Swift India
CORPORATE SERVICES LLP

Swift e-Bulletin
Edition 16/ 22-23
Week – July 18 to July 22

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

"Dreams do not come true just because you dream them. It's hard work that makes things happen. It's hard work that creates change."

- Shonda Rhimes

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 Securities and Exchange Board of India ("SEBI") and critical judgements/orders passed by various authorities like MCA, Supreme Court, High court & SEBI.

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

- SEBI vide Circular dated July 18, 2022 imposed GST on the fees payable to SEBI.

- SEBI vide Circular dated July 20, 2022 enumerates regarding the Sub-KYC Agency User ("Sub-KAU") norms.

We have prepared a comprehensive summary for quick reference of the aforesaid updates and Judgements / orders issued during the week of July 18, 2022 to July 22, 2022.

Thank you,
Swift team

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REGULATORY UPDATES

SEBI

1. **SEBI vide Circular dated July 18, 2022 imposed GST on the fees payable to SEBI.**

- SEBI vide Circular dated July 18, 2022 intimated the withdrawal of the exemption by the GST Act post GST Council's deliberations in their meeting held in the month of June 28-29 of this year.

- Pursuant to the said withdrawal of the exemptions on services rendered by the SEBI; the entities that are listed or intend on listing and all the other market participants otherwise dealing in the securities market will be liable to pay GST @ 18%.

- The aforesaid Circular shall come into force with immediate effect.

To read the Circular in detail, please click here.

2. **SEBI vide Circular dated July 20, 2022 enumerates regarding the Sub- KYC Agency User ("Sub-KAU") norms.**

- SEBI vide past Circulars has detailed about the e-KYC Authentication Facility under the Prevention of Money Laundering Act, 2002. SEBI has also in its past circulars provided the list of the entities allowed to be registered as the "**Sub-KAUs**".

- SEBI in this regard permitted the SEBI registered intermediaries to carry out the KYC of their clients and regarded them as "**Sub-KAUs**"

- The said entities need to enter into an agreement with KYC agency to get themselves registered and the procedure of the same has been detailed by SEBI in its Circular dated November 05, 2019.

To read the Circular in detail, please click here.

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JUDGEMENTS AND ORDERS

SEBI

1. **In the matter of Allied Computers International (Asia) Ltd. the SEBI imposed INR.15,00,000/- on the Notice for violation of provisions of PIT and SAST regulations**

- Securities and Exchange Board of India ("**SEBI**") initiated adjudication proceedings against Mr. Hirji Kanji Patel, promoter-cum-director of the Company, ("**Noticee**") for alleged violation of SEBI (Substantial Acquisition of Shares and Takeover) Regulations ("**Takeover Regulations 1997 and 2011"**), SEBI (Prevention of Insider Trading) Regulations, 1992 ("**PIT Regulations, 1992"**) read with SEBI (Prevention of Insider Trading) Regulations, 2015 ("**PIT Regulations, 2015"**) in the aforesaid matter.

- SEBI conducted investigation to ascertain the violation done during the period November 23, 2007 to September 22, 2012 (hereinafter referred to as '**Investigation Period/IP'**). It observed that there was change in the shareholding of Noticee during the IP, through acquisition/disposal of shares through various modes i.e on-market, off-market and physical transfers.

- Further, BSE informed that they have not received any disclosures from Noticee for change in shareholding during the aforesaid period and alleged that Noticee has violated Regulation 13 (4) read with 13(5) of PIT Regulations,1992 and Regulation 7(2) a of PIT Regulations, 2015 and 7(1A) of SAST Regulations, 1997 read with regulation 29 of the SAST Regulations, 2011.

- SCN was issued to Noticee but AO received no response for allegations made and sufficient opportunities was also given to represent his case by way of reply to the SCN and also by way of personal hearing but Noticee failed to appear. Therefore, AO presumed that notice has accepted the allegations made and on consideration of facts and circumstances AO imposed monetary penalty of **INR. 15,00,000/-** (Indian Rupees Fifteen Lakh) on Noticee for aforesaid violation of above-mentioned provisions of PIT and SAST Regulations.

To read the Order in detail, please click here.

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SUPREME COURT (IBC)

1. **In the matter Vidarbha Industries Power Limited Vs. Axis Bank Limited [Civil appeal No. 4633 of 2021] Supreme court held that section 7(5)(a) of Insolvency and Bankruptcy Code, 2016 ("The Code"), confers discretionary power on the Adjudicating Authority ("AA") to admit an application of a Financial Creditor ("FC") for initiation of Corporate Insolvency Resolution Process ("CIRP").**

- In an Appeal made to supreme court **in the matter of Vidarbha Industries Power Limited Vs. Axis Bank Limited,** the honorable court held that Section 7(5)(a) of the IBC, therefore confers discretionary power on the AA to admit an application of a FC under section 7 of the Code for initiation of CIRP.

- In the said matter AA is required to ascertain the existence of a default from the records of the information utility or any other evidence furnished by the FC under Section 7(3) of the Code, within 14 days of the date of receipt of the application.

- Both, the AA and the NCLAT proceeded on the premises that an application must necessarily be entertained under Section 7(5)(a) of the Code if a debt existed and the Corporate Debtor **("CD")** was in default of payment of debt. **AA found section 7(5)(a) of the Code to be mandatory**.

- There can be no doubt that a CD who is in the red should be resolved expeditiously, following the timelines in the Code. No extraneous matter should come in the way. However, the viability and overall financial health of the CD are not extraneous matters.

- The NCLAT erred in holding that the AA was only required to see whether there had been a debt and the CD had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP. The existence of a financial debt and default in payment thereof only gave the financial creditor the right to apply for initiation of CIRP.

- The Honorable Supreme Court distinguished between Section 9(5)(a) and Section 7(5)(a) of the code and observed that:

    - Legislature has in its wisdom used the word **'may'** in Section 7(5)(a) of the Code in respect of an application for CIRP initiated by a FC against a CD but has used the expression **'shall'** in the otherwise almost identical provision of section 9(5) of the Code relating to the initiation of CIRP by an OC.

    - Legislature intended section 9(5)(a) to be mandatory and Section 7(5)(a) of the Code to be discretionary. An application of an OC for initiation of CIRP under

Section 9(2) of the Code is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the Code.

- The Legislature has consciously differentiated between FCs and OCs, as there is an innate difference between FCs, in the business of investment and financing, and OCs in the business of supply of goods and services. The impact of the non-payment of admitted dues could be far more serious on an OC than on a FC.

- Legislature has, in its wisdom, chosen to use the expression **"may"** in Section 7(5)(a) of the Code. When AA is satisfied that a default has occurred and the application of a FC is complete and there are no disciplinary proceedings against proposed IRP, it **may by order admit the application**.

- However, it is well settled that the prima facie presumption about the provision being imperative may be rebutted by other considerations such as the scope of the enactment and the consequences flowing from the construction.

- Had it been the legislative intent that Section 7(5)(a) of the Code should be a mandatory provision, Legislature would have used the word **'shall'** and not the word **'may'**. There is no ambiguity in section 7(5)(a).

- The honorable supreme in the said matter made a clear distinction between 7(5) & Section 9(5) of the Code and has also observed and considered many aspects like the objective of the code, difference between OC and FC and allowed the appeal to be proceeded.

To read the Order in detail, please click here.

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HIGH COURT

1. **Dispute between parties were settled by the Delhi High Court Mediation and Conciliation Centre wherein the parties remain bound in terms of the Settlement Agreement**

NITIN REKHAN	**Petitioner**
UNION OF INDIA & ORS.	**Respondents**

Date of Judgement: July 15, 2022

- The instant Criminal Writ Petition has been filed under Article 226 of the Constitution of India read with Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code") inter alia praying for passing appropriate orders and directions to the Respondent No. 2 to perform their duty in accordance with law and to prosecute Respondents No. 3 to 7 under Sections 73 and 76A of the Companies Act, 2013 and to take appropriate action on the complaint filed by the petitioner.

- Facts of the case and submissions: -

  - The fact of the case was that Petitioner had paid Rs. 40,00,000/-to the Directors of Respondent No. 3 Company for issuance of shares in the said company on 27th December 2010 by depositing the share application money in Bank Account.
  - The Respondent No.3 Company failed to allot the shares as promised to the Petitioner and returned the money on 9th February 2018 through RTGS. It was alleged that the company failed to repay the interest accrued as per Companies (Acceptance of Deposits) Rules, 2014 and Rule 17 of the Companies (Acceptance of Deposits) Rules, 2014.
  - The learned counsel for Petitioner made various submission by giving references to definition of "Deposit" and to the relevant provisions of Companies Act 2013. He also contended that Respondent 02 has failed to register the case against the Respondent 03 and this has led to delay in enquiry and investigation.
  - The learned counsel for Respondent submitted that according to the General Circular no. 05/2015 issued by the MCA dated 30th March 2015 and the clarification by RBI, the amount received by a private company prior to 1st April 2014 shall be governed by the Companies Act, 1956 read with Companies (Acceptance of Deposits) Rules, 1975 and shall not be treated as deposit under the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014 subject to the condition that relevant private company shall disclose, in the notes to its financial statement for the financial year commencing on or after 1st April, 2014 the figure of such amounts and the accounting head in which such amounts have been shown in the financial statement.

- On consideration of various submission made by the learned counsel for Petitioner and Respondent and on the basis of opinion that the contractual relations or other obligations arising therefrom between the Petitioner and the Respondent 03 are outside the scope of the instant writ petition and the Delhi High Court, stated that there are no cogent reasons to entertain the petition and allow the prayers sought therein. Hence, considering the foregoing discussion and analysis the instant petition stands dismissed.

To read the Judgement, please click here.

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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.

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