Newsletter

Volume 6, Jan 2023

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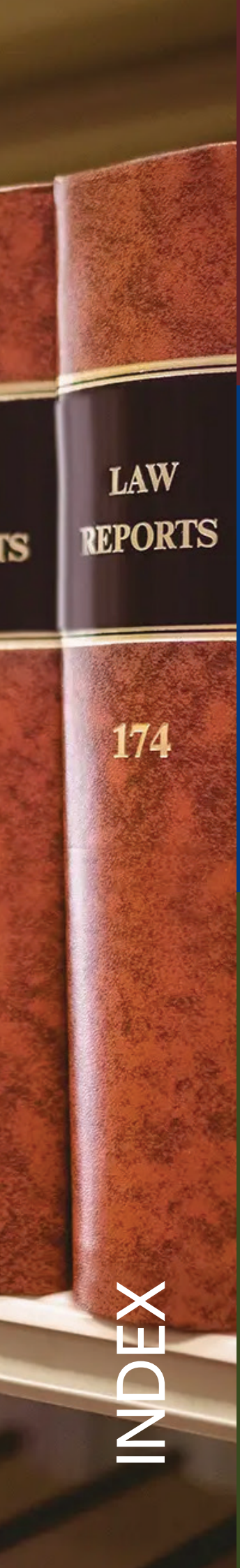

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Editor's note

Dear Readers,

I am delighted to share the January, 2023 SNG newsletter. In this issue, you will find report of the Standing Committee on Finance on anti-competitive practice of big tech companies; important circulars on ESG; important judgements under the IBC particularly on position of the guarantor who is not party to the OTS, findings on whether personal guarantee can be invoked during the mortarium period; and other important legal updates.

This issue also includes certain recent important circulars issued by MCA, RBI and SEBI.

I hope you will find this edition useful and informative.

Best wishes,

Rajesh Narain Gupta

Managing Partner,
SNG & Partners

A. COMPETITION LAW :

1. Report of Standing Committee on Finance on Anti-competitive Practices by Big Tech Companies

The Report was presented in Lok Sabha and laid in Rajya Sabha on December 22, 2022.

The need for addressing potential anti-competitive concerns was observed in the report due to the growing advantage of the digital markets. There are economies of scale in the digital markets and such markets grow exponentially due to the learning and network effects.

The Standing Committee on Finance noted activities of the leading players in digital markets that can negatively impact the competition. There are 10 such significant activities as noted in the report.

Therefore, a recommendation has been made to categorize certain entities as Systematically Important Digital Intermediaries ("SIDI") and several mandatory obligations were noted to be imposed on such entities. The report mentions activities of the SIDI that are anti-competitive. In this regard, mandatory obligations have been recommended. These are:

a. Anti-steering provisions preventing users from moving to other platforms
b. Self-preferencing
c. Bundling and tying
d. Data usage
e. Mergers and acquisitions including "killer acquisitions"
f. Dynamic pricing and deep discounting
g. exclusive tie-ups
h. Search and ranking preferencing
i. Restricting third party applications
j. Advertising policies.

Another recommendation was submission of annual report by the SIDIs to the Competition Commission of India. The report should detail the measures undertaken by the SIDIs to prevent anti-competitive practices and comply with the mandatory obligations. Introduction of a 'Digital Competition Act' for ensuring fair competition in the digital market has also been suggested. It is also recommended to introduce a designated and specialized digital market unit which only addresses the need of competition in the digital markets.

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B. ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG):

1. Issuance Calendar for Marketable Sovereign Green Bonds: FY 2022-23

To mobilize resources for green infrastructure, the Government of India will issue Sovereign Green Bonds ("SGrBs"). The proceeds will be used in public sector projects that help in reducing the carbon intensity of the economy.

Certain key features of SGrBs are:

a. **Issuance Method:**
   SGrBs will be issued via Uniform Price Auction
b. **Non-competitive bidding facility:**
   As per the scheme, 5% of the notified amount of sale will be reserved for retail investors.
c. **Eligibility for Repurchase Transactions (Repo):**
   SGrBs will be eligible subject to Repurchase Transactions (Repo) (Reserve Bank) Directions, 2018.
d. **Eligibility for Statutory Liquidity Ratio (SLR):**
   SGrBs will be reckoned as an eligible investment for SLR purposes.
e. **Underwriting:**
   It will be as per the 'Revised Scheme of Underwriting Commitment and Liquidity Support' issued by RBI.
f. **When-issued trading:**
   As per the guidelines on 'Transactions in the When issued market in Central Government Securities' issued by RBI
g. **Tradability:**
   Eligible for trading in the secondary market.
h. **Investment by Non-residents:**
   For investment in Government Securities by Non-residents, the SGrBs will be classified as specified securities under the "Fully Accessible Route".

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2. Disclosures by Fund Management Entities for Environmental, Social or Governance Schemes

A framework has been released by IFSCA requiring ESG schemes to make initial and periodic disclosures to strengthen consistency, comparability and reliability in disclosures concerning ESG schemes.

Some of the features are:

a. Initial disclosures in the offer document/ placement memorandum

Name of the scheme, investment objective, investment strategy, investment processes, risks and risk management practices, and benchmark.

b. Periodic disclosures

Compliance with the states ESG-related investment objectives of the scheme, ESG-related performance, actual proportion of the investable corpus/assets under management invested as per the stated ESG-related investment objectives, key findings/major observations of internal audits or third-party valuation if any.

c. Monitoring and performance evaluation.

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C. INSOLVENCY AND BANKRUPTCY CODE (IBC):

1. NCLT , Amravati opines: If a Personal Guarantor is not a party to the OTS, then OTS cannot be construed as an acknowledgment on part of the Guarantor

The NCLT, Amravati Bench observed that as per Section 135 of the Indian Contract Act of 1872, a surety is discharged if the creditor and principal debtor enters a contract by which a composition or promise is arrived at unless surety assents to such contract.

It was noted that the Personal Guarantor was not a party to the said OTS proposal and it was not even signed by the Personal Guarantor. Therefore, the OTS cannot be construed as an acknowledgement on part of the Personal Guarantor.

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2. NCLAT, New Delhi enunciates that for every refund demanded by the liquidator, an application has to be made

The NCLAT, Principal Bench, New Delhi observed that there is no inconsistency between Section 11B of the Central Excise Act, 1944 and Section 33 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC").

Section 11B enables the Corporate Debtor to make an application for a refund of duty. The purpose of the Moratorium which comes into play after the liquidation order is to protect the Debtor from legal proceedings. In the present case, no such legal proceeding has been initiated against the Debtor. It was noted by the Appellate Tribunal that the present case concerns a refund based on whether an application is required to be made or not.

It was opined by the Appellate Tribunal that Section 11B of the Central Excise Act, 1944 does not provide for an automatic refund. Concerning one refund for which the Application was not filed by the Liquidator, the Bench expounded that for such a refund if there was no claim, the Central Excise Department was not obliged to refund the said amount.

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3. NCLAT, New Delhi enunciates that if 'related parties' constitute CoC, the Committee along with the decision taken by the Committee becomes ipso facto illegal

The NCLAT, New Delhi expounded that in absence of any proof and just by relying on letters demanding repayment of loans sent by financial creditors to the Corporate Debtor, the NCLT should not have accepted the Section 7 application of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred

to as "IBC"). It was also enunciated that once the beginning of CIRP is found to be based on fraud, other issues about the constitution of CoC and decisions, etc. become irrelevant as once the foundation of CIRP crumbles, all the later process would fall as it wouldn't have any base to stand on. Concerning the allegation of related parties, the Tribunal propounded that the four companies are 'related parties' of the Corporate Debtor and therefore, there was a clear contravention of the first proviso of Section 5(24) of the IBC. The CoC became illegal and all the decisions taken thereof too became illegal when the related parties became members of the CoC.

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4. NCLAT, New Delhi enunciates that an irrevocable and unconditional Bank Guarantee can be invoked during the Section 14 moratorium

The NCLAT, New Delhi bench expounded that Bank Guarantees are outside the scope of the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") and Section 3 (31) specifically excludes Performance Bank Guarantees.

It was further opined that after an amendment to Section 14③(b) of the IBC, an irrevocable and unconditional Bank Guarantee can be invoked during the Section 14 moratorium.

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5. NCLT, Indore expounds: Right of dissenting creditor to proceed against the personal guarantor of the Corporate Debtor cannot be extinguished by CoC

The NCLT, Indore Bench expounded that a conditional plan without the consent of all the secured financial creditors is in contravention of the IBC.

It was opined that the Committee of Creditors ("CoC") can only take decisions concerning the insolvency of the Corporate Debtor. Under the pretext of commercial wisdom, the right of a secured financial creditor to proceed against the personal guarantor of the Corporate Debtor cannot be extinguished.

It was enunciated that the CoC by majority votes cannot enforce its decision for extinguishment of the right of the dissenting creditor to proceed against the personal guarantor.

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6. Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016

Changes to the admission of corporate insolvency resolution process applications, streamlining the insolvency resolution process, recasting the liquidation process and the role of service providers are being considered to strengthen the functioning of the IBC.

Some of the changes being considered are:

a. To use an e-platform that provides a case management system., an automated process for filing applications.
b. Before initiating the corporate insolvency resolution process by filing an application, the financial creditors, operational creditors and corporate debtors first ascertain the relevant information regarding the occurrence of a default or dispute at the information utilities.
c. Amendment to Section 215 is being considered that before an operational creditor file an application to initiate the corporate insolvency resolution process, relevant financial information is filed with the Information Utilities in advance.
d. For adjudicating any application is preferred under Sections 7 or 9, the Adjudicating Authority only relies on the record of the default available with the Information Utilities.
e. Amendment to section 10 to delete the right of the corporate debtor to propose an Insolvency Resolution Professional.
f. Certain modifications and relaxations are to be made under Chapter IIIA of Part II of the IBC.
g. To clarify Section 31 further to include the Adjudicating Authority can send back a resolution plan to the CoC for curing defects.
h. To amend Section 29 to provide that the estimated value of the assets of the corporate debtor is added to the information memorandum.
i. Restriction on the right of the secured creditor is being considered to either realize the security interest or relinquish it within a prescribed period.
j. It is being considered to enable the CoC to seek replacement of the RP from becoming liquidator by a vote of a minimum 66% of the voting shares.
k. Common AA and IP for the corporate debtor and its related parties.

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7. Report of Cross Border Insolvency Rules/Regulations Committee (CBIRC-II) on Group Insolvency

Various relevant stakeholders were consulted by CBIR-II and a report was submitted to MCA.

Some of the key recommendations are:

a. A voluntary and flexible group insolvency framework.
b. UNCITRAL Model Law on Enterprise group insolvency to be incorporated after enactment of single entity cross border insolvency laws.
c. A broad and inclusive definition of "group" should be provided in the group insolvency framework so that many corporate debtors can be included.
d. The group insolvency framework should not be made applicable to the solvent members of the group.
e. List of procedural coordination mechanisms to be made available.
f. Allowing joint applications against multiple corporate debtors by those belonging to the same group.
g. Proceedings concerning corporate debtors belonging to one group may take place under the same Adjudicating Authority.
h. Enabling of group coordination proceedings for corporate debtors belonging to the same group and undergoing corporate insolvency resolution or liquidation process.
i. Voluntary participation of the corporate debtor in the group coordination. The CoCs must have the flexibility to opt-in to the group coordination proceedings until 30 days after its opening.
j. Requirement of the approval of all participating CoCs by 66% each of their voting shares respectively in a group strategy.
k. The cost of conducting group coordination proceedings should form part of the insolvency or liquidation process cost of the participating group members.

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8. NCLAT, New Delhi enunciates : a financial service provider having assets worth Rs. 500 crores or more can only proceed for insolvency and liquidation

The NCLAT, New Delhi bench observed that a notification by MCA has been issued vide which Financial Service Providers have been brought under the IBC. However, the notification puts a threshold which is an asset size of Rs. 500 crores or more.

It was opined that the current law on this matter is that a financial service provider having assets worth Rs. 500 crores or more can only proceed for insolvency and liquidations. It was enunciated that the Tribunal would have jurisdiction that is exercised on the date when an application can be filed against the financial service provider for insolvency. Moreover, an application under Section 95 can only be filed against the personal guarantor only when on the same date insolvency can be commenced against the financial service provider.

Merely for argument's sake, the Appellate Authority analyzed the issue where the asset size of the financial service provider as on the date of filing of the application was more than Rs. 500 crores, but reduced during the pendency of the application, then it that case whether NCLT would lose its jurisdiction.

In this regard, the Bench opined that in the case of statutory precondition for the exercise of jurisdiction, the pre-condition must be fulfilled before the jurisdiction is exercised by the tribunal. The Bench observed that if the contention of the Respondent is accepted that if asset size is reducing during the pendency, the Tribunal loses jurisdiction then the same would be contrary to the objective of IBC which is speedy.

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9. Delhi HC propounds: Adjudication of avoidance application is independent of the resolution of the Corporate Debtor and can survive CIRP

The Delhi High Court opined that the corporate insolvency resolution process (hereinafter referred to as "CIRP") and avoidance applications are different proceedings and hence, adjudication of avoidance application is independent of the resolution of the corporate debtor and can survive CIRP. Further, avoidance applications cannot be rendered infructuous where the resolution plan is silent on the treatment of such applications. Money borrowed from creditors is public money and hence, the same cannot be appropriated by way of private transactions/arrangements.

Therefore, the RP will not be functus officio when it comes to avoidance applications. After avoidance of transactions the money cannot go to the kitty of the resolution applicant and the benefit must be given to the creditors.

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10. Distribution of Capital Market Products and Services under the International Services Centres Authority (Capital Market Intermediaries) Regulations, 2021

The International Financial Services Centres Authority (hereinafter referred to as "IFSCA") issued a circular vide which a framework for the distribution of capital market products and services has been specified. The circular has some important definitions such as capital market products and services and it specifies the permissible activities that may be undertaken by a registered distributor.

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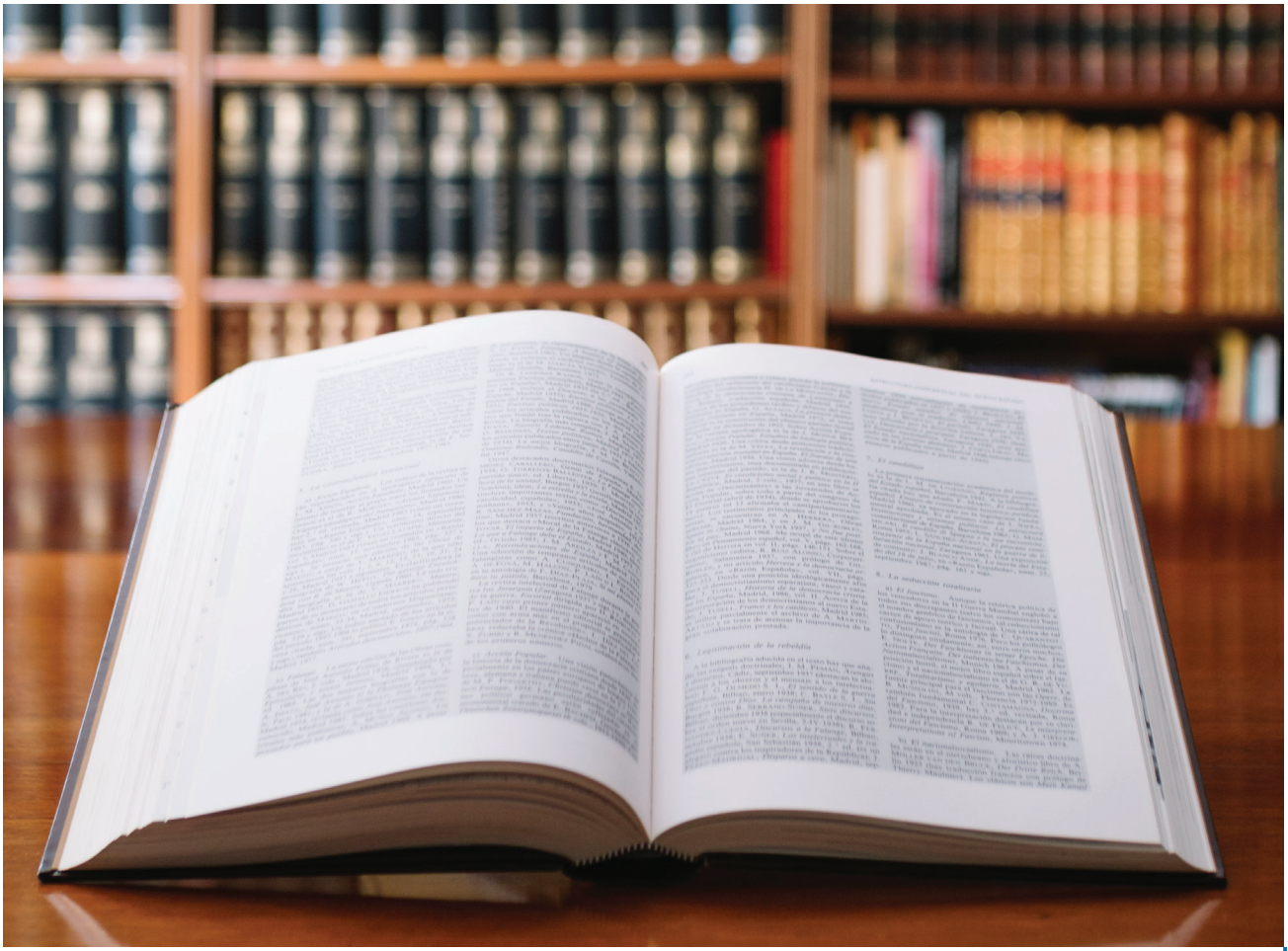

D.MINISTRY OF CORPORATE AFFAIRS (MCA):

1. Release Plan of 45 company e-Forms in MCA 21 Version 3.0-reg

Ministry of Corporate Affairs is in process of introducing several company e-Forms in MCA21 Version 3.0 and therefore, such forms will not be available in MCA21 Version-2 from 07.01.2023 to 22.01.2023.

The time for filing has been extended by 15 days in cases where the due date for filing the 45 forms falls from 07.01.2023 to 22.01.2023, without levying of additional fee for the due date falling in the said period.

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2. Filing of Forms GNL-2 and MGT-14 due to migration from V2 to V3 version in MCA 21 Portal from 7th January to 22nd January, 2023

Since the MCA 21 Portal is being migrated from V2 Version to V3 Version, it has been decided that the companies intending to file:

a. Form GNL-2 (filing of prospectus-related documents)
b. MGT-14 (filing of Resolutions relating to prospectus-related documents)

Between 07.01.2023 and 22.01.2023 may file such forms in physical mode. The forms should be duly signed by the concerned persons and filed with the concerned Registrar without payment of any fee. An undertaking by the company also has to be filed along with the form stating that once the filing is enabled on the portal, the company will file the relevant form in electronic form on MCA 21 portal along with the requisite fee.

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3. Companies (Accounts) Amendment Rules, 2023

Amendments have been made to the Companies (Accounts) Rules, 2014. These will come into effect from January 23, 2023.

A new format for Form AOC-5 has been substituted as per the amendment.

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4. Companies (Authorized to register) Amendment Rules, 2023

Amendments have been made to the Companies (Authorized to register) Rules, 2014. These will come into effect from January 23, 2023.

Some of the key amendments are:

a. Substitution of Rule 3②(a)(iv)
   "No objection certificate from secured creditor along with charge holder, if applicable."
b. Form No. URC-1 substituted

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5. Companies (Management and Administration) Rules, 2023

Amendments have been made to the Companies (Management and Administration) Rules, 2014. These will come into effect from January 23, 2023.

Form No. MGT-3 has been substituted.

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6. Companies (Shares Capital and Debentures) Amendment Rules, 2023

Amendments have been made to the Companies (Shares Capital and Debentures) Rules, 2014. These will come into effect from January 23, 2023.

Some of the key amendments are:

a. Substitution of Rule 17(14)
   "There shall be a declaration with the return filed with the Registrar in Form No. sh.11, signed by two directors of the company including the managing director, if any, certifying that the buy-back of securities has been made in compliance with the provisions of the act and the rules made thereunder."
b. Substitution of Forms No. SH – 7, SH – 8 and SH – 9.

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7. Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2023

Amendments have been made to the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014. These will come into effect from January 23, 2023.

Form No. MR.1 and MR.2 are substituted.

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8. Companies (Incorporation) Amendment Rules, 2023

Amendments have been made to the Companies (Incorporation) Rules, 2014. These will come into effect from January 23, 2023.

Some of the key amendments are:

a. Substitution of Rule 4②:

"The name of the person nominated under sub-rule ① shall be mentioned in the memorandum of one person company and as such nomination details along with consent of such nominee shall be filed in Form No. INC-32 (SPICe+) as a declaration and the said form along with free as provided in the Companies (Registration offices and fees) Rules, 2014 shall be filed with the Registrar at the time of incorporation of company along with its e-memorandum and e-articles."

b. Substitution of Rule 6③:

"The company shall file an application in e-Form No. INC-6 for its conversion into Private or Public Company, other than under Section 8 of the Act, along with fees as provided in the Companies Companies (Registration offices and fees) Rules, 2014 with altered e-MOA and e-AOA."

c. Substitution of Rule 7⑤:

"On being satisfied that the requirements stated herein have been complied with, the Registrar after examining the latest audited financial statement shall approve the form and issue certificate."

d. Addition of Proviso to Rule 30④ and provides that the Applicant need not submit a separate copy of the application with the registrar and an intimation of filing of the application in Form INC-23 shall be shared.

e. NO application filed in e-form No. RD GNL-5 in Rule 40.

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9. Companies (Prospectus and Allotment of Securities) Amendment Rules, 2023

Amendments have been made to the Companies (Prospectus and Allotment of Securities) Rules, 2014. These will come into effect from January 23, 2023.

a. Rule 12⑥ has been omitted

b. Substitution of Form PAS-2, 3 and 6

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10. Companies (Registration of Foreign Companies) (Amendment) Rules, 2023

Amendments have been made to the Companies (Registration of Foreign Companies) Rules, 2014. These will come into effect from January 23, 2023. Substitution of Form FC-1, 2, 3 and 4.

Read More

11. Companies (Appointment and Qualification of Directors) (Amendment) Rules, 2023

Amendments have been made to the Companies (Appointment and Qualification of Directors) Rules, 2014. These will come into effect from January 23, 2023.

a. Insertion Rule 14 (IA):

"Whenever a company received the information in Form DIR-8, company shall, within thirty days of such receipt, file Form- DIR-9 with the Registrar."

b. Substitution of Forms DIR-3, 3C, 5, 6, 8 ,9, 10, 11 and 12.

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12. Companies (Miscellaneous) Amendment Rules, 2023

Amendments have been made to the Companies (Miscellaneous) Rules, 2014. These will come into effect from January 23, 2023.

a. Formats of Form no. MSC-1, 3 and 4 have been substituted.

b. To obtain the status of a dormant company, there must be no dispute in the management or ownership of the company. No certificate in this regard is required to be enclosed with Form MSC-1. In case of outstanding unsecured loans, the company may apply under Rule 3 after obtaining the concurrence of the lender. The same is not required to be attached to Form MSC – 1.

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13. Companies (Registration Offices and Fees) Amendment Rules, 2023

Amendments have been made to Companies (Registration Offices and Fees) Rules 2014 which will come into effect from January 23, 2023.

a. Insertion of Rule 8A:

"Signing of forms: e-forms wherever applicable shall be signed by the Insolvency resolution professional or resolution professional or liquidator of companies under insolvency or liquidation, as the case may be, and filed with the Registrar along with the fee as mentioned in the Table annexed these rules"

b. Substitution of Form GNL – 2, 3 and 4.

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14. Nidhi (Amendment) Rules, 2023

Amendments have been made to Nidhi Rules 2014 which will come into effect from January 23, 2023.

Substitution of Form NDH-1, 2, 3 and 4.

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E. RESERVE BANK OF INDIA (RBI):

1. Basel III Capital Regulations- Eligible Credit Rating Agencies

RBI has advised the banks to use the ratings of the below mentioned domestic credit rating agencies for risk weighting their claims for the purpose of capital adequacy:

a. Acuite Ratings & Research Limited
b. Credit Analsysis and Research Limited
c. CRISIL Ratings Limited
d. ICRA Limited
e. India Ratings and Research Private Limited
f. INFORMERICS Valuation and Rating Pvt. Ltd.

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2. Master Direction- Reserve Bank of India (Acquisition and Holding of Shares or Voting Rights in Banking Companies) Directions, 2023

To ensure diversification of the ultimate ownership and control of banking companies and that the major shareholders of banking companies are fit and proper on a continuing basis, directions have been issued by RBI that are to be read with 'Guidelines on Acquisition and Holding of Shares or Voting Rights in Banking Companies' issued by RBI.

Chapters such as prior approval for acquisition, continuous monitoring arrangements etc. have been provided in the direction itself.

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3. Guidelines on Acquisition and Holding of Shares or Voting Rights in Banking Companies

These are the guidelines that have to be read with the direction issued by the RBI i.e., Reserve Bank of India (Acquisition and Holding of Shares or Voting Rights in Banking Companies) Directions, 2023.

The guidelines provide for prior approval for acquisition of shares or voting rights in a banking company along with limits on shareholding, lock-in requirement and calling on voting rights.

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F. SECURITIES EXCHANGE BOARD OF INDIA (SEBI):

1. Limited Relaxation - Dispatch of physical copies of financial statements etc.- Regulation 58 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

Vide Circular dated May 12, 2020, some provisions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 were relaxed till December 31, 2022.

SEBI has decided to extend the relaxations till September 30, 2023. The relaxation is provided in terms of Regulation 58①(b) of the Listing Regulations which prescribes that an entity with listed non-convertible securities shall send a hard copy of a statement containing the salient features of all the documents as given under Section 136 of the Companies Act, 2013.

The Circular will come into force with immediate effect.

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2. Operational Circular for Credit Rating Agencies

SEBI has prescribed guidelines for registration and obligations of Credit Rating Agencies ("CRAs"), manner of inspection and investigation and code of conduct applicable on CRAs.

Some of the guidelines are:

a. In case of a change in control, registered CRAs will have to obtain prior approval from SEBI.
b. Disclosure of a proper rating process on the website of the CRAs is mandatory.
c. CRA shall obtain a 'No Default Statement' from the issuer at the end of each month to ensure timely recognition of default.
d. The rating shall be upgraded from default to non-investment grade after 90 days after a default is cured and payments regularized, subject to the satisfactory performance of the company during this period.

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3. Management and Advisory services by AMCs to Foreign Portfolio Investors (FPIs)

After consultation with International Financial Services Centres Authority ("IFSCA") and based on requests from AMCs, it has been decided that AMCs may provide management and advisory services to FPIs operating from International Financial Services Centres and regulated by IFSCA, not falling under the categories of FPIs as specified under Para 2(i) of SEBI Circular dated December 16, 2019.

However, the same is subject to:

a. Such FPIs are not allowed to invest in mutual fund schemes other than the schemes in the category of "thematic" as per the SEBI circular dated October 6, 2017.
b. FPI shall not take contra-position for a period of 6 months from the date of purchase/sale of securities, in case of investment in equity and equity derivative securities listed on stock exchanges in India.

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4. Comprehensive Framework on Offer for Sale ("OFS") of shares through Stock Exchange Mechanism

Certain provisions of the existing OFS framework through the Stock Exchange Mechanism have been modified. The key provisions are:

a. Eligibility

The facility of OFS of shares would be available on the Bombay Stock Exchange, National Stock Exchange, and Metropolitan Stock Exchange of India.

b. Sellers

The non-promoter shareholders are now allowed to sell their equity shares in a company through OFS. However, OFS would be available to companies with a market capitalization of Rs.1000 crore and above.

The promoters of such companies that are eligible for trading and are required to increase public shareholding to meet minimum public shareholding requirements as per the prescribed rules.

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5. Change in control of Portfolio Managers providing Co-investment services

The procedure for seeking prior approval in case of change in control of the Portfolio Manager was prescribed by SEBI vide circular No. SEBI/HO/IMD-1/DOF1/P/CIR/2022/77 dated June 02, 2022. Para 2(iv) of the said circular has been partially modified:

"Pursuant to the grant of prior approval by SEBI, to enable existing investors/clients to take a well-informed decision regarding their continuance or otherwise with the changed

management, the portfolio manager shall inform its existing investors/clients about the proposed change before effecting the same and give the option to exit without any exit load, within a period of not less than 30 calendar days, from the date of such communication. However, for the clients under co-investment portfolio management services, the Portfolio manager shall ensure such compliance with the second proviso of Regulation 22② of PMS Regulations."

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6. Introduction of future contracts on Corporate Bond Indices

A working group was constituted by SEBI to make recommendations on the matter of 'Derivatives on Bond Indices'. Based on these recommendations, it has been decided to permit Stock Exchanges to introduce derivative contracts on indices of corporate debt securities rated A++ and above. For starting, it has been allowed to launch future contracts on corporate bond indices.

A detailed proposal to SEBI must be submitted by the stock exchanges that are interested in introducing such contracts.

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7. Standard Operating Procedure for the handling of Stock Exchange Outage and extension of trading hours thereof

To handle the situation of outages at stock exchanges in a harmonized and consistent manner, a standard operating procedure has been detailed.

The stock exchange suffering from an outage shall inform the various stakeholders such as SEBI, Market Participants etc. Until the restoration of normalcy, the affected stock exchange shall update about the ongoing outage in 45 minutes time intervals.

Further, situations wherein trading hours remain unchanged or extended are also provided for in the circular.

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8. Mode of settlement for trades executed on the Request for Quote ("RFQ") platform

RFQ is an electronic platform that enables taking place of sophisticated, multi-lateral negotiations on a centralized online trading platform for trade execution and settlement of trades in listed Non-Convertible Securities, Securities Debt etc.

Currently, Real-time Gross Settlement ("RTGS") is used as a mode of settlement for trades executed on the RFQ platform. SEBI in addition to this has clarified that payment mechanisms provided by banks/payment aggregators authorized by the RBI can be used for settlement of trades executed on the RFQ platform.

The circular will come into force with immediate effect.

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9. Facility of conducting meetings of unit holders of REITs through video conferencing or other audio-visual means

As per Regulations 22③ of the SEBI (Real Estate Investment Trusts) Regulations, 2014, the annual meeting of all unit holders must be held at least once a year within 120 days from the end of the financial year. Further, between two meetings, the gap should not be more than 15 months. Maximum participation can be ensured by enabling participation through video conferencing or other audio-visual means.

Therefore, it has been decided to allow managers of REIT to conduct the meeting through video conferencing or other audio-visual means. Addition requirements for following the procedure in this regard have been specified in the circular.

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10. Facility of conducting meetings of unit holders of InvITs through video conferencing or other audio-visual means

The annual meeting of all unit holders must be held at least once a year within 120 days from the end of the financial year. Further, between two meetings, the gap should not be more than 15 months. Maximum participation can be ensured by enabling participation through video conferencing or other audio-visual means.

Therefore, it has been decided to allow managers of InvITs to conduct the meeting through video conferencing or other audio-visual means. Additional requirements for following the procedure in this regard have been specified in the circular.

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11. Participation of AIFs in Credit Default Swaps (CDS)

AIFs have been allowed to participate in CDS as protection buyers and sellers and accordingly, the SEBI (Alternative Investment Funds) Regulations, 2012 have been amended.

Certain specifications have been issued by SEBI in this regard:

a. Category 1 and II AIFs may buy CDS only for the purpose of hedging. Category II AIFs may buy for other purposes as well but it has to be within the permissible leverage.
b. Category III AIFs may sell CDS subject to the permissible limits as specified by SEBI.
c. The details of CDS transactions have to be reported in the manner prescribed by the custodian.
d. All CDS transactions must take place on a SEBI or RBI-regulated platform.

The circular shall come into force with immediate effect.

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12. Allowing stock exchanges to launch multiple contracts on the same commodity derivatives segment

After consultation with the Commodity Derivatives Advisory Committee, it has been decided that stock exchanges may be permitted to launch multiple contracts in the same commodity. Accordingly, necessary amendments may be made by the exchanges to the bye-laws, rules and regulations.

The circular shall come into force with immediate effect.

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13. SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2023

Certain key amendments to SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 are:

a. Omission of Explanation ④ in Regulation 15(1A)
b. Insertion of Regulation 15(IB):

Notwithstanding anything contained in this regulation, in case of an Infrastructure Investment Trust registered under the provisions of Securities and Exchange Board of India (Infrastructure Investment Trust) Regulations 2014, the governance norms specified under the Securities and Exchange Board of India (Infrastructure Investment Trust) Regulations 2014 shall be applicable.

c. Insertion of Regulation 15(IC):

Notwithstanding anything contained in this regulation, in case of a Real Estate Investment Trust registered under the provisions of Securities and Exchange Board of India (Real Estate Investment Trust) Regulations 2014, the governance norms specified under the Securities and Exchange Board of India (Real Estate Investment Trust) Regulations 2014 shall be applicable.

The amendments will come in to force immediately, except for Regulation 15 which will come in to force with effect from April 1, 2023.

Read More

G. EVALUATION OF PROPERTY TAX IN GREATER MUMBAI – RATEABLE VALUE V/S. CAPITAL VALUE

By : Samreen Paloba and Sana Khan

Ann Landers once said that, *"A person doesn't know how much he has to be thankful for until he has to pay taxes on it."*

In a metropolitan city like Mumbai, property tax is a vital source of revenue to the municipal corporation. The valuation and collection of property taxes are governed by the Mumbai Municipal Corporation Act, 1888 ("**MMC Act**").

Until the year 2009, property tax computation was placed solely on the basis of rateable value. The Municipal Corporation of Greater Mumbai ("**Corporation**") gauged that fixation of rateable value was heavily based on the annual rent/fees and was very subjective, hence the Corporation found it necessary to explore other methods of assessment. After much of deliberation and in lines with the report of the Tata Institute of Social Sciences, capital value based system of assessment was recommended as an alternative to the earlier rateable value method. In 2009; an amendment was made to the MMC Act wherein sections 154(1A), (1B) and (1C) were introduced and it was stipulated that the Municipal Commissioner was authorised to fix the capital value of land and building with the approval of the Standing Committee.

The concepts of rateable value and capital value are briefly explained herein.

Rateable Value Vs Capital Value?

The basis of determination of rateable value as provided in the MMC Act was the annual rent for which such property might reasonably be expected to let from year to year, in case the property is let out. Whereas, in order to fix the capital value of the property assessable to a property tax, the Commissioner shall have regard to the value of property as indicated in the Stamp Duty Ready Reckoner for the time being or the market value of such property as the base value.

Why the shift from rateable value to capital value?

Since the rateable value was purely basis the rent/licensee, it had become a common practice to manipulate the rent by splitting the rent into various components viz. furniture & fixture, business etc. which led to huge revenue loss to the Corporation. This entire trick of dodging the property tax was let go.

As per Section 154(1A) of the MMC Act which was brought pursuant to the amendment; while fixing the capital value as aforesaid, the Corporation shall also have regard to (a) the nature and type of the land and structure of the building, (b) area of land or carpet area of building, (c) user category, (d) age of the building, or (e) such other factors as may be specified by rules made under subsection (1B).

As an after effect, the property tax in areas/locations which have high market value, for instance South Mumbai, were increased. Thus, there was no scope of keeping the property tax deliberately low.

However, even though property value stipulated in the stamp duty ready reckoner was the basis of capital value; the Rules formulated by the Corporation were taking account of future potential. This amplified the property value even beyond the stamp duty ready reckoner.

A number of petitions were filed before the Hon'ble Bombay High Court challenging the constitutional validity of the amendments effected vide the Maharashtra Act No. XI of 2009(Writ Petition No. 2592 of 2014 Property Owners Association and Ors. Vs. State of Maharashtra and Ors.). Large organizations like Property Owners Association filed Writ Petitions to oppose the unilateral augmentation of property tax on the basis of likelihood of future exploitation particularly Rule 20 of the Capital Value Rules of 2010 which provided that in addition to the present potential of the property, future potential is also to be valued and assessed for property tax accordingly. The petitions also challenged the retrospective applicability of Capital Value Rules of 2010.

The Hon'ble Bombay High Court vide its Order dated 24th April 2019, upheld the constitutional validity of the amendments effected vide the Maharashtra Act No. XI of 2009. At the same time, the Rules 20, 21 and 22 of the Capital Value Rules of 2010 and the Capital Value Rules of 2015 were struck down as ultra vires. Also, the Capital Value Rules of 2010 were to apply prospectively from the date on which the same were made.

The Corporation being aggrieved, approached the Apex Court by **Special Leave Petition (C) 17009 of 2019**. The Hon'ble Supreme Court, *inter alia*, weighed in the question as to whether future potential of the land or the likelihood of exploitation in future can also be taken into consideration while fixing the capital value?

In its Order dated 7th November 2022, the Hon'ble Supreme Court thus *inter alia* held that the capital value of the land and building must be based on situation "*in presenti*" and not the future potential and upheld the ruling of the Hon'ble Bombay High Court.

Conclusion:

In light of the aforesaid, the Bombay High Court and the Apex Court have ruled in favour of levying property tax on the basis of Capital Value that is implemented in Mumbai. This process shall bring transparency and more objectivity in the process. It has led to averting the hand in gloves schemes of landlords and lessees to evade the property tax.

Similar to Mumbai, even Gujarat places reliance on capital value to levy property tax. In order to bring the uniformity and transparency it is hoped that in times to come, a unified code for levying assessment tax is brought in place all over the country.

Samreen Paloba, Principal Associate and Sana Khan, Senior Associate

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