheme is not taxable as same held as in the nature of capital nature[1]

Aditya Balkrishna Shroff ('the assessee'), an individual, received funds towards repayment of interest free loan given in USD under Liberalised Remittance Scheme to his relative. Since the repayment was converted at an accelerated exchange rate, the gains on account of foreign exchange rate difference, were taxed by the Assessing Officer as 'income' under the head Income from Other Sources.

With regard to the taxability of the gains arising pursuant to the foreign exchange fluctuations, the Tribunal held that what was missed out by the Assessing Officer was the critical fact that, in terms of the provisions of the Income Tax Act, 1961 ('ITA'), all 'gains' are not covered by the scope of 'income'. Section 2(24)(vi) provides that "income, includes any capital gains chargeable under section 45". Once the statutory provision itself lays down the principle that only such capital gains are included in the scope of 'income' as are chargeable under section 45, it is only elementary that a capital gain, which is not chargeable to tax under section 45, cannot be included in income.

Further, the Tribunal observed that there was a benefit or a gain to the assessee, however such benefit or the gain was not on account of interest payment; that benefit or gain was on account of foreign exchange fluctuation but since the foreign exchange fluctuation with respect to a transaction in capital field, on the facts of this case foreign exchange fluctuation receipt itself turned out to be a capital receipt and therefore, directed the assessing officer to delete the said addition.

1 Aditya Balkrishna Shroff v. Income Tax Officer, Ward-16(1)(1), [127 taxmann.com 343 (Mum)]

Direct tax updates (4/4)

Revenue directed to make the portal more assessee-friendly; sets aside faceless assessment order

A meeting was held between senior officials of the Finance Ministry and Infosys on June 22, 2021 on issues in the new Income Tax Portal. Since its launch, there were numerous glitches in the functioning of the new portal. In this context, taking note of the grievances voiced on social media by taxpayers, tax professionals, and other stakeholders, issues were flagged to the vendor M/s Infosys, calling upon them to address these concerns. It was emphasized that enhanced taxpayer service is an important priority for the present Government and every effort should be made to amplify the same. It was communicated to work on the tax portal to make it more humane and user-friendly.

The team from Infosys, which was led by the CEO and COO of Infosys, took note of the issues highlighted by the stakeholders. They also noted the observations and suggestions received from various users and stakeholders through email. The Infosys team acknowledged the technical issues in the functioning of the portal and shared the status of the resolution w.r.t the issues highlighted by the stakeholders. They informed that Infosys has been working to fix the technical issues noticed in the functioning of the portal and that they have augmented the resources for execution of the project on the hardware as well as the application side and that some of the issues have already been identified and fixed. For the other remaining technical issues, they assured that their teams were working on these issues and gave the expected timelines within which the issues such as e-proceedings, Form 15CA/15CB, TDS statements, DSC, viewing of past ITRs, etc. are expected to be resolved in about a week. It was also decided that the timelines mentioned by Infosys to redress the issues would also be placed in the public domain in due course. This interaction was followed by another detailed meeting between senior officers of the Department of Revenue and the Infosys team, covering technical issues in the new portal.

CORPORATE LAW UPDATES

JUNE 2021

Corporate Law - Regulatory updates (1/5)

MCA amends Companies (Meetings of Board and its powers) Rules, 2014 vide Gazette Notification dated June 15, 2021

The Ministry of Corporate Affairs ("MCA") with a view to enhance ease of doing business and to work towards its endeavor for complete virtualization of Board approval process has omitted Rule 4 of the Companies (Meetings of Board and Its Powers) Rules, 2014 which restricted the Board to deliberate the below mentioned agendas through a Video Conferencing Meeting ("VC Meeting") which meant below agenda could only be discussed at a physically convened meeting:

- Approval of the annual financial statements;
- Approval of the Board's report;
- Approval of the prospectus;
- Audit Committee meetings for consideration of financial statements including consolidated financial statement if any, to be approved by the Board under sub-section (1) of Section 134 of the Companies Act, 2013; and
- Approval of the matters relating to amalgamation, merger, demerger, acquisition and takeover.

In view of the COVID 19 situation from April 2020, MCA had relaxed the above norm and allowed the companies to deliberate the above agenda through VC Meeting until June 30, 2021. While the relaxation provided by MCA ends on June 30, 2021, the persistence of the COVID-19 situation and VC Meeting means have now become new normal for conducting meeting and day to day business may have caused MCA to permanently omit the above rule and allow the companies to deliberate the above matters even through VC Meeting as well. It is thoughtful on part of the MCA to allow these matters to be dealt via VC Meeting as well.

Thus, from June 15, 2021 onwards, companies can conduct their Board Meetings through VC Meeting to deliberate any kind of agenda without any restrictions on type of agenda.

Corporate Law - Regulatory updates (2/5)

MCA amends Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019 vide Gazette Notification dated June 18, 2021

In the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019, in rule 3 relating to Creation and maintenance of data bank in sub-rule (7) relating to charging of fees from individuals, in clause (a), after the words "for inclusion", the words "or renewal" shall be inserted and accordingly the updated Rule 3 (7)(a) shall be read as under:

"(a) individuals for inclusion or renewal of their names in the data bank of independent directors;"

In rule 3 relating to Creation and maintenance of data bank after sub-rule (7) relating to charging of fees from individuals following sub rule shall be inserted:

"(8) In case of delay on the part of an individual in applying to the institute under sub-rule (7) for inclusion of his name in the data bank or in case of delay in filing an application for renewal thereof, the institute shall allow such inclusion or renewal, as the case may be, under rule 6 of the Companies (Appointment and Qualification of Directors) Rules, 2014 after charging a further fees of one thousand rupees on account of such delay."

Corporate Law - Regulatory updates (3/5)

MCA amends Companies (Indian Accounting Standards) Rules, 2015 vide Gazette Notification dated June 18, 2021

MCA has amended the Indian Accounting Standard w.e.f. April 1, 2021. Some of the changes brought forth by this amendment are as follows:

The definition of **Small and Medium Sized Company ("SMC")** has been amended as below:
"Small and Medium Sized Company" (SMC) means, a company-
(i) whose equity or debt securities are not listed or are not in the process of listing on any stock exchange, whether in India or outside India;6
(ii) which is not a bank, financial institution or an insurance company;
(iii) whose turnover (excluding other income) does not exceed two hundred and fifty crore rupees in the immediately preceding accounting year;
(iv) which does not have borrowings in excess of fifty crore rupees at any time during the immediately preceding accounting year; and
(v) which is not a holding or subsidiary company of a company which is not a small and medium-sized company.
For the purposes of this clause, a company shall qualify as a Small and Medium Sized Company, if the conditions mentioned therein are satisfied as at the end of the relevant accounting period.

In **Indian Accounting Standard (Ind AS) 103 in relation to Business Combination**, for paragraph 11, the following shall be substituted:
"To qualify for recognition as part of applying the acquisition method, the identifiable assets acquired and liabilities assumed must meet the definitions of assets and liabilities in the Framework for the Preparation and Presentation of Financial Statements in accordance with Indian Accounting Standards* issued by the Institute of Chartered Accountants of India at the acquisition date. For example, costs the acquirer expects but is not obliged to incur in the future to effect its plan to exit an activity of an acquiree or to terminate the employment of or relocate an acquiree's employees are not liabilities at the acquisition date. Therefore, the acquirer does not recognise those costs as part of applying the acquisition method. Instead, the acquirer recognises those costs in its post-combination financial statements in accordance with other Ind AS.";

In **Indian Accounting Standard (Ind AS) 105**, in Appendix A, in the definition of ―recoverable amount, for the words ―fair value less costs to sell, the words ―fair value less costs of disposal shall be substituted;

Corporate Law - Regulatory updates (4/5)

National Company Law Tribunal rejects the application for dispensation of shareholders meeting under section 230 of the Companies Act, 2013 in the matter of M/s Quickcalls Private Limited and Others

National Company Law Tribunal, Principal Bench ("Tribunal") rejects application for dispensation of shareholders meeting under section 230 of the Companies Act, 2013 ("the Act") in the matter of M/s Quickcalls Private Limited and Others. The matter was referred to the Tribunal owing to the dissent order passed by the judicial member to the order passed by the technical member which was of the view that National Company Law Tribunal ("NCLT") cannot dispense the shareholders' meetings under section 230 (1) of the Act since it is a mandate given under the statute to hold shareholders meeting as and when a proposal for either arrangement or demerger or merger or amalgamation is placed by the applicant companies before NCLT.

Tribunal affirmed that NCLT has discretion to decide the manner of calling, holding and conducting meeting but the Act does not provide NCLT the power to dispense the shareholders meeting. The Tribunal was of the view that, the power to dispense the meeting of shareholders will nullify the provisions of section 230 (1) of the Act. The dispensation of shareholders' meeting would mean that the notice of such meeting will not be attained by regulating authorities because of which, authorities will not be able to raise their objections to the decisions taken by the shareholders.

While pronouncing its view of the given scenario, it highlighted that tribunals are given discretion to dispense with calling of a creditors meeting or class of creditors meetings, however it cannot be presumed that such grant of dispensation can be extended to the shareholders meeting and affirmed that if the shareholder's meeting is not held as stated under section 230 (3) of the Act, then the whole process envisaged under section 230 (3) (4) (5) (6) will become redundant and the proposal of dispensation of shareholders meeting is in violation of the procedure laid under Section 230 of the Act. Lastly, Tribunal threw some light on concept of ratio decided stating that it is a common-law doctrine to be applied to the cases where statutory guidance is absent, but not in the cases where the statute itself has left no scope to cast doubt on its mandate. While concluding its judgement, the Tribunal agreed with the view of the Technical Member that the shareholders' meeting cannot be dispensed by NCLT, while giving liberty to the applicant company to take directions from the respective Bench over the application seeking a prayer for holding meetings.

Corporate Law - Regulatory updates (5/5)

MCA provides clarification on spending of Corporate Social Responsibility funds

The Ministry had earlier clarified vide its General Circular 10/2020 dated March 23, 2020 that spending of CSR funds for COVID-19 is an eligible CSR activity. In respect to same, vide general circular no. 09/2021 dated June 5, 2021, further clarification has been issued in relation specifically to 'creating health infrastructure for Covid care' and 'establishment of medical oxygen generation and storage plants' as under:

- Establishment of medical oxygen generation and storage plants', 'manufacturing and supply of Oxygen concentrators, ventilators, cylinders and other medical equipment for countering COVID-19' or similar such activities are eligible CSR activities under item nos. (i) and (xii) of Schedule VII of the Companies Act, 2013 relating to promotion of health care, including preventive health care, and, disaster management respectively;
- Reference is also drawn to item no. (ix) of Schedule VII of the Companies Act, 2013 which permits contribution to specified research and development projects as well as contribution to public funded universities and certain Organizations engaged in conducting research in science, technology, engineering, and medicine as eligible CSR activities;
- The companies including Government companies June undertake the activities or projects or programmes using CSR funds, directly by themselves or in collaboration as shared responsibility with other companies, subject to fulfillment of Companies (CSR Policy) Rules, 2014 and the guidelines issued by this Ministry from time to time.

FOREIGN EXCHANGE MANAGEMENT (‘FEMA’) UPDATES

JUNE 2021

FEMA Regulatory updates

Government of India increases Foreign Direct Investment ("FDI") limit in Insurance Companies from 49% to 74% vide Press Note dated June 14, 2021

The Government of India has reviewed the extant FDI policy on Insurance sector and has made the following amendments under the Consolidated FDI Policy of 2020, as amended from time to time ("FDI Policy"):

Sector / Activity	Entry
Insurance Company	74% -Automatic
Intermediaries or Insurance Intermediaries including insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time to time.	100% - Automatic

Among other changes some of them are provided below:

- No Indian Insurance company shall allow the aggregate holdings by way of total foreign investment in its equity shares by foreign investors, including portfolio investors, to exceed 74% of the paid-up equity capital of such Indian Insurance company;
- Foreign investment in this sector shall be subject to compliance with the provisions of the Insurance Act, 1938 and the condition that Companies receiving FDI shall obtain necessary license /approval from the Insurance Regulatory & Development Authority of India for undertaking insurance and related activities;
- Any increase in foreign investment in an Indian Insurance company shall be in accordance with the pricing guidelines specified by Reserve Bank of India under the Foreign Exchange Management Act ("FEMA") Regulations;

FEMA Regulatory updates

Government of India increases Foreign Direct Investment (“FDI”) limit in Insurance Companies from 49% to 74% vide Press Note dated June 14, 2021 (2/2)

- The foreign equity investment cap of 100 percent shall apply on the same terms as above to insurance brokers, re-insurance brokers, insurance consultants, Corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time to time. The composition of the Board of Directors and key management persons of Intermediaries or Insurance Intermediaries shall be as specified by the concerned regulator from time to time

SEBI REGULATORY UPDATES

JUNE 2021

SEBI Regulatory updates (1/8)

SEBI amends SEBI (Alternate Investment Funds) Regulations, 2012 ("SEBI AIF Regulations") vide circular no. SEBI/HO/IMD-I/DF6/P/CIR/2021/584 dated June 25, 2021 (1/2)

Amendment to SEBI (AIF) Regulations focuses on following key aspects:

1. **Framework for AIFs to invest simultaneously in units of other AIFs and directly in securities of investee companies :**

   a. AIFs may invest in units of other AIFs without labelling themselves as a Fund of AIFs;

   b. Existing AIFs may also invest simultaneously in securities of investee companies and in units of other AIFs, subject to appropriate disclosures in the Private Placement Memorandum (PPM) and with the consent of at least two-thirds of unit holders by value of their investment in the AIF in terms of regulation 9(2) of the AIF Regulations.

   c. AIFs which propose to invest in units of other AIFs shall provide, inter-alia, the following information in their PPMs:

      (a) Proposed allocation of investment in units of other AIFs;
      (b) Out of total fees and expenses charged to investors of the AIF, portion of fees and expenses which may be attributed to investment in units of other AIFs;
      (c) Process to be followed by the Manager to ensure compliance with investment conditions as specified in Regulation 15 (related to General conditions) and Regulation 16 (related to Category I AIF), 17 (related to Category II AIF) or 18 (related Category III AIF), as applicable, of the AIF Regulations;
      (d) Whether any investments are proposed to be made in units of other AIFs managed/ sponsored by the same Manager/ Sponsor or associates of the Manager/ Sponsor and details thereof, including allocation, fees, expenses, etc.

   d. Category III AIFs investing in units of other AIFs may undertake leverage not exceeding two times of the value of portfolio (NAV) after excluding the value of investment in units of other AIFs

SEBI Regulatory updates (1/8)

SEBI amends SEBI (Alternate Investment Funds) Regulations, 2012 ("SEBI AIF Regulations") vide circular no. SEBI/HO/IMD-I/DF6/P/CIR/2021/584 dated June 25, 2021 (2/2)

2. Applicability of Code of Conduct on Key Managerial Personnel:

a. The key management personnel of the AIF and the Manager shall abide by the Code of Conduct as specified in the Fourth Schedule of the AIF Regulations. For the purpose of this Regulation, 'key management personnel' shall mean:

(i) members of key investment team of the Manager, as disclosed in the PPM of the fund;

(ii) employees who are involved in decision making on behalf of the AIF, including but not limited to, members of senior management team at the level of Managing Director, Chief Executive Officer, Chief Investment Officer, Whole Time Directors, or such equivalent role or position;

(iii) any other person whom the AIF (through the Trustee, Board of Directors or Designated Partners, as the case may be) or Manager may declare as a key management personnel.

b. AIFs shall disclose the names of all the key management personnel of the AIF and Manager as specified in Paragraph 3.1 above, in their PPMs. Any change in key management personnel shall be intimated to the investors and the Board.

3. Clarifications with respect to Investment Committee

a. Investment committee is required to furnish a waiver to AIF in respect of compliance with the said Regulation, in the prescribed format.

b. Consent of the investors of the AIF or scheme may not be required for change in ex-officio external members (who represent the sponsor, sponsor group, manager group or investors, in their official capacity), in the investment committee set up by the Manager.

SEBI Regulatory updates (2/8)

SEBI mandates half yearly disclosures regarding loans, guarantees provided to promoters under the Compliance Report on Corporate Governance vide Circular dated May 31, 2021

As per the provisions of Regulation 27(2) of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("Listing Regulations"), a listed entity is required to submit a quarterly compliance report on corporate governance in the format specified by the Board from time to time to Recognised Stock Exchange(s).

The format for compliance report on Corporate Governance by listed entities has been specified, as per the following annexures, vide Circular No. CIR/CFD/CMD/5/2015 dated September 24, 2015 and modified vide Circular No. SEBI/HO/CFD/CMD1/CIR/P/2019/78 dated July 16, 2019.

I. Annex -I-on quarterly basis;

II. Annex -II-at the end of a financial year;

III. Annex -III-at the end of 6 months from the close of financial year.

In order to bring about transparency and to strengthen the disclosures around loans/ guarantees/comfort letters/ security provided by the listed entity, directly or indirectly to promoter/ promoter group entities or any other entity controlled by them, it has been decided to mandate such disclosures on a half yearly basis, in the Compliance Report on Corporate Governance. The format of disclosure in this regard is specified vide Annex –IV of the said report and shall be effective from financial year 2021-22.

SEBI Regulatory updates (3/8)

SEBI notifies SEBI (Delisting of Equity Shares) Regulations, 2021 vide notification dated June 10, 2021 (1/2)

Considering many listed entities are adopting to delist their equity shares from the stock exchanges in an effort to reduce their compliance cost and enhance business efficiencies by gaining flexibility to take business decision and expand organically. However, SEBI (Delisting of Equity Shares) Regulations, 2009 were strict and rigid such that many delisting offers were unsuccessful.

In order to streamline and strengthen the delisting processes to make it more more transparent and investor friendly, on November 20, 2020, SEBI had issued a consultation paper to review SEBI (Delisting of Equity Shares) Regulations, 2009.

Based on various recommendations from stakeholders and consultants, SEBI vide notification dated June 10, 2021, has notified SEBI (Delisting of Equity Shares) Regulations, 2021 ("Delisting Regulations 2021") which repeals and supersedes the earlier SEBI (Delisting of Equity Shares) Regulations, 2009.

In the Delisting Regulations 2021, various amendments are made to rationalize the timelines, refining the process, streamline the regulations to make it more robust, efficient, transparent and investor's friendly. There is also increase in the disclosure requirement. Further new provisions in respect of delisting of subsidiary of listed companies has been introduced. Key changes to the Delisting Regulations 2021 are as under:

- As per the Delisting Regulations 2021, the acquirer (usually, the promoter) is required to make an initial public announcement, via the stock exchanges, to delist the Company first and within one working day of the public announcement, they need to also inform the Board of the Company at its Registered Office. As per the erstwhile regulations, the acquirer had to first intimate the Board of the Company which then used to intimate the stock exchanges;
- Announcement will need to provide for an Indicative Price, definition of which has been introduced in the Delisting Regulations 2021, to mean any price which is higher than the floor price. Earlier, the promoters used to indicate to the Board, the price they were willing to offer, which has now become a statutory requirement;

SEBI Regulatory updates (3/8)

SEBI notifies SEBI (Delisting of Equity Shares) Regulations, 2021 vide notification dated June 10, 2021 (2/2)

- The Company is now required to set up a committee of independent directors who will have to give reasoned recommendations on the delisting offer and the voting pattern of independent directors is also required to be disclosed;
- The Delisting Regulations 2021 also provide for prohibition on delisting within six months of buyback or preferential allotment;
- The Delisting Regulations 2021 provides for specific timelines at various stages of delisting process (for example, the board approval for delisting to be obtained within 21 days of the initial public announcement, special resolution has to be passed within 45 days of the board resolution) which was not there in the erstwhile delisting regulations;
- The Delisting Regulations 2021 now requires the acquirer/ promoter to take active steps to provide exit to public shareholders who have not participated in the reverse book building process by submitting quarterly reports to stock exchanges (with details such as number of shares tendered, etc.), sending follow up communications to shareholders, publishing advertisements to invite the shareholders to avail the offer and tender their shares;
- The Delisting Regulations 2021 provides that the Company shall appoint (before the board meeting for granting approval) a Peer Reviewed Company Secretary (independent of the promoter/ acquirer/ merchant Banker) who will carry out the necessary due diligence;
- Reverse book building requirement will not apply if the listed company becomes 100% subsidiary of its listed parent company under a Scheme of Arrangement, if the listed parent and the subsidiary company are in the same line of business and subject to compliance with certain conditions.

SEBI Regulatory updates (4/8)

SEBI defers applicability of certain disclosures with respect to certain schemes vide Circular dated May 31, 2021

SEBI, vide circular no. SEBI/HO/IMD/IMD-II DOF3/P/CIR/2021/555 dated April 29, 2021, specified disclosures with regard to disclosure of (a) risk-o-meter of the scheme and the benchmark along with the performance disclosure of the scheme vis-à-vis benchmark and (b) details of portfolio, which were applicable from June 01, 2021.

Based on the representation received from AMFI, it has been decided to extend the implementation date of the provisions of the aforesaid circular to September 1, 2021.

Such additional disclosure has been mandated to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

Private Family Trusts exempt from making open offer upon settlement of shares of Vadilal Industries Limited

SEBI has allowed the application seeking exemption from making open offer under Regulation 11 of the Takeover Regulations in the case of proposed transaction of direct and indirect acquisition of equity shares of the Vadilal Industries Ltd by the family trust (with individual family members as trustees and beneficiaries) from the existing promoters.

SEBI Regulatory updates (5/8)

SEBI provides relaxation from requirement of minimum vesting period under SEBI (Share Based Employee Benefit) Regulations, 2014 vide Circular dated June 15, 2021

Presently, regulation 18(1) and 24(1) of the SEBI (Share Based Employee Benefit) Regulations, 2014 ("SBEB Regulations") provides that there shall be a minimum vesting period of one year in case of employee stock options ("options") and stock appreciation rights ("SAR").

Further, regulation 9(4) of the SBEB Regulations states that in the event of death of the employee while in employment, all the options, SAR or any other benefit granted to him/ her under a scheme till such date shall vest in the legal heirs or nominees of the deceased employee.

In view of the COVID-19 pandemic situation, to provide relief to the families of the deceased employees of listed companies, it has been decided as under:

a. the provisions under the SBEB Regulations relating to minimum vesting period of one year shall not apply in case of death (for any reason) of an employee and in such instances all the options, SAR or any other benefit granted to such employee(s) shall vest with his/her legal heir or nominee on the date of death of the employee; and

b. this relaxation shall be available to all such employees who have deceased on or after April 01, 2020.

SEBI Regulatory updates (6/8)

SEBI grant exemption to the acquirer from open offer obligation to Debt recovery officer in case of United Breweries Limited

In the case of United Breweries Limited ("the Target Company"), being the company owned by Mr. Vijay Mallya and his group companies, an application was filed by Heinken International B.V. for acquisition of 14.99% of the stake of the Target Company from the recovery officer of the Bangalore Debt Recovery Tribunal. Application sought for exemption from open offer under Regulation 3(2) and 3(3) of the SEBI Takeover Regulations, 2011.

On account of Vijay Mallya and his group company's default in paying their outstanding dues to the SBI Consortium, the shares held by them in the Target Company, for purely technical reasons have been taken into the custody of the Recovery Officer in its demat account. Accordingly, recovery officer held shares under his custody pursuant to the recovery certificate dated April, 2017 obtained from DRT. Accordingly, technically, the transferor would be the recovery officer. But merely possession / holding of the transfer shares would not qualify the recovery officer as a promoter of the Target Company.

Exemption was granted on the following reasons:

- The Recovery Officer acts as a mere agent of the Bangalore DRT to administer and sell the assets of the defaulters to recover outstanding dues and is not vested with title to such assets. The transfer of the Transfer Shares to the Recovery Officer's demat account is only a matter of procedure, is temporary in nature, and only an intermediate step to enable the Recovery Officer to sell the Transfer Shares in accordance with the RDB Act. It is a settled position in law that the Recovery Officer, as an agent of the Bangalore DRT, would not gain any title or beneficial ownership over the relevant Transfer Shares and that the Vijay Mallya Group Transferors would continue to retain beneficial title and ownership over the Transfer Shares until such time that the underlying Transfer Shares are actually sold.
- One of the key objectives behind requiring an acquirer to make an open offer is to allow the public shareholders the opportunity to exit their investment in a company pursuant to a substantial acquisition of shares by a new shareholder.

SEBI Regulatory updates (7/8)

SEBI issues interim orders in connection with insider trading of shares of Infosys Limited

SEBI has issued an interim order under section 11 of the Securities and Exchange Board of India Act, 1992 (“SEBI Act”) read with SEBI (Prohibition of Insider Trading) Regulations, 2015, 1992 (“Insider Trading Regulations”). A SEBI alert system had generated insider trading alerts for the script of Infosys (‘INFY’) for the period around 15th July 2020 i.e., around the corporate announcement of audited financial results of INFY for the quarter ended June 30, 2020. Based thereon, a preliminary examination was conducted as to whether certain persons/entities which traded in INFY were in possession of Unpublished Price Sensitive Information (UPSI). The order makes a reference to extract of “Structured digital database” result in the financial results of INFY and came to the conclusion that UPSI came into existence on June 29, 2020 and UPSI was for a period from June 29, 2020 to July 15, 2020.

One of the senior officials was the Senior Corporate Counsel of INFY and the others were considered to be ‘insiders’ as defined in the regulations and a lot of reference to “pre ponderance of probability” of being in possession of UPSI. An official in the corporate accounting group of INFY was identified as a ‘designated person’ by INFY for the purpose of UPSI and he was in frequent communication with the Senior Corporate Counsel, including through telecommunication and therefore, both were considered as having prima facie violated the Insider trading regulations. A huge amount of detail has been gone into in terms of the INFY price movements, mobile communication done between the relevant parties, bank statements of the relevant entities, fund transfers, shares purchased and many other detailed factual aspects and based thereon, an interim ex-parte order has been passed by SEBI with several directions which shall be in force until further orders, including the following:

- Relevant parties restrained from dealing in securities, directly or indirectly, in any manner whatsoever until further orders.
- In relation to certain parties, their bank accounts (to the extent of proceeds generated) are impounded and are directed to open an escrow account with a nationalised bank to the extent of the gains generated from the proceeds of the prima facie insider trading.
- Several of the parties are directed to provide an inventory of assets held in their name within 5 days from the date of the order.

The relevant parties are required to submit their replies/ objections, if any, within 21 days of this order.

SEBI Regulatory updates (8/8)

Off- Market transfer of Securities by FPI

Pursuant to the amendment in the Finance Act, 2021 in relation to tax incentives for relocating foreign funds to International Financial Services Centre (IFSC) in order to make the IFSC in GIFT City a global financial hub, SEBI provided an amendment to facilitate such relocation.

In continuation to same, it has been decided that a FPI(‘original fund’ or its wholly owned special purpose vehicle) may approach its DDP for approval of a one-time ‘off-market’ transfer of its securities to the ‘resultant fund’.

The terms ‘original fund’, ‘relocation’ and ‘resultant fund’ will have the same meaning as assigned to them under the Finance Act,2021.

The DDP after appropriate due diligence may accord its approval for a one-time ‘off-market’ transfer of securities for such relocation.

Relocation request will imply that the FPI has deemed to have applied for surrender of its registration and the DDP may be guided by the guidelines pertaining to surrender of FPI registration.

The ‘off-market’ transfer shall be allowed without prejudice to any provisions of tax laws and FEMA.

1 SEBI Circular No. SEBI/HO/FPI&C/P/CIR/2021/0569 dated June 1, 2021