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# ETERNITY:LAW APPRISE

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## SECURITIES EXCHANGE BOARD OF INDIA

### Modification in Operational Guidelines for FPIs and DDPs pursuant to amend- ment in SEBI (Foreign Portfolio Investors) Regulations, 2019

1. Section 9A of the Income Tax Act, 1961 (“IT Act”) states that if the offshore as well as the Indian fund managers satisfy the requirements set out in Section 9A of the IT Act, the fund management activity carried out through such fund managers shall not constitute the offshore fund’s ‘business connection’ in India and thereby avoid the tax implication.
2. With a view to allow Resident Indian fund managers to benefit from the provisions of Section 9A of the IT Act, Regulation 4(c) of the SEBI (Foreign Portfolio Investors) Regulations, 2019, which deals with the eligibility criteria to qualify as an FPI, was substituted by *SEBI ( Foreign Portfolio Investors) (Amendment) Regulations, 2021 dated August 03, 2021* to read as follows:

*“(c) non-resident Indians or overseas citizens of India or resident Indian individuals may be constituents of the applicant provided they meet the conditions specified by the Board from time to time:*

*Provided that resident Indian other than individuals, may also be constituents of the applicant, subject to the following conditions, namely –*

- i. such resident Indian, other than individuals, is an eligible fund manager of the applicant, as provided under sub-section (4) of section 9A of the Income Tax Act, 1961 (43 of 1961); and*
- ii. the applicant is an eligible investment fund as provided under sub-section (3) of section 9A of the Income Tax Act, 1961 (43 of 1961) which has been granted approval under the Income Tax Rules, 1962;”*



3. In exercise of powers conferred under Section 11(1) of the Securities and Exchange Board of India Act, 1992 the Securities and Exchange Board of India (“SEBI”) has issued *Circular bearing ref. no. SEBI/ HO/ FPI&C/ P/CIR/2021/609 dated August 04, 2021* (“Circular”) to make the above mentioned amendment to the SEBI (Foreign Portfolio Investors) Regulations, 2019 operational. The Circular has modified the Explanation provided under Para 2 (ii) (b) of Part A — the Operational Guidelines for Foreign Portfolio Investors (“FPIs”) and Designated Depository Participant (“DDPs”) to state that contribution of the Resident Individuals shall be made through Liberalised Remittance Scheme (LRS) as notified by the Reserve Bank of India and only in global funds who have an Indian exposure of less than 50%. The same has been reproduced below for ease of perusal:

*“Explanation: The contribution of resident Indian individuals shall be made through the Liberalised Remittance Scheme (LRS) notified by Reserve Bank of India and shall be in global funds whose Indian exposure is less than 50%.”*



## SECURITIES EXCHANGE BOARD OF INDIA

### SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021

The Securities and Exchange Board of India (“SEBI”) in its *Notification bearing No. SEBI/LAD-NRO/GN/2021/35 dated August 03, 2021* has notified the third amendment to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (“**Principal Regulations**”). These regulations shall be called SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 [“**LODR (Third Amendment) Regulations**”]. These LODR (Third Amendment) Regulations shall come into force from **January 01, 2022**. The following are the amendments notified by the LODR (Third Amendment) Regulations to the Principal Regulations:

1. **Amendments to Regulation 16 of the Principal Regulations which contains the definitions of the terms used in that chapter:**
  - a. In Regulation 16(1)(b) sub-clause (iv) relating to the definition of an ‘independent director’ and which reads as “*who, apart from receiving director's remuneration, has or had no material pecuniary relationship with the listed entity, its holding, subsidiary or associate company, or their promoters, or directors, during the two (2) immediately preceding financial years or during the current financial year*” after the words “during the” and before the word “immediately”, the word “two” shall be substituted by the word “three”.
  - b. The amended Regulation 16(1)(b) sub-clause (v) shall be read as follows:

“(v) none of whose relatives,

    - *is holding securities of or interest in the listed entity, its holding, subsidiary or associate company during the three immediately preceding financial years or during the current financial year of face value in excess of fifty lakh rupees or two percent of the paid-up capital of the listed entity, its holding, subsidiary or associate company, respectively, or such higher sum as may be specified;*
    - *is indebted to the listed entity, its holding, subsidiary or associate company or their promoters or directors, in excess of such amount as may be specified during the three immediately preceding financial years or during the current financial year;*
    - *has given a guarantee or provided any security in connection with the indebtedness of any third person to the listed entity, its holding, subsidiary*



*or associate company or their promoters or directors, for such amount as may be specified during the three immediately preceding financial years or during the current financial year; or*

- *has any other pecuniary transaction or relationship with the listed entity, its holding, subsidiary or associate company amounting to two percent or more of its gross turnover or total income:*

*Provided that the pecuniary relationship or transaction with the listed entity, its holding, subsidiary or associate company or their promoters, or directors in relation to points(A) to (D)above shall not exceed two percent of its gross turnover or total income or fifty lakh rupees or such higher amount as may be specified from time to time, whichever is lower."*

- c. In sub-clause (vi) of Regulation 16(1)(b) of the Principal Regulations the symbol and word "/herself" shall be inserted after the word "himself" and before the symbol and word "nor" so that it reads, "who, neither himself/herself, nor whose relative(s)". Also in point (A) of the same, after the words "associate company" and before the words "in any", the words and symbols "or any company belonging to the promoter group of the listed entity," shall be inserted, so that, it reads, "(A) holds or has held the position of a key managerial personnel or is or has been an employee of the listed entity or its holding, subsidiary or associate company or any company belonging to the promoter group of the listed entity, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;"

Further, a proviso to the above Regulation16(1)(b)(vi) sub-clause (A), a new proviso shall be inserted namely, *"Provided that in case of a relative, who is an employee other than key managerial personnel, the restriction under this clause shall not apply for his / her employment."*

2. **In Regulation 17 of the Principal Regulations**, after sub-regulation (1B), which speaks about composition of the Board of Directors of a listed entity, a new sub-regulation (1C) has been inserted namely, *"(1C). The listed entity shall ensure that approval of shareholders for appointment of a person on the Board of Directors is taken at the next general meeting or within a time period of three months from the date of appointment, whichever is earlier.*
3. **In Regulation 18(1)(b) of the Principal Regulations**, which speaks about



the Audit Committee of a listed company, the words “At least” shall be inserted before the words “two-thirds” so that it reads, “(b) *At least two-thirds of the members of audit committee shall be independent directors and in case of a listed entity having outstanding SR equity shares, the audit committee shall only comprise of independent directors.*”

4. **In clause (c), of sub-regulation (1), of Regulation 19** which speaks about the Nomination and Remuneration Committee, the words “fifty percent” shall be substituted by the words “two-thirds” so that it reads as “(c) *at least two-thirds of the directors shall be independent directors.*”
5. **In sub-regulation (2) of Regulation 23**, which speaks of Related Party Transactions, a new proviso shall be inserted namely, “*Provided that only those members of the audit committee, who are independent directors, shall approve related party transactions.*”
6. Following amendments have been made to **Regulation 25 of the Principal Regulations**, which speaks about, obligations of the independent directors:
  - After sub-regulation (2) of Regulation 25, which says that the maximum tenure of independent directors should be in accordance with the Companies Act, 2013 and rules made thereunder, in regards of the same, from time to time, a new sub-regulation (2A) shall be inserted namely, “(2A). The appointment, re-appointment or removal of an independent director of a listed entity, shall be subject to the approval of shareholders by way of a special resolution.”
  - In sub-regulation (6), the words “the immediate next meeting of the board of directors or” appearing after the words “later than the” and before the words “three months” and the symbol and words “, whichever is later” appearing after the words “such vacancy” and before the proviso shall be omitted. So now it reads as, “(6) An independent director who resigns or is removed from the board of directors of the listed entity shall be replaced by a new independent director by listed entity at the earliest but not later than three months from the date of such vacancy.”
  - In sub-regulation (10), the word, numbers and symbol “October 1, 2018” shall be substituted with the word, numbers and symbol “January 1, 2022” and the number “500” shall be substituted with the number “1000” so that it reads as, “(10) With effect from January 1, 2022, the top 1000 listed entities by market capitalization calculated as on March 31 of



the preceding financial year, shall undertake Directors and Officers insurance ('D and O insurance') for all their independent directors of such quantum and for such risks as may be determined by its board of directors."

- A new sub-regulation (11) after sub-regulation (10) has been inserted which reads as, "(11) No independent director, who resigns from a listed entity, shall be appointed as an executive / whole time director on the board of the listed entity, its holding, subsidiary or associate company or on the board of a company belonging to its promoter group, unless a period of one year has elapsed from the date of resignation as an independent director."

7. **In sub-clause (d) of Regulation 36(3)**, which speaks about documents and information to be shared with the shareholders, after the words "the board", the words "along with listed entities from which the person has resigned in the past three years" shall be inserted so that it reads, "(d) names of listed entities in which the person also holds the directorship and the membership of Committees of the board along with listed entities from which the person has resigned in the past three years."

Further, a new clause (f) after clause (e) has been inserted which reads as, "(f) In case of independent directors, the skills and capabilities required for the role and the manner in which the proposed person meets such requirements."

8. **After clause (1), in Para A, of part D, of Schedule II** which speaks about the role of the nomination and remuneration committee, a following new sub-clause (1A) shall be inserted,

*"(1A) For every appointment of an independent director, the Nomination and Remuneration Committee shall evaluate the balance of skills, knowledge and experience on the Board and on the basis of such evaluation, prepare a description of the role and capabilities required of an independent director. The person recommended to the Board for appointment as an independent director shall have the capabilities identified in such description. For the purpose of identifying suitable candidates, the Committee may:*

*a.) use the services of an external agencies, if required;*



*b.) consider candidates from a wide range of backgrounds, having due regard to diversity;*

*c.) consider the time commitments of the candidates.”*

9. **In Schedule III**, which speaks about disclosures which a listed company has to make to stock exchange (s) on the happening of certain specified events, the following amendments in **Part A, in Para A, in clause (7B)** have been made:
- In sub-clause (i), the words, “The letter of resignation along with” shall be inserted before the words, “detailed reasons”. Also, the words “of independent directors” appearing after the word “resignation” and before the words “as given” along with the words “shall be disclosed by the listed entities to the stock exchanges” appearing after the word “director” shall be omitted. So now it reads as, “(i) Detailed reasons for the resignation as given by the said director shall be disclosed to the stock exchange(s) within seven days from the date of resignation in case of resignation by an independent director.”
  - SEBI inserted a new sub-clause (ia) after sub-clause (i) namely, “(ia) Names of listed entities in which the resigning director holds directorships, indicating the category of directorship and membership of board committees, if any.”
  - In sub-clause (iii), the words “detailed reasons” appearing after the words “along with the” shall be substituted by the word “disclosures.” After the words and symbols “sub-clause (i)” and before the word “above”, the word and symbols “and (ii)” shall be inserted, so that it reads as, *“(iii) The confirmation as provided by the independent director above shall also be disclosed by the listed entities to the stock exchanges along with the disclosures as specified in sub-clause (i) and (ii) above.”*





## Securities Exchange Board of India

### SEBI (Listing Obligations and Disclosure Requirements) (Fourth Amendment) Regulations, 2021

The Securities and Exchange Board of India (“SEBI”) vide *Notification bearing No. SEBI/LAD-NRO/GN/2021/42 dated August 13, 2021* has notified amendments to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (“Principal Regulations”). These regulations shall be called SEBI (Listing Obligations and Disclosure Requirements) (Fourth Amendment) Regulations, 2021 [“LODR (Fourth Amendment) Regulations”]. The following are the amendments notified by the LODR (Fourth Amendment) Regulations to the Principal Regulations:

1. **In Regulation 52(4) of the Principal Regulations:**

- Sub-clauses (a), (b), (d) and (e) have been omitted.
- The disclosures which were to be made by listed entities while submitting half yearly/ annual financial results as per sub-clauses (a), (b), (d) and (e) include credit rating and change in credit rating, asset cover available in case of non-convertible debt securities, previous due date for the payment of interest/ dividend for non-convertible redeemable preference shares/ repayment of principal of non-convertible preference shares/ non-convertible debt securities and whether the same has been paid or not, next due date for payment of interest/ dividend of non-convertible preference shares/ principal along with the amount of interest/ dividend of non-convertible preference shares payable and the redemption amount, respectively, have been done away with and is omitted.

2. **In Regulation 57 of the Principal Regulations:**

- The heading shall include the word “*Intimations/*” before the word “*Other*” so that it reads as “*Intimations/ Other submissions to stock exchange(s)*”; and
- Regulation 57(2) has been omitted.

3. **In Regulation 58 of the Principal Regulations:**

- In the heading of Regulation 58 of the Principal Regulations which read as, “*Documents and information to holders of non-convertible debt securities and non-convertible preference shares*”, the words “*debt*” and “*non-convertible preference shares*” are omitted and shall now be read as “*Documents and information to holders of non-convertible securities*”.





- In the sub-regulation (1), clause (a) which reads as, “(a) *Soft copies of full annual reports to all the holders of non-convertible preference share who have registered their email address (es) for the purpose;*” shall be replaced by “(a) *Soft copies of the full annual reports to all the holders of non-convertible securities who have registered their email address(es) either with the listed entity or with any depository;*”
- In the sub-regulation (1), clause (b), the words “*preference share*” shall be substituted with the word “*securities*” to read as “(b) *Hard copy of statement containing the salient features of all the documents, as specified in Section 136 of Companies Act, 2013 and rules made thereunder to those holders of non-convertible securities who have not so registered;*”
- In the sub-regulation (1), clause (c) which reads as, “(c) *Hard copies of full annual reports to those holders of non-convertible debt securities and non-convertible preference share, who request for the same;*” the words “*debt*” and “*and non-convertible preference share*”, shall be omitted.
- The entire clause (d) of sub-regulation (1) which reads, “(d) *Half yearly communication as specified in sub-regulation (4) and (5) of regulation 52, to holders of non-convertible debt securities and non-convertible preference shares;*” shall be omitted.

#### 4. **In Regulation 61 of the Principal Regulations**

- The words “*non-convertible debt securities and/or*” shall be inserted after the words “*dividend of*” in sub-regulation (1) of Regulation (61) to read as, “61. (1) *The listed entity shall ensure timely payment of interest or dividend of non-convertible redeemable preference shares or redemption payment;*” and
- The second proviso of sub-regulation (1) of Regulation 61 which reads as, “*Provided further that this requirement shall not be applicable in case of unsecured debt securities issued by regulated financial sector entities eligible for meeting capital requirements as specified by respective regulators.*”, shall be omitted.



### Ministry of Corporate Affairs

In exercise of the powers conferred by section 393A of the Companies Act, 2013, the Central Government issued a *Notification dated August 05, 2021* exempting, certain companies from the provisions of Section 387 (*dating of prospectus and particulars to be contained therein*), Section 388 (*Provisions as to expert's consent and allotment*), Section 389 (*Registration of Prospectus*), Section 390 (*Offer of Indian depository receipts*), Section 391 (*Application of sections 34 which states about Criminal liability for misstatements in prospectus, section 35 which is about civil liability for misstatements in prospectus and section 36 which contains the punishment for fraudulently inducing persons to invest money and Chapter XX*) and Section 392 (*Punishment for contravention*) of the Companies Act, 2013. The above mentioned exemption has been provided by the Central Government to the following companies:

1. foreign companies;
2. companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India.

The above mentioned companies are exempted to the extent of their relation to their offering for subscription in the securities, requirements related to the prospectus, and all supplementary matters in the International Financial Service Centres (**IFSC**) set up under Section 18 (Setting up of International Financial Services Centre) of the Special Economic Zones Act, 2005.



### CASE SUMMARY

Case Name	: <b><i>Supertech Limited Vs Emerald Court Owner Resident Welfare Association &amp; Ors.- Civil Appeal No. 5041 of 2021.</i></b>
Court	: Supreme Court of India.
Order	: August 31, 2021

#### **Facts of the Case:**

1. On November 23 2004, New Okhla Industrial Development Area (“NOIDA”) allotted Supertech Limited (“**The Appellant**”), a plot of land ad-measuring 48,263 sq. meters of Plot No. 4, Sector 93A, NOIDA, for the de-velopment of a group housing society, by the name of Emerald Court which consisted of fourteen (14) towers, each with ground and nine floors (G+9). The original plan of the project was sanctioned on June 20, 2005. On June 21, 2006, a supplementary lease deed was executed by NOIDA in favour of the Appellant for an additional land area of 6556.51 sq. meters in the same plot of land. So, the total leased area allotted to the Appellant increased to 54,819.51 sq. meters.
2. The original plan was revised several times. In the first revised plan, NOIDA sanctioned two (2) additional floors to the already sanctioned ground and nine (G+9) floors bringing them all to ground and eleven (G+11) floors and additional buildings were also sanctioned namely, Tower 15 ground and eleven (G+11) floors and Tower 16 (comprising of a cluster of wings includ-ing one (1) of ground and eleven (G+11) floors and three (3)wings of ground and four (G+4) floors along with a shopping complex comprising of ground and one G+1 floors). It also contemplated a green area in front of Tower- 1. In the second revised plan, the earlier T-16 ground and eleven (G+11) floors was replaced with a T-16 consisting of ground and twenty-four (G+24) floors and the shopping complex was replaced with T-17 con-sisting of ground and twenty-four (G+24) floors. In the third revised plan, the height of Tower 16 (**‘T-16’**) and Tower 17 (**‘T-17’**) (the disputed towers, **‘Ceyane’** and **‘Apex’**) was permitted to be raised from twenty-four (24) floors to forty (40) floors i.e., ground and forty (G+40) floors and both the towers would also consist of two basements and open space for parking beneath the towers.
3. On May 3, 2012 and May 22, 2012, when the first Respondent filed a Right



to Information (“RTI”) application with NOIDA for obtaining the sanctioned plans but NOIDA refused to provide the sanctioned plans as the Appellant refused to grant its consent to release sanctioned plans and maps to the first respondent.

4. On December 10, 2012, the Residents Welfare Association (“RWA”) filed a writ petition under Article 226 of the Constitution before the Allahabad High Court (“High Court”) seeking a direction to quash the revised plan which approved the construction of T-16 and T-17, and to demolish them. The High Court allowed the writ petition and passed its judgement on April 11, 2014, directing the demolition of T-16 and T-17, with the expenses of the demolition to be borne by the Appellant and to refund the consideration received from flat purchasers who had booked apartments in T-16 and T-17, with fourteen (14) per cent interest compounded annually.
5. Hence, the Appellant filed a Special Leave Petition before the Hon’ble Supreme Court of India, under Article 136 of the Constitution of India, on April 28, 2014 pleading to set aside the above mentioned judgment of the High Court.

**Held by the Hon’ble Supreme Court of India:**

1. The Hon’ble Supreme Court of India passed its judgement on August 31, 2021 where in it upheld the directions of the High Court, given vide its judgement dated April 11, 2014 and affirmed the decision to demolish the Tower 16 (Ceyane) and Tower 17 (Apex).
2. Also, the Hon’ble Supreme Court of India mentioned that the need to maintain the minimum distance between Tower 1, 16 and 17 was a mere afterthought and contrary to the stated position which had been stated by Appellant in its affidavit filed before the High Court.
3. The Hon’ble Supreme Court of India directed that the expenses of the demolition of the towers have to be borne by the Appellant and also mentioned that the work of demolition should be carried out within a period of three (3) months from the date of this judgement. In order to ensure that the work of demolition is carried out safely NOIDA shall consult its own experts from Central Building Research Institute Roorkee.
4. Further, the Hon’ble Supreme Court of India ordered the Appellant to refund to all the flat purchasers of Ceyane and Apex all the amounts paid by



them for the purchase of flats together with interest at the rate of twelve (12) per cent per annum payable with effect from the date of the respective deposits until the date of refund.

5. The Appellant was also directed to pay the RWA costs of Rs. 2 crores only in one (1) month from the receipt of the judgement.

**Some important key issues analysed by the Hon'ble Supreme Court of India:**

The Hon'ble Supreme Court of India further highlighted the collusion between the officers of NOIDA with the Appellant and its management and also revealed the immoral participation of the planning authority in the violation by the developer of the provisions of law. Further, the court also observed that the need to protect the environment along with the well-being of the people amidst the rising urban housing is the need of an hour, as the quality of life is directly affected if the planning authority fails to enforce the compliance for the same. Enumerating the above the Hon'ble Supreme Court of India held as follows:

*"...While the availability of housing stock, especially in metropolitan cities, is necessary to accommodate the constant influx of people, it has to be balanced with two crucial considerations – the protection of the environment and the well-being and safety of those who occupy these constructions. The regulation of the entire process is intended to ensure that constructions which will have a severe negative environmental impact are not sanctioned. Hence, when these regulations are brazenly violated by developers, more often than not with the connivance of regulatory authorities, it strikes at the very core of urban planning, thereby directly resulting in an increased harm to the environment and a dilution of safety standards. Hence, illegal construction has to be dealt with strictly to ensure compliance with the rule of law."*

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Warm Regards,

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