Swift e-Bulletin

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Edition 07/21-22
Week – May 17^{th} to May 21^{st}

Quote for the week:

"Any fool can criticize, complain, and condemn—and most fools do. But it takes character and self-control to be understanding and forgiving."

-Dale Carnegie

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**"), Securities and Exchange Bboard 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:

- **Clarification on offsetting the excess Corporate Social Responsibility ("CSR") amount spent for FY 2019-20 by MCA**

- **Enhancements in the overall limit for overseas investment by Alternative Investment Funds (AIFs)/Venture Capital Funds (VCFs)**

- **Banking Units ("BU") to become Trading/Clearing members of IFSCA recognized Stock Exchanges, clarification by IFSCA**

We have prepared a comprehensive summary for quick reference of the aforesaid updates and Judgements / orders issued during the week of May 17, 2021 to May 21, 2021.

Thank you,
Swift team

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REGULATORY UPDATES

MCA UPDATES

1. MCA provides clarification on offsetting the excess Corporate Social Responsibility ("CSR") amount spent for FY 2019-20 vide Circular dated May 20, 2021

- In light of the spread of COVID-19 in India, an appeal dated March 30, 2020 was made to Managing Directors/Chief Executive Officers ("**MDs/CEOs**") of top 1000 companies in terms of market capitalization, to contribute generously to "Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund" ("**PM CARES Fund**"). In the appeal, it was mentioned that such contribution may, inter-alia, include the unspent CSR amount, if any, and an amount over and above the minimum prescribed CSR amount for FY 2019-20, which can later be offset against the CSR obligation arising in subsequent financial years. The said appeal was uploaded on the website of the Ministry and sent to e-mails of the aforementioned corporates on March 31, 2020.

- In fulfillment to the said appeal, certain companies claimed to have contributed CSR funds to the 'PM CARES Fund' over and above their prescribed CSR amount for FY 2019-20. Several representations have been received in the Ministry for setting off the excess CSR amount spent by the companies in FY 2019-20 by way of contribution to PM CARES Fund against the mandatory CSR obligation for FY 2020-21.

- MCA after due consideration, has hereby clarified that, where a company has contributed any amount to 'PM CARES Fund' on March 31, 2020, which is over and above the minimum amount as prescribed under Section 135(5) of the Companies Act, 2013 relating to spending of funds on CSR activities for FY 2019-20, and such excess amount or part thereof is offset against the requirement to spend under Section 135(5) for FY 2020-21 in terms of the aforementioned appeal, then the same shall not be viewed as a violation subject to the conditions that:

  - *The amount offset as such shall have factored the unspent CSR amount for previous financial years, if any;*
  - *The Chief Financial Officer shall certify that the contribution to "PMCARES Fund" was indeed made on March 31, 2020 in pursuance of the appeal and the same shall also be so certified by the statutory auditor of the company; and*

- *The details of such contribution shall be disclosed separately in the Annual Report on CSR as well as in the Board's Report for FY 2020-21 in terms of Section 134 (3) (o) of the Act relating to the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year to be mentioned in the Board's Report*.

To read the Circular in detail, please click here.

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SEBI UPDATES

1. **SEBI enhances the overall limit for overseas investment by Alternative Investment Funds (AIFs)/Venture Capital Funds (VCFs) vide Circular dated May 21, 2021.**

- As outlined by earlier SEBI Circulars dated August 09, 2007, October 01, 2015, and July 3, 2018, SEBI registered Alternative Investment Funds ("**AIFs**") and Venture Capital Funds ("**VCFs**") are permitted to invest overseas, subject to an overall limit of USD 750 million.

- Post consultation with the Reserve Bank of India, the said limit has now been enhanced to USD 1,500 million. Further, all other regulations governing such overseas investment by eligible AIFs/VCFs shall remain unchanged.

  To read the Circular in detail, please click here.

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IFSCA UPDATES

1. **IFSCA issues clarification on the criteria for Banking Units ("BUs") to become Trading/Clearing members of IFSCA recognized Stock Exchanges vide Circular dated May 17, 2021**

- IFSC (Banking) Regulation, 2020 – Directions for implementation, dated December 04, 2020 had adopted some parts of Reserve Bank of India (Financial Services Provided by Banks) Directions, 2016 in respect of services provided by such BU operating in the such International Financial Service Centre ("**IFSC**") jurisdiction.

- Para 21(a) (Parameters to be met by BUs to become trading/clearing members of IFSC Stock Exchange) shall be henceforth adopted in the following manner:

  - *No Banking Units ("**BU**") shall become a trading member in interest rate and currency derivatives segment and/or clearing member in any derivatives segment of IFSCA recognized stock exchanges unless its parent bank satisfies the minimum prescribed capital requirement (including Capital Conservation Buffer) specified by the home regulator of the parent bank;*
  - *BU not meeting the aforesaid condition may participate in the currency derivatives segment only as a client;*
  - *BU that is a trading/clearing member shall keep its and its clients' position distinct from one another.*

- BUs have also been allowed to function as a trading member for trading in interest rate or currency derivatives and/or as a clearing member (including professional clearing member) for clearing and settlements in any derivative segment subject to satisfaction of minimum prescribed capital requirement condition referred above.

To read the Circular in detail, please click here.

JUDGEMENTS/ ORDERS

NCLT

1. **National Company Law Tribunal allows the Restoration of M/s Terawise Consultants Private Limited**

National Company Law Tribunal, New Delhi Bench **("Tribunal")** accepts the appeal filed by the directors and shareholders of Terawise Consultants Private Limited **("Appellant Company")** under section 252 of the Companies Act, 2013 **("the Act")** and allows the restoration of the Appellant Company.

The Appellant submitted that the Registrar of Companies **("RoC")** New Delhi and Haryana, struck off the Appellant Company from the Register of Companies due to non-filing of financial statements and annual returns for the financial years 2010 onwards, in accordance with section 248 of the Act and had not filed application under section 455 of the Act for obtaining status of Dormant Company.

The learned counsel of Appellant Company submitted that the non-filing of statutory returns was due to inadvertence and the Appellant Company has always been in operation since its date of incorporation. Further, the Appellant Company did not receive any show cause notice from the Respondent nor any opportunity of being heard was given to explain the reason of non-filing of statutory returns. In support of the said plea, the learned counsel of Appellant Company had placed before the Tribunal the copies of audited financial statements from financial year 2014-2015 onwards, acknowledgement copies of Income Tax returns for the assessment years 2011-2012 onwards, GST registration certificate and other various corporate documents as an evidence that the Appellant Company was acting as a going concern during the relevant period. He further affirmed that the Appellant Company shall complete all pending filings along with the requisite fees.

Based on facts presented, the Tribunal was satisfied that during the relevant period the Appellant Company was in fact in operation and passed the restoration order subject to their filing of all statutory returns for the defaulting years as required by law and completion of all formalities within two months from the date on which its name is restored in the

Register of Companies and on payment INR 25,000/- to be paid to Prime Minister's Relief Fund.

To read the order in detail, please click here.

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SEBI

1. **SEBI imposed penalty on Company and Senior Vice President for trading in company's securities during the trading period closed and for making delayed disclosures to the Stock Exchange**

Securities and Exchange Board of India **("SEBI")** received a letter from Biocon Limited **("Company")**, regarding violation under the Company's code of conduct for prevention of insider trading **("code of conduct")** by a Designated Person during the trading window closure period. The Company inter-alia submitted that Narendra Chirmule ("**Noticee 1**"), employed as Senior Vice President with the Company and a Designated Person under the Company's code of conduct, had sold 12,000 equity shares of the Company during the trading window closure period.

The investigation revealed that the Noticee 1 being a Designated Person of the Company had admittedly traded in the Company's securities when the trading window was closed. Thus, Noticee 1 had violated the provisions of Clause 4 of the Code of Conduct prescribed under Schedule B of Regulation 9(1) and (2) of SEBI (PIT)Regulations. Further, Noticee 1 intimated the Stock Exchange after 262 days of the transaction.

SEBI imposed a total penalty of INR 14,00,000 (INR Fourteen Lakh) lakh on the Company' and Noticee for trading in the company's securities when the trading window was closed and for making delayed disclosures of sale transaction of the Noticee1 to the stock exchanges.

To read the order in details please click here.

2. **SEBI imposed penalty on Gromo Trade & Consultancy Limited for not utilizing the preferential issue proceeds as stated special resolutions passed at the EGMs**

SEBI imposed penalty of INR 5,00,000 under Section 23E of SCRA on the Gromo Trade & Consultancy Limited for not utilizing the preferential issue proceeds as stated in the notice to the general meetings wherein preferential allotments of shares was approved, instead used it for share trading, extending loans & advances and creation of fixed deposits.

SEBI noted that there has been a material deviation between the purpose stated in the special resolutions passed at the EGMs for considering the preferential issues and the actual utilization of funds. The variation was required to be furnished to the stock exchange on a quarterly basis. However, Company did not submit any information to stock exchange as required under clause 43 of Listing agreement.

Further, SEBI also imposed penalty on noticees under Section 15HA of SEBI Act, 1992, for indulging in price manipulation in the scrip and creation of false and misleading appearance of trading in the scrip of the company.

To read the order in detail please click here.

3. **SEBI imposed a penalty for failure to make the requisite disclosures to the Company and to the Stock Exchange and failed to comply the provisions of model code of conduct**

Securities and Exchange Board of India **("SEBI")** conducted an investigation in the scrip of IFL Promoters Limited **("IFL")** to ascertain any violation of the provisions of SEBI Act and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 **["SEBI (PFUTP") Regulations]** with regard to trading by certain group of entities.

SEBI observed the following lapses:

1) The promoters of the Company have failed to make the requisite disclosures to the Company and to the Stock Exchange as provided in SEBI (Substantial Acquisition of Shares & Takeovers), Regulation), 1997 [SEBI (SAST) Regulations];

2) The Noticee (Bharat Gupta), pursuant to change in his shareholding by more than 2% failed to make the requisite disclosures to the company and to the stock exchange as provided SEBI (Prohibition of Insider Trading) Regulations, 1992 (SEBI (PIT) Regulations);

3) The Noticee 1 (Anjana Gupta) Director of the Company, pursuant to change in his shareholding by more than 25,000 shares had failed to make the requisite disclosures as per SEBI (PIT) Regulations;

4) Anjana Gupta while making while transacting in the shares of IFL had entered into opposition transactions within a period of six months, thereby failed to comply the provisions of model code of conduct;

5) Anjana Gupta, who was also a compliance officer of IFL did not take preclearance of trades before dealing in the securities of IFL, thereby failed to comply the provisions of model code of conduct;

6) The Company, directors and compliance officer of the Company had failed to ensure that code of conduct adopted by the company IFL Promoters Limited for prevention of insider trading is in consonance with the Model Code of Conduct

Based on facts and circumstances of the case SEBI imposed a penalty of INR 14,00,000/- on noticees for failure to make the requisite disclosures to the Company and to the Stock Exchange and failed to comply the provisions of model code of conduct

To read the order in detail please click here.

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HIGH COURT

1. **Delhi High Court dismisses the appeals by excluding certain evidences, subject to limited caveat.**

Raghuvir Buildcon Private Limited	**Petitioner**
Ircon International Limited	**Respondent**

<u>Date of Judgement</u>: May 18, 2021

Ircon International Limited had invited tenders for certain civil works had accepted the offer vide Letter of Acceptance. However, as required by the conditions stipulated in the notice inviting tender and the Letter of Acceptance, Performance Guarantees were furnished by M/s Raghuvir Buildcon Private Limited and a formal contract between the parties were executed. However, the work allotted to M/s Raghuvir Buildcon Private Limited, under the aforesaid contract, due to default the contract was terminated and a notice was issued to complete the outstanding work. The appellant in this case is the claimant in the said arbitral proceedings and the respondent is also the respondent therein.

The invocation and encashment, by the respondent – M/s Ircon International Limited, of the Bank Guarantees furnished by the appellant - Raghuvir Buildcon Private Limited was, therefore, assailed on the grounds that the contractual provisions permitted such encashment/invocation only consequent on termination/rescission of the contract, and not prior thereto. Thereafter, the Statements of Claim filed by the appellant also went on to assail the termination, by the respondent, of the contract, on various grounds. Hence, the respondent filed applications and at a later point filed a supplementary application before the Arbitrator, challenging the termination of the contract.

The Court held that, the challenge to the finding of the learned Arbitrator, regarding non-arbitrability of “excepted” matters is concerned, while no patent error may be found even in that regard, as the prayers were restricted to an observation, that the findings may be treated as prima facie in nature. Further, held that the appellant would be at liberty to argue against such prima facie finding at the final stage of the hearing and concluded that subject to the limited caveat, the appeals are consequently dismissed excluding certain evidences. To read the Judgement in detail, please click here.

2. Kuber Enterprises filed a petition under Section 9(1) of the Arbitration and Conciliation Act, 1996 stands rejected on no valid grounds for interdicting the invocation of the Bank Guarantee.

Kuber Enterprises	**Petitioner**
Doosan Power Systems India Private Limited	**Respondent**

<u>Date of Judgement</u>: May 19, 2021

Kuber Enterprises, being the petitioner had filed a petition under Section 9(1) of the Arbitration and Conciliation Act, 1996, praying the Court to restrain the invocation of the Bank Guarantee and that the respondent be directed not to en-cash the cheque furnished by them. The parties had entered into an Agreement whereby the respondent sub-contracted CHS Civil Works of Jawaharpur Super Thermal Power Station to the petitioner. The petitioner furnished the Bank Guarantee as the Performance Guarantee and claimed that a cheque was issued for an equivalent value.

The petitioner had claimed that the scope of the work was considerably enhanced and had requested the respondents to correspondingly enhance the value of the Agreement and further claimed that there was delay in making the payments under the Agreement, for which the petitioner continued to pursue the respondent for making the payment for extra work executed by it.

The Delhi High Court examined the averments made and held that the there is no ground alleging any fraud of the part of the respondent and the contentions advanced on behalf of the petitioner are unmerited. It further held that the grounds on which the Bank Guarantee can be interdicted are extremely limited and only in exceptional circumstances. Mere contractual disputes cannot be asserted to give rise to special equities.

The Court held that any allegation that the respondent has been reluctant to join the proceedings for an amicable resolution of the disputes in terms of the Contract is not per se a ground for interdicting an unconditional bank guarantee and finds no valid grounds for interdicting the invocation of the Bank Guarantee, there by rejecting the prayer made by the petitioner in this respect.

To read the Judgement in detail, please click here.

3. **Qualcomm India Private Limited files petition under Article 226 of the Constitution of India, seeking sanction of interest on refund amount under Section 11BB of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994**

Qualcomm India Private Limited	**Petitioner**
Union of India and others	**Respondents**

<u>Date of Judgement</u>: May 21, 2021

M/s Qualcomm India Private Limited, a company incorporated under the Companies Act, 1956, having its registered office at Bandra Kurla Complex, Mumbai, who is engaged in the business of providing support services primarily to its foreign affiliates within the meaning of Chapter V of the Finance Act, 1994. M/s Qualcomm India Private Limited, being the Petitioner in the present case had filed the petition under Article 226 of the Constitution of India, seeking direction to forthwith grant and sanction interest on the refund amount to the respondents under Section 11BB of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

Since 'Qualcomm' is engaged in the business of providing support services primarily to its foreign affiliates, for which the entity receives various input services and avails credit for service tax paid thereon under rule 3 of the CENVAT Credit Rules, 2004. The petitioner being aggrieved by the orders partially rejecting the refund claims by the refund sanctioning authority had preferred an appeal before the appellate authority and subsequently the refund amounts as sanctioned were received, however the refund amounts were sanctioned beyond three months from the date of filing the of refund applications.

The said refund was granted after a period of three months of receipt of the application, due to which the applicant would be entitled to interest on such delayed refund as a matter of right. The interest would then cover the period from the date immediately after expiry of the period of three months from the date of receipt of the application till the date of payment of the refund.

The Bombay High Court in the present case basis its observations and considering the facts and circumstances of the case, and with reference being made of the in the judgement made by the Supreme Court where it was analyzed that Section 11B of the Central Excise Act and the interpretation given thereto in Ranbaxy Laboratories Limited, the present petition was accordingly allowed.

To read the Judgement in detail, please click here.

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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).

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