Swift e-Bulletin

Swift e-Bulletin
Edition 20/21-22
Week – August 16th to August 20h

<u>Quote for the week:</u>

"Those who dare to fail miserably can achieve greatly"

-John F. Kennedy

Introduction

We welcome you to our weekly newsletter!

The 'Swift e-Bulletin' - weekly newsletter, covers all regulatory updates and critical judgements passed during the week. We hope that you liked our previous editions and found it to be of great value in its content. We want this newsletter to be valuable for you so, please share your feedback and suggestions to help us improve.

Further, various regulatory authorities have been proactive in bringing significant regulatory changes in recent challenging times. This week's newsletter covers various Circulars/notifications issued by certain regulatory authorities such as the Ministry of Corporate Affairs ("**MCA**"), the Securities and Exchange Board of India ("**SEBI**") and the International Financial Services Centres Authority ("**IFSCA**") and critical judgements and orders passed by the National Company Law Tribunal **("NCLT")**, SEBI and High Court

The Regulatory authorities provided various updates/relaxations, some of which being:

- **MCA amends Companies (Appointment and Qualification of Directors) Rules, 2014**

- **SEBI issues new guidelines on Penalty for Repeated Delivery Default**

- **IFSCA issues Guidelines on Factoring and Forfaiting of Receivables**

We have prepared a comprehensive summary for quick reference of the aforesaid updates and Judgements / orders issued during the week of August 16, 2021 to August 20, 2021.

Thank you,
Swift team

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REGULATORY UPDATES

MCA UPDATES

1. **MCA amends Companies (Appointment and Qualification of Directors) Rules, 2014 vide Gazette Notification dated August 19, 2021**

- These Rules may be called the Companies (Appointment and Qualification of Directors) Amendment Rules, 2021.

- Following are the changes outlined below:

  - In the Companies (Appointment and Qualification of Directors) Rules, 2014, in Rule 6 relating to Compliances required by a person eligible and willing to be appointed as an independent director, in sub-rule (4):
    - in the first proviso, for clause (B), the following clause shall be substituted, namely:

    "(B) in the pay scale of Director or equivalent or above in any Ministry or Department, of the Central Government or any State Government, and having experience in handling,

    (i) the matters relating to commerce, corporate affairs, finance, industry or public enterprises; or

    (ii) the affairs related to Government companies or statutory corporations set up under an Act of Parliament or any State Act and carrying on commercial activities.".;

    - *after the second proviso, the following proviso shall be inserted, namely: "Provided also that the following individuals, who are or have been, for at least ten years:*

    (A) an advocate of a court; or

    (B) in practice as a chartered accountant; or

    (C) in practice as a cost accountant; or

    (D) in practice as a company secretary,

    shall not be required to pass the online proficiency self-assessment test.".

To read the Notification, Please click here.

2. **MCA amends Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019 vide Gazette Notification dated August 19, 2021**

- These Rules may be called the Companies (Creation and Maintenance of databank of Independent Directors) Second Amendment Rules, 2021.

- In Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019, after Rule 5 relating to panel, the following Rule and the Schedule shall be inserted, namely:

  *"**6. Annual report on the capacity building of Independent Directors:** The institute shall within sixty days from the end of every financial year send an annual report to every individual whose name is included in the data bank and also to every company in which such individual is appointed as an Independent Director in format provided in the Schedule to these Rules.*

  The formal of the annual report on capacity building of Independent Director is given in the Schedule in the Notification.

  To read the Notification, Please click here.

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SEBI UPDATES

1. **SEBI issues new guidelines on Penalty for Repeated Delivery Default vide Circular dated August 17, 2021**

- SEBI had stipulated delivery default norms vide Circular dated March 23, 2021. There was a need to put in place a suitable deterrent mechanism to address instances of repeated delivery defaults. These measures are expected to further strengthen the delivery mechanism and ensure market integrity.

- After consultation with Clearing Corporations ("**CCs**"), SEBI has decided on the following:

  - *In the case of repeated default by a seller or a buyer, for each instance of repeated default, an additional penalty shall be imposed, which shall be 3 % of the value of the delivery default.*
  - *Repeated Default shall be defined as an event, wherein a default on delivery obligations takes place 3 times or more during a six months' period on a rolling basis.*
  - *The penalty levied shall be transferred to Settlement Guarantee Fund ("**SGF**") of the Clearing Corporation.*

To read the Circular in detail, please click here.

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IFSCA UPDATES

1. **IFSCA issues Guidelines on Factoring and Forfaiting of Receivables vide Circular dated August 17, 2021.**

- IFSCA had notified International Financial Services Centres Authority (Finance Company) Regulations, 2021 (hereinafter referred to as 'Finance Company Regulations') on March 25, 2021.

- The International Financial Services Centres Authority (hereinafter referred to as "Authority"), in order to regulate the Factoring and Forfaiting activity as mentioned in Regulation 5(1)(i)(b) of the Regulations by the Finance Company/ Finance Unit in the International Financial Services Centre (hereinafter referred to as "IFSC") in India, directs the entities concerned to follow the Guidelines as outlined vide this circular.

- These Guidelines shall be applicable to Finance Companies / Finance Units registered with the Authority under regulation 3 relating to Registration requirements of the Regulations that are intending to undertake the activity of Factoring and Forfaiting of receivables.

    - *Part I of these Guidelines shall be applicable to IFSC Banking Units ('IBUs') licensed by the Authority under IFSC (Banking) Regulations, 2020, to undertake permissible activities subject to such prudential regulations as may be applicable to them.*
    - *Part I of these Guidelines shall also be applicable to all participants registered on 'ITFS Platform' for undertaking permissible Factoring and Forfaiting transactions under the Framework for setting up of International Trade Financing Services Platform ('ITFS') for providing trade finance services at International Financial Services Centres ('IFSCs') dated July 9, 2021.*

- PART I contains Guidelines on Factoring and Forfaiting transactions covering following areas some of which are:

    - *Assignment of receivables;*
    - *Notice to debtor and discharge of obligation of such debtor;*
    - *Discharge of liability of debtor on payment to assignee;*
    - *Payment made by debtor to assignor to be held in trust for benefit of assignee in certain cases;*
    - *Assignor prohibition;*

- *Rights and obligations of parties to contract for assignment of receivables;*
- *Liability of debtor;*
- *Assignor to be trustee of assignee;*
- *contract;*
- *Breach of Contract;*
- *Provisions of these Guidelines not to apply in certain cases;*
- *General Guidelines on risk management for undertaking factoring transactions; and*
- *Powers of Authority to give directions and to collect information from factor/forfeiter.*

- PART II contains Prudential Guidelines covering following areas:

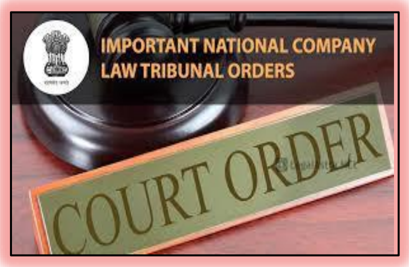
  - *Recognition of Non-Performing Assets ("**NPA**").*

To read the Circular in detail, please click here.

JUDGEMENTS/ ORDERS

NCLT

1. **National Company Law Tribunal allows the Restoration of M/s. Collective Growth Realty Private Limited**



National Company Law Tribunal, NCT of Delhi and Haryana **("Tribunal")** accepts the appeal filed by the Income tax officer, New Delhi under section 252 of the Companies Act, 2013 **("the Act")** and allows the restoration of the M/s. Collective Growth Realty Private Limited **("Respondent Company")**.

The Respondent Company had been struck off from the Register of Companies by Registrar of Companies **("RoC")**, NCT of Delhi and Haryana vide its notification dated August 08, 2018, striking off the name of Respondent Company from the Register of Companies by the ROC, NCT of Delhi and Haryana.

The Respondent Company had made substantial cash deposits of INR 18,00,000 /- and in spite-of that the Respondent Company had not filed its income tax return for the assessment year 2017-2018. Absence of the said income tax return had resulted in tax demand of Rs.44,62,269/- in terms of the Income-tax Act, 1961 for assessment year 2012-13.

The Income tax officer submitted that the income received by the respondent-company is required to be verified and assessed in the hands of the Appellant under the Income-tax Act, 1961 and to undertake assessment proceedings, name of the respondent-company has to be restored in the Register RoC. The copy of assessment order, Demand notice and penalty notices issued by Appellant was placed before the Tribunal. The officer further argued that the respondent-company is trying to escape the assessment proceedings and the liability that may arise out of the said proceedings. The name of respondent company had been struck off by the ROC without any enquiry and the same was not intimated to the Appellant, Assessing officer or the concerned Commissioner of Income Tax.

Based on facts presented, the Tribunal was satisfied that the respondent company and its directors are trying to escape the assessment proceedings and liability arising out of the said proceedings. Hence, Tribunal passed the restoration order and directed the RoC to proceed to take such other and further penal action against the respondent in accordance with the statutory provisions.
To read the order in detail, please click here.

SEBI

1. SEBI withdrawn the proceeding under PFUTP Regulations as the Noticee was struck off by the Registrar of Companies.

Securities and Exchange Board of India ("**SEBI**") carried out an investigation in the matter of the Company examining the trading activity in the scrip. On the basis of investigation conducted by SEBI, was inter-alia alleged that ASBN Commodities & Fineserve Private Limited. (**"Noticee"**) and 20 other entities violated the provisions of regulations SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations,2003 (**"PFUTP Regulations"**). Accordingly, adjudication proceedings were initiated against the Noticee and 20 other entities under the provisions of PFUTP Regulations.

The Adjudicating officer **("AO")** sent Show Cause Notice **("SCN")** to the Noticee stating that why an inquiry should not be held against under the PFUTP Regulations for the alleged violations. However, the Noticee never responded to the SCN delivered. During the course of proceeding it was ascertained that name of Noticee was struck off from the list of companies by the Office Registrar Companies, Mumbai, Maharashtra (RoC).

Further it is an established fact that when a company's name is struck-off from the RoC list and the company is also dissolved, it is a non-existing and the adjudication proceedings against the non-existing company is thus nullity and as per Black's Law Dictionary explains 'dissolution' as termination or winding up. It further clarifies that the dissolution of a corporation is the termination of its legal existence. Strike off essentially means removing the name of the company from the Register maintained by the Registrar of Companies. It is like closure of the company and the company will not be in existence after being struck-off and cannot perform any operations.

Therefore, the AO in view of the facts and circumstances of the case and also the fact that the Noticee's name has been struck-off from the RoC list and also 'dissolved', concluded that present adjudication proceedings initiated against the Noticee be proceeded with.

To read the order in detail, please click here.

HIGH COURT

1. **Dispute between SAIL and L&T arose which led to invocation of Arbitration clause as contained in the Agreement**

Steel Authority of India Limited	**Appellant**
Larsen & Toubro Limited	**Respondent**

<u>Date of Judgement</u>: August 17, 2021

Steel Authority of India Limited ("SAIL"), a company incorporated under the Companies Act, 1956 filed the present Petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the arbitral award in the context of disputes between the parties in relation to a Contract Agreement.

SAIL had withheld certain payment that was due to Larsen and Toubro Limited ("L&T") on various grounds w.r.t the processing of the invoices and release of payments and processing of payments for price adjustment. Due to arose of disputes, L & T invoked the Arbitration Clause as contained in the Agreement. The Arbitral Tribunal rendered the challenged award in favour of L&T and rejected the counter claims preferred by SAIL, and aggrieved by the challenged award, SAIL filed the present petition.

The court held that the petition is unmerited it found no grounds to interfere with the challenged award, as in the view of the court the contention that the Agreement between the parties prohibited grant of any price variation and the challenged award liable to be set aside as being contrary to the express terms of the Contract, is also without any merit.

To read the Judgement in detail, please click here.

2. **Sprint Cars Private Limited denied the existence of invoices as also any liability to pay, Valo Automotive Private Limited was allowed to file amended plaint along with the documents and statement of truth.**

Valo Automotive Private Limited	**Petitioner**
Sprint Cars Private Limited & ORS.	**Respondents**

Date of Judgement: August 18, 2021

Valo Automotive Private Limited filed the present petition under Article 227of the Constitution of India on being aggrieved by the order of Learned District Judge, whereby the applications filed under Order VI Rule 17 and under Order Rule VII Rule 14 of the Code of Civil Procedure, 1908 (**"CPC"**) for amendment of the plaint for bringing on record the documents, invoices, to substantiate the amendment sought, which was for enhancing the suit claim and for placing on record the additional documents respectively, were dismissed.

Earlier Valo Automotive Private Limited had filed a suit for recovery against Sprint Cars Private Limited, by claiming that certain documents and statement of accounts were already placed by it in on the record.

Though it does not appear to be any denial that the parties were transacting with one another, but the Sprints Car Private Limited, being the respondent/defendant had denied the existence of invoices as also any liability to pay. This being the case, application under Order VI Rule 17 of CPC was filed specifically for recording that it was after laboriously and meticulously going through the record, to answer the claim of the respondents/defendants that they have never raised any bills or invoices, that the documents could be traced, a sound explanation has come forth. In view to determine the real question in controversy between the parties, Order VI Rule 17 of CPC permits the court to consider and allow amendments to the pleadings, as may be necessary.

The present petition was allowed, though the challenged orders were liable to be and are set aside, as being erroneous, and the Petitioner/Plaintiff was granted one opportunity to file the amended plaint along with the documents and statement of truth.

To read the Judgement in detail, please click here.

+91 22 6669 5000

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About Swift

Swift India Corporate Services LLP (“Swift”) (Formerly known as SwiftIndiaInc Corporate Services Private Limited) established in the year 2005, is an associate entity of Nishith Desai Associates — Legal & Tax Counseling Worldwide (legal and tax consulting firm).

We are a team of professionals with rich corporate, legal and secretarial backgrounds. We are a premier corporate compliance firm that caters to the needs and demands of our global clients. Swift aims to provide quick and pragmatic corporate solutions alongside high-quality compliances.

Swift India Corporate Services LLP

Regd. Office: 91-92 B, Mittal Court, Nariman Point, Mumbai 400 021, India
LLPIN: AAH-4705, registered under the Limited Liability Partnership Act, 2008
Tel +91 22 6669 5000, Fax +91 22 6669 5001

www.swiftindiallp.com