ETERNITY LEGAL
Advocates & Solicitor
Patent & Trademark Attorneys

ETERNITY:LAW APPRISE

*Private Circulation Only

MAY, 2014

INSIDE THIS ISSUE:

SECURITIES AND EXCHANGE BOARD OF INDIA

SEBI: Establishment of Connectivity with both depositories NSDL & CDSL- Companies eligible for shifting from trade for trade settlement (TFTS) to Normal Rolling Settlement

The Securities & Exchange Board of India ("**SEBI**") *vide* circular no. CIR/MRD/DP/16/2014 dated May 16, 2014 observed that certain companies listed therein established connectivity with both the depositories and was of the opinion that stock exchanges may consider shifting the trading in those securities to normal Rolling Settlement. This would be possible if at least 50% other than promoter holdings as per clause 35 of the Listing Agreement are in dematerialized mode before shifting the trading in the securities of the company from TFTS to normal Rolling Settlement. For this purpose, the listed companies shall obtain a certificate from Registrar & Transfer Agent ("**RTA"**) and submit the same to stock exchange/s. However, if an issuer-company does not have a separate RTA, it may obtain a certificate in this regard from a practicing company Secretary/Chartered Accountant and submit the same to the stock exchange/s.

SEBI: Circular on Mutual Funds

SEBI *vide* circular no. CIR/IMD/DF/10/2014 dated May 22, 2014 *inter alia* modified circular no. CIR/IMD/DF/21/2012 dated September 13, 2012 which permitted cash transaction in mutual funds to the extent of Rs. 20,000/- per investor, per mutual fund, per financial year. In partial modification to para I (1) of the aforesaid circular, the limit of cash transactions in mutual funds are increased from the existing limit of Rs. 20,000/- per investor, per mutual fund, per financial year to Rs. 50,000/- per investor, per mutual fund, per financial year, subject to (i) compliance with Prevention of Money Laundering Act, 2002 and Rules framed there under, the SEBI Circular(s) on Anti Money Laundering ("**AML**") and other applicable AML rules, regulations and guidelines and (ii) sufficient systems and procedures in place.

The circular also modified SEBI circular dated May 08, 2001 and circular dated July 11, 2003, on guidelines for Investment/Trading in Securities by Employees of Asset Management Companies and Trustees of Mutual Funds.

MINISTRY OF CORPORATE AFFAIRS

Circular no. 10/2014: Certification of E-forms/non-e-forms under the Companies Act, 2013 by practicing professionals

The Ministry of Corporate Affairs ("**MCA**") *vide* circular no.10/14 dated May 07, 2014 has allowed professional members like the ICAI, ICSI and ICOAI to authenticate correctness and integrity of the documents filed with MCA in electronic mode.

The Registrar shall examine all e-forms or non e-forms attached with the general forms on MCA and to verify if all requirements have been fulfilled. In case of any false or misleading information or omission of material facts the Registrar/ Regional Director shall conduct quick inquiry against the professional concerned in the manner provided therein.

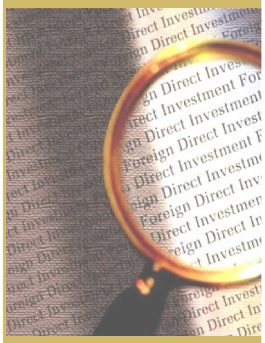
Circular no. 12/2014: Applicability of PAN requirement for Foreign Nationals

MCA *vide* circular no. 12/14 dated May 22, 2014 acknowledged the difficulties faced by Foreign Nationals while filing Incorporation form (INC-71) due to mandatory requirement of submission of PAN details of intending Directors at the time of filing the application for incorporation.

The circular clarified that PAN details are mandatory only for those foreign nationals who are required to possess "PAN" in terms of provisions of the Income Tax Act, 1961 on the date of application for incorporation where the intending Director who is a Foreign National is not required to compulsorily possess PAN, it will be sufficient for such a person to furnish his/her passport number, alongwith undertaking stating that provisions of mandatory applicability of PAN are not applicable to the person concerned. The form of Declaration is required to be made in the proforma enclosed in the said circular.

RESERVE BANK OF INDIA

Foreign Direct Investment (FDI) in India – Reporting mechanism for transfer of equity shares/ fully and mandatorily convertible preference shares/ fully and mandatorily convertible debentures



The Reserve Bank of India ("RBI") vide A.P. (DIR Series) Circular No.127 dated May 2, 2014 *inter alia* announced that to rationalise the existing procedure, in cases where the NR investor including an NRI acquires shares on the stock exchanges in terms of the aforesaid A.P. (DIR Series) Circular No. 38 dated September 6, 2013, the investee company would have to file form FC-TRS with the AD Category-I bank.

External Commercial Borrowings (ECB) from Foreign Equity Holder - Simplification of Procedure

RBI vide A.P. (DIR Series) Circular No. 130 dated May 16, 2014 stated that as per the extant ECB policy, ECBs from direct foreign equity holders ("**FEHs**") are considered both under the automatic and the approval routes, as the case may be. ECBs from indirect equity holders and group companies and ECBs from direct FEH for general corporate purpose are, however, considered under the approval route. Further, any request for change of the ECB lender in case of FEH requires RBI's approval. It has been decided to delegate powers to AD banks to approve the following cases under the automatic route:

a. Proposals for raising ECB by companies belonging to manufacturing, infrastructure, hotels, hospitals and software sectors from indirect equity holders and group companies.

b. Proposals for raising ECB for companies in miscellaneous services from direct / indirect equity holders and group companies. Miscellaneous services mean companies engaged in training activities (but not educational institutes), research and development activities and companies supporting infrastructure sector. Companies doing trading business, companies providing logistics services, financial services and consultancy services are, however, not covered under the facility.

c. Proposals for raising ECB by companies belonging to manufacturing, infrastructure, hotels, hospitals and software sectors for general corporate purpose. ECB for general corporate purpose (which includes working capital financing) is, however, permitted only from direct equity holder.

d. Proposals involving change of lender when the ECB is from FEH – direct / indirect equity holders and group company.

All other terms and conditions stipulated in the relative circulars shall continue to be applicable. Other aspects of the ECB policy such as eligible borrower, recognised lender, permitted end-use, amount of ECB, all-in-cost, average maturity period, pre-payment, ECB liability : equity ratio, refinance of existing ECB, reporting arrangements, etc. shall remain unchanged.

Overseas Direct Investments – Limited Liability Partnership (LLP) as Indian Party

RBI vide A.P. (DIR Series) Circular No. 131 dated May 19, 2014 decided to notify a Limited Liability Partnership ("**LLP"**), registered under the Limited Liability Partnership Act, 2008 (6 of 2009), as an "Indian Party" under clause (k) of Regulation 2 of the Notification No. FEMA.120/RB-2004 dated July 07, 2004 and amended from time to time. Accordingly, an LLP, may henceforth undertake financial commitment to / on behalf of a JV / WOS abroad

in terms of the extant FEMA provisions under Regulation 6 (and regulation 7, if applicable) of the Notification ibid.

Import of Gold by Nominated Banks / Agencies / Entities

RBI *vide* A.P. (DIR Series) Circular No. 133 dated May 21, 2014 revised the guidelines for import of Gold by the nominated banks / agencies / entities, as under:

Star Trading Houses / Premier Trading Houses which are registered as nominated agencies by the Director General of Foreign Trade may now import gold under 20:80 scheme subject to the conditions mentioned therein.

Further, nominated banks are permitted to give Gold Metal Loans ("**GML**") to domestic jewellery manufacturers out of the eligible domestic import quota of 80% to the extent of GML outstanding in their books as on March 31, 2013.

Export of Goods-Long Term Export Advances

RBI vide A.P. (DIR Series) Circular No. 132 dated May 21, 2014 decided to permit AD Category - I banks to allow exporters having a minimum of three years' satisfactory track record to receive long term export advance up to a maximum tenor of 10 years to be utilized for execution of long term supply contracts for export of goods subject to the conditions mentioned therein. The circular also contained guidelines for issuance of bank guarantees / stand by letter of credit for export performance by Authorized Dealer Banks.

COMPETITION LAW

Order of the Competition Appellate Tribunal in the matter of DLF Limited

The Competition Appellate Tribunal ("**COMPAT**") vide its order dated May 19, 2014 upheld the order of the Competition Commission of India ("**CCI**") in which the CCI had imposed a penalty of Rs. 630 crores on DLF Limited.

The subject matter of the Appeals as well as the contentions raised were common, although there was some material difference in the facts and all three orders by CCI dated August 12, 2011, August 29, 2011 and January 31, 2012 pertain to three different apartments built by DLF, namely – Belaire, Park Place and Magnolia. The following issues were raised in the matter:

A) Whether the provisions of Competition Act, 2002 ("Act") applied to the facts and circumstances of the instant case?

The CCI relied on the definition of section 2(u) of the Act. In the definition of service under the Act, if the service is made available to the potential users in connection with banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information etc., these services squarely fall within the ambit of term 'service'. It was held that the CCI was right in assuming the jurisdiction on the basis of the definition in section 2(u) of the Act. COMPAT held that the CCI was absolutely correct in holding that the Appellant was providing service relating to construction and it amounted to service in the sphere of real estate business and as such on that count the CCI had the jurisdiction to consider the affect of this service in respect of breach of section 4 of the Act.

It was held that the whole transactions whereby the allottees applied for the allotment and entered into Apartment Buyers' Agreements ("**ABAs**") are prior to the relevant date of 20th May, 2009, hence there was no doubt that section 4 is not retrospective in operation. It was held that there is absolutely nothing in the language of section 4, which even distinctly suggests its retrospective operation, and a statute becomes retrospective only and only when the language of provision so provides.

B) Whether the Appellant was dominant in the relevant market, in the context of section 4 read with section 19(4) of the Competition Act?

COMPAT upheld the view of the CCI that the product market was that of service of developer/ builder in respect of 'high-end' or as the case may be 'luxury' residential accommodation, was a correct finding. Further, in view of the rules regarding licenses for purchasing land and its development, consideration for density of population, consideration for height of the building and most importantly the wide discretion and scope that the builder has in developing such properties, are much more relaxed as compared to other areas and therefore, it was held that the CCI was correct in holding the relevant geographic market as Gurgaon. In the matter of the Appellant being dominant, the CCI relied on CMIE data in view of it being most reliable and the COMPAT agreed to the preference to use the said CMIE data. The COMPAT upheld the observations of the CCI that the market share of the DLF among the companies operating in Gurgaon exceeded 55% and held DLF to be a dominant player in the relevant market.

C) In case the Appellant was found to be dominant, was there any abuse of its dominant position in the relevant market?

The COMPAT clarified that no ABAs executed after 20th May, 2009 were taken into consideration and the inquiry was restricted only to the ABAs executed in 2006-2007 against which the information was filed with the CCI. The COMPAT viewed the unfair action on the part of Appellant, in first not disclosing the number of floors, at least after section 4 of the Act came on the legal scene and then in proceeding with the construction of additional floors, increasing the number of apartments by 53% in case of Belaire, Park Place and Magnolia. It was further agreed by the COMPAT that the hefty increase in the super area because of the addition of the floors amounted to an abuse of dominance by the Appellant. For the aforesaid reasons, the COMPAT was convinced that this amounted to abuse of dominance, since this was conducted in the most unfair condition and were of the firm opinion that the Appellant had abused its dominant position and committed breach of section 4(2)(a)(i) and section 4(2)(a)(ii) of the Act. The COMPAT further stated that the CCI has inflicted a penalty of Rs.630 crores, which is 7% of the turnover of the Appellant. The COMPAT was of the view that an abuse of dominance whether it is on one count or on many remains an abuse and therefore it must be dealt with iron hands and therefore, confirmed the order of the penalty of Rs. 630 crores.

Green Energy Association v. Maharashtra State Electricity Distribution Company Limited in Case No. 44 of 2014

On May 6, 2014 the Hon'ble Maharashtra Electricity Regulatory Commission ("**MERC / Commission**") vide its order in Green Energy Association ("**GEA**") v. Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**") directed MSEDCL to long pending Open Access ("**OA**") applications of the members of GEA. The Hon'ble Commission also shed light on its approach to the issue of sourcing of power from multiple sources of energy.

GEA is a non-profit organization having its main objective as the development of Renewable Energy including Solar Energy. The members of GEA were inclined to supply energy to third parties and they entered into Power Purchase Agreements ("**PPA**") with such third parties. Hence they applied for and sought open access from MSEDCL by making the requisite applications. However, the Applications of many members of GEA were pending approval in some cases for 121 days and in some others even for 290 days. Consequently, as on December 31, 2013 the applicants were facing a loss of Rs. 568 lacs due to non-recovery from OA consumers. Further they were also not being issued credit notes for the energy fed into the grid. Having no recourse the Petitioners filed the present petition on January 28, 2014. The Hon'ble Commission after hearing both the parties decided that in case of the energy is being sourced from a single source through OA then the said Applications should be granted permission immediately as Section 2(4) and Section 42(2) of the Electricity Act, 2003 clearly allow the non-discriminatory OA to all Renewable Energy sources alike. Thereby the Hon'ble Commission dismissed the contention of MSEDCL that the absence of any guidelines and/or policy as grounds for not granting permissions as insufficient cause for delay. Further it was observed by the Hon'ble Commission that in the meantime MSEDCL had allowed OA permission for sale of solar energy to another utility namely Brihanmumbai Electricity Supply and Transport ("**BEST**") Undertaking. Thus no grant of permission would clearly amount to discriminatory and prejudicial.

Hence the Hon'ble Commission directed MSEDCL to grant the permissions to OA application from the generator applicants wherein the OA was being sought through solar energy as a single source. The said permissions should be granted following the procedure of the previous financial year. Further the Hon'ble Commission directed that the credit notes

should be issued immediately if not done earlier as per the timelines reflected under the Citizens Charter.

However with respect to the OA through multiple sources, the Hon'ble Commission agreed with MSEDCL that sourcing of energy from different categories / type of sources would entail several difficulties especially with respect to billing and operations.

Another difficulty that the Hon'ble Commission observed was to frame such OA sourcing into the current regulatory mechanism. The Hon'ble Commission pointed out that they are in the process of amending the MERC (Distribution Open Access) Regulation, 2005 and they have assured that they shall try to expedite the amendment after inviting and incorporating the concerns of the various stakeholders.

End of Newsletter

Dear Readers,

If you are interested in receiving updates only in respect of specific area of law, do write to us. Also, in case you do not wish to receive our monthly update, please send us email on legalupdates@eternitylegal.com with the subject as "Unsubscribe".

Warm Regards,

Dipali Sarvaiya Sheth

Founder

Eternity Legal

ETERNITY LEGAL
Advocates & Solicitor
Patent & Trademark Attorneys

1207, Dalamal Tower, Free Press Journal Road,

Nariman Point, Mumbai– 400 021

Email: contact@eternitylegal.com | Tel no.: +91 22 67479001

Website: www.eternitylegal.com