Swift India
CORPORATE SERVICES LLP

Swift e-Bulletin
Edition 21th 22-23
Week – August 22nd to August 26th

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

"Fall seven times and stand up eight"

– Colleen Arneil.

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 Reserve bank of India (**"RBI"**), Securities and Exchange Board of India ("**SEBI**"), International Financial Services Centres Authority ("**IFSCA**") and orders passed by the SEBI, High Court, Supreme Court and other relevant authorities.

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

- **SEBI vide Circular dated August 25, 2022 issued the disclosure requirements for the Asset Management Companies ("AMCs").**

- **SEBI vide Notification dated August 22, 2022 issued notification amending the Portfolio Managers Regulations.**

We have prepared a comprehensive summary for quick reference of the aforesaid updates and Judgements / orders issued during the week of August 22 to August 26, 2022.

Thank you,
Swift team

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REGULATORY UPDATES

RBI

1. **RBI vide Notification dated August 22, 2022 details out the Overseas Investment Regulations and directions.**

- RBI vide Notifications dated August 22, 2022 details out the directions along with the regulations w.r.t. Foreign Exchange (overseas Investment).

- These directions brief on the following:

  - Definitions;
  - Financial commitments including debt, guarantee & pledge or charge but other than equity by Indian entities;
  - Acquisition/transfer by way of deferred payment;
  - Mode of payment;
  - Obligations of person resident in India;
  - Reporting obligations & late fee for delayed reporting; and
  - Restrictions on further capital.

- The amendment in the new Regulations brought about by vide the Notification has included the major definition of "strategic sector".

- Initially prior approval was required for the following which was done away with these regulations:

  - Mode of payment – deferred payment;
  - Divestment/investment done by Residents under the investigation;
  - Issuance of corporate guarantees to and for second and stepdown subsidiary; and
  - Writing off divestment accounts.

- The annexure as provided in this notification briefs out the detailed instructions pertaining to the Overseas Investment Regulations and directions.

To read the Overseas Investment Regulations in detail, please click here.

To read the Overseas Investment Directions in detail, please click here.

SEBI

1. **SEBI vide Circular dated August 25, 2022 issued the disclosure requirements for the Asset Management Companies ("AMCs").**

- SEBI vide Circular dated August 25, 2022 detailed out the disclosure requirements for the AMCs.

- SEBI vide Notification no **SEBI/LAD-NRO/GN/2022/92** dated August 03, 2022 amended the definition of associates –

    - Directly or indirectly exercises control over the AMC, trustee or sponsor.
    - Person on whom AMC, trustee or sponsor exercises control.
    - Person whose director, employee or officer is the same as in AMC.

- AMCs should do quarterly investment scheme-wise disclosure on the last day of the quarter w.r.t. securities that are excluded from associate definition.

- The disclosure should be posted on the website of the AMC as well as AMFI within 1 month from the quarter.

- Disclosure to include the ISIN wise value of investment and value as percentage of AUM of scheme.

To read the Circular in detail, please click here.

2. **SEBI vide Notification dated August 22, 2022 issued notification amending the Portfolio Managers Regulations.**

- SEBI vide Notification dated August 22, 2022 amends the Portfolio Manager Regulations which will now be termed as Securities and Exchange Board of India (Portfolio Managers) (Amendment) Regulations, 2022.

- Vide this Notification, the Regulation 2 (pa) clause has been added to include the Related Party definition.

- Regulation 22 has been duly amended whereby now, the Portfolio Managers are allowed to make investments in securities of related parties pursuant to obtaining the approval from the client.

- This requirement is done away with, if the said investment has been made in accordance with the Board.

- Addition to Regulation 3(24) has been made to include the duties of the Portfolio Managers.

To read the Circular in detail, please click here.

3. **SEBI vide Circular dated August 25, 2022 issued the advanced disclosures to be made by the Credit Rating Agencies ("CRAs") and withdrawal of rating.**

- SEBI vide Circular dated August 25, 2022 issued the advanced disclosures requirement for CRAs.

- It gave the methodology for computation of "**Sharp Reporting Action**", thus the SRA shall be disclosed if the difference in the 2 consecutive press releases is equivalent to 3 or more notches downwards.

- Such disclosure along with separate disclosure about the non-cooperative issuers is to be made on a **half yearly basis** on the website of the Stock Exchanges ad Depositories.

- The Circular also details out about the following:

  - Issuers not cooperating and information required;
  - Rating withdrawal that makes it mandatory to give new rating in case the said security is outstanding;
  - Rating withdrawal of perpetual debt securities;
  - Disclosure of Average Rating Transition Rates for Long-Term Credit Ratings; and
  - Enhanced disclosures by CRAs.

To read the Circular in detail, please click here.

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IFSCA

1. IFSCA vide Circular dated August 25, 2022 issued Directions for Issuance of Debit Cards by IFSC Banking Units ("IBUs").

- IFSCA Vide its powers conferred on it under Section 35A of the Banking Regulation Act, 1949 and Section 13(1) of International Financial Services Centres Authority Act, 2019, issued following directions for the issuance of Debit cards by IBUs.

- This Circular lays down the conditions/guidelines for issuance of Physical or virtual debit cards for:

  - Withdraw cash;
  - Make online payments; and
  - Undertake PoS terminal transactions, fund transfer, etc.

- Guidelines as laid down in circular are;

  - IBUs may issue Debit cards to their customers holding a Current or Savings account with them.
  - Withdrawal of cash in IFSC, using Debit cards issued by IBUs, is not permitted. Withdrawal of cash using Debit cards issued by IBUs, in jurisdictions outside IFSC, is permitted subject to the rules and regulations of the said jurisdiction.
  - All other transactions including making online payments, undertaking PoS transactions, funds transfer etc. using Debit cards issued by IBUs is permitted.
  - Debit cards issued by IBUs to a person resident in India shall not be used for accessing funds (through whatever means) from the bank accounts, if any, held by such person in the domestic territory.
  - IBUs shall ensure that transactions permitted to be undertaken through Debit cards issued to person's resident in India are compliant with the requirements of the Foreign Exchange Management Acr,1999.

To read the Circular in detail, please click here.

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JUDGEMENTS AND ORDERS

SEBI Order

1. In the matter of Esaar India Limited. SEBI imposed penalty of INR. 5,00,000/- on Noticee for violation of provisions of SEBI Act r/w SEBI ("PFUTP") Regulations 2003.

- Securities and Exchange Board of India ("**SEBI**") initiated adjudication proceedings against Esaar India Limited ("**Noticee**") for alleged violation of the Section 12A (a), (b), (c) of the Securities and Exchange Board of India Act, 1992(SEBI Act) r/w Regulations 3 (b), (c), (d) & 4(1) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 2003 (hereinafter referred as "**PFUTP Regulations**").

- In this regard, SEBI served Show Cause Notice ("**SCN**") to inquire into the aforementioned alleged violation of the provisions of law by the Noticee. It observed that there was preferential allotment of 31,77,000 equity share of ₹.10/- each issued at a premium of ₹.40/- per share to 44 non-promoter entities in the scrip Esaar (India) Ltd and same was listed on BSE. During the during the period from May 24, 2012 to October 20, 2014 there was sale of shares to connected entities and SEBI on analysis of the Bank statements it was observed that there are certain violations made by Noticee pertaining to fund flow.

- In addition to above, SEBI collated information from Ministry of Corporate Affairs database on Directors details and further additional details were sought on reasons for inward credit received in these transactions. The Noticee made various submissions, denied on above violation and requested that an opportunity of personal hearing be given before passing of any order in the present proceeding.

- On consideration of facts and circumstances of the case and material available on record, AO found that the act of Noticee to involve in false representation through preferential allotment has the potential to mislead and induce genuine investors to trade in the scrip and harm them and, thus, violate the fundamental tenets of market integrity which deserves monetary penalty for such serious violations.

- Accordingly, AO imposed penalty of **INR. 5,00,000**/- (Indian Rupees Five Lakh) on Noticee for violation of provision of Section 12A(a), (b), (c) of the SEBI Act, 1992 r/w Regulations 3 (b), (c), (d) & 4(1) of the SEBI (PFUTP) Regulations, 2003.

To read the Order in detail, please click here.

HIGH COURT

1. The petition filed by M/s. Greaves Cotton Limited praying under Article 227 of the Constitution of India was permitted.

M/s. Greaves Cotton Limited	**Petitioner**
Idea Estate Private Limited	**Respondent**

Date of Judgement: August 22, 2022

- M/s. Greaves Cotton Limited filed the present petition under Article 227 of the Constitution of India to pray, for the most respectfully prayer that the Hon'ble High Court had pleased to:

  - Set aside the order dated 02.05.2022 and allow the present petition to take on record in the present suit CS No.10291 /2016 the Judgment/Order dated 10.02.2009 of this Hon'ble Court in the case titled 'Idea Estate Pvt. Ltd. Vs. Trans Asian Industries Expositions Pvt. Ltd. and ANR.'
  - Such other and further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case may also be passed."

- The Delhi High Court did not express any opinion on the applicability or relevance of the aforesaid order to the dispute before the learned Additional District Judge. The petitioner is permitted to rely on the aforesaid order in the manner he chooses, and it would be for the learned Additional District Judge to decide whether the order is relevant and of help either to the petitioner or to the respondent.

- The Delhi High Court in its considered opinion, satisfies the prayer in this petition and the said petition is accordingly disposed of by permitting the petitioner to cite, before the learned Additional District Judge passed by the Delhi High Court as in the judgement passed in ***(Idea Estate Pvt. Ltd. v. Trans Asian Industries Expositions Pvt. Ltd.).***

To read the complete Judgement, please click here.

IBBI

1. **In the matter of Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs [Civil Appeal No. 7667 of 2021] Hon'ble Supreme Court held that customs authority only has a limited jurisdiction during Corporate Insolvency Resolution Process.**

- The Hon'ble Supreme Court vide its order dated August 26, 2022 held that the **Insolvency and Bankruptcy Code, 2016 ("IBC"), would prevail over the Customs Act**, and once moratorium is imposed in terms of sections 14 or 33(5) of the Code, the customs authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies.

- During the proceedings Hon'ble SC made some important findings and observations as under:

  - <u>Stages of Corporate Insolvency Resolution Process ("CIRP")</u>.

    - The CIRP must normally be completed within 180 days of admission of the application by the NCLT, during this period a moratorium is imposed to ensure no coercive proceedings are launched or continued against the Corporate Debtor in any other forum or under any other law, until approval of the resolution plan or initiation of the liquidation process.

  - <u>Jurisdictional conflict between IBC and Customs Act 1962 during CIRP.</u>

    - The Customs Act and the IBC act in their own jurisdictions and in case of any conflict, the IBC overrides the Customs Act.

    - Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the customs authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. **The customs authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act**.

    - After the assessment customs authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority.

- Considering the observation as mentioned above and other relevant facts in the case, Hon'ble Supreme court has made the following concluding remarks and **set aside the order passed by NCLAT:**

- The Custom authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium.

- The customs authority could only initiate assessment or re-assessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of sections 14 or 33(5) of the IBC.

- The interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal, and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive.

To read the Order in detail, please click here.

2. **In the matter of Yadubir Singh Sajwan & Ors. Vs. M/s. Som Resorts Private Limited [Company Petition No. (IB)-67(ND)/2022] Adjudicating Authority ("AA") lifted the corporate veil to protect the interest of the Home Buyers.**

- **Petitioner/s:** Yadubir Singh Sajwan & Ors. – Home Buyers
  Respondent: M/s. Som Resorts Private Limited.

- The AA vide its order dated August 02 2022, held that the **M/s. Som Resorts Private Limited** - Corporate Debtor ("**CD**") cannot be allowed to defraud the homebuyers in the disguise of separate legal entity by concealing the real nature of the transaction. The AA lifted the corporate veil of the corporate debtor to look into the real nature of transactions and initiated corporate insolvency resolution process ("**CIRP**") against the corporate debtor.

- **Background of the case:**

  - In December 2012 CD launched a project titled **Casa Italia** and appointed **M/s. Cosmic Structures Limited** as its marketing agency. The petitioners had booked space in said the project and had made payments to the CD. The CD failed in handing over the possession and in refunding the money to the homebuyers.

  - Delhi HC, vide its order dated 11.01.2017, appointed an Official Liquidator ("**OL**") for the Cosmic Structures Limited, consequent to which, the OL **sealed the project Casa Italia** considering that the property belongs to it.

  - Subsequently, Cosmic Structure Limited, the CD and the homebuyers executed a Memorandum of Settlement ("**MoS**") whereby the CD undertook to complete the construction of the project **within 18 months** from the de-sealing of the project site by the High Court of Delhi and promised to hand over possession to the homebuyers failing which the CD will **refund the amount along with interest**

@18% p.a. On CD's failure to honor the MoS, homebuyers filed CIRP under section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") against the CD.

- **Observation and Conclusion:**

  - The AA observed that the agreement between Cosmic Structures Limited and the CD is purely an agency agreement, wherein Cosmic Structures Limited was acting as an agent of the CD.

  - Quoting the maxim "***qui facit per alium, facit per se***" AA invoked the **Doctrine of Indoor Management** stating that the marketing agreement between the CD and Cosmic Structures Limited is a matter of internal affairs of the CD and the homebuyers being outsiders are not privy to the internal affairs of the CD and the doctrine of indoor management applies herein. Therefore, it is not open to the CD to take advantage of Cosmic Structures Limited to shield its position at the cost of the homebuyers.

  - AA invoked the **Doctrine of Corporate Veil** in CIRP as it would not be fair to the homebuyers/petitioners and for the protection of the public interest it is of paramount importance if the corporate entity makes an attempt to evade legal obligations, then, **lifting of veil is necessary** to prevent corporates to use the principle of distinct corporate entity and defraud the public at large.

  - AA concluded that Cosmic Structures Limited was not only working as an agent of the CD but was directly or indirectly managed by the CD and ultimate beneficiary was the CD, the application was admitted.

To read the Order in detail, 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).

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