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# ETERNITY:LAW APPRISE


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*Private Circulation Only

MAY 2022


## Securities Exchange Board of India

## (Non-convertible Securities)

The Securities Exchange Board of India (**"SEBI"**) in exercise of its powers conferred upon it by Section 11 (1) of the Securities and Exchange Board of India Act, 1992 read with Regulation 101 of the Listing Regulations issued a *Circular Dated May 13, 2022* (**"Circular"**) for relaxing compliance of certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulation, 2015 (**"SEBI LODR Regulation, 2015"**) which shall come into force with immediate effect from its publication in the Official Gazette.

In compliance with the relaxations granted by the Ministry of Corporate Affairs (**"MCA"**), SEBI issued a circular on May 12, 2020 that modified certain provisions of the SEBI LODR Regulations, 2015 (Listing Regulation) related to the distribution of hard copies of annual reports to debenture holders which were extended till December 31, 2021 by SEBI vide its circular dated January 15, 2021.

Pursuant to which MCA vide its circular dated May 05, 2022 extended the relaxations for delivering physical copies of financial statements for the year 2022 till December 31, 2022.

Therefore, it has been agreed to grant relief from compliance of requirements of Regulation 58 (1)(b) of the SEBI LODR Regulations, 2015 which prescribes that an entity with listed non-convertible securities shall send a 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 registered their email address(es) either with the listed entity or with any depository till December 31, 2022.

## Securities Exchange Board of India

The Securities Exchange Board of India (**"SEBI"**) in exercise of its powers conferred upon it by Section 11 (1) of the Securities and Exchange Board of India Act, 1992 read with Regulation 101 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**"SEBI LODR Regulations, 2015"**) *issued a Circular dated May 13, 2022* (**"Circular"**) for relaxation from compliance with certain provisions of the SEBI LODR Regulations, 2015 which shall come into force with immediate effect from its publication in the Official Gazette.

Pursuant to receiving multiple requests received from listed companies in order to seek exemptions from the requirement to deliver paper copies of annual reports to shareholders Ministry of Corporate Affairs (**"MCA"**) vide Circular dated May 05, 2022 has extended the relaxations from dispatching of physical copies of financial statements for the year 2022 till December 31, 2022.

In view of the above, SEBI has decided to provide relaxation from Regulation 36 (1) (b) of SEBI LODR Regulations, 2015 which requires sending hard copy of annual report containing salient features of all the documents prescribed in Section 136 of the Companies Act, 2013 to the shareholders who have not registered their email addresses. Further SEBI has also directed that the notice of Annual General Meeting published through advertisement must include a link to the annual report, according to Regulation 47 of the SEBI LODR Regulations, 2015, in order to enable the shareholders to view the full annual report.

SEBI has however emphasized that in accordance to Regulation 36 (1) (c) of SEBI LODR Regulations 2015, listed companies must send hard copies of their full annual report to shareholders who request for the same. Further, SEBI has also waived off the requirement of sending proxy forms under Regulation 44 (4) of the SEBI LODR Regulations, 2015 is dispensed with up to December 31, 2022, in case of general meetings held through electronic mode only.

## MINISTRY OF CORPORATE AFFAIRS

In exercise of powers conferred upon by Section 56 (1) and (3) read with Section 469 (1) and (2) of the Companies Act, 2013 (18 of 2013), the Central Government vide its *Notification dated May 04, 2022* (**"Notification"**) further amended the Companies (Share Capital and Debenture) Rules, 2014 (**"Companies SCD Rules, 2014"**). The Companies SCD Rules, 2014 shall now be called as Companies (Share Capital and Debentures) Amendment Rules, 2022 (**"Companies SCD Rules, 2022"**) and shall come into force with effect from its publication in the Official Gazette.

Following amendments have been made to the Companies SCD Rules, 2014:

In Annexure in Form No. SH-4 a declaration stating about government approval which the transferee is required to obtain under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 has been inserted before the enclosures. The same shall read as follows,

**Declaration:**

a) The Transferee is not required to acquire Government clearance prior to transferring shares under the FEM NDI Rules, 2019;

b) The Transferee is obliged to seek Government authorization prior to transferring shares under the FEM NDI Rules, 2019, which has been obtained and is submitted herewith.

## MINISTRY OF CORPORATE AFFAIRS

In exercise of the powers conferred by Section 42 read with Section 469(1) and Section 469(2) of the Companies Act, 2013, Central Government *issued a Circular dated May 05, 2022* ("Circular") wherein it amended the Companies (Prospectus and Allotment of Securities) Rules, 2014 ("Rules, 2014"). Pursuant to this Circular, Rules 2014 shall be called as Companies (Prospectus and Allotment of Securities) Rules, 2022 ("Rules 2022") and shall come into force from the date of their publication in the Official Gazette.

Following amendments have been made to Rules 2014:

In Rule 14(1) after the fourth proviso, a new proviso regarding offer of securities to body corporate incorporated in, or a national of, a country which shares a land border with India. The proviso reads as follows,

"Provided also that no offer or invitation of any securities under this rule shall be made to a body corporate incorporated in, or a national of, a country which shares a land border with India, unless such body corporate or the national, as the case may be, have obtained Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 and attached the same with the private placement offer cum application letter."

In Part –B of Form PAS-4 in Annexure companies are required to provide details regarding the following,

(a) Whether the applicant is required to obtain government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("FEM NDI Rules, 2019") prior to subscription of shares.;

(b) Whether the applicant is required to obtain government approval under the FEM NDI Rules, 2019 prior to subscription of shares and the same has been obtained, and is enclosed in PAS-4.

## CASE SUMMARY

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|---|---|
| **Case Name** | *Civil Appeal Nos. 2578 – 2579 of 2008- Chhattisgarh State Power Distribution Company Limited Vs. Chhattisgarh State Electricity Regulatory Commission and Anr.* |
| **Court** | Hon'ble Supreme Court of India |
| **Judgment** | May 12, 2022 |
| **Sections cited** | Section 2(8) of Electricity Act, 2003 ("**EA, 2003**"); Section 2(49) of EA, 2003; Section 9 of EA, 2003, Section 42(1) of EA, 2003; Section 42(2) of EA, 2003; Rule 3 of Electricity Rules, 2005 ("**Rules, 2005**") |

**Facts of the Case:**

1. Shri Bajrang Power and Ispat Limited (**"SBPIL"**) had established a captive generation plant. Shri Bajrang Metallics and Power Limited (**"SBMPL"**) which is a sister concern of SBIPL, held shares in SBIPL. SBIPL filed a petition before Chhattisgarh State Electricity Regulatory Commission (**"CSERC**") seeking open access and wheeling of power, i.e., permission to wheel 19 lakh units, corresponding to 13 MW through the transmission system of the Chhattisgarh State Power Distribution Company Limited ("**Appellant**") for captive use by SBMPL. It was submitted in the petition that SBMPL holds 27.6% of the equity shares of SBPIL and more than fifty one percent (51%) of the electricity generated by the captive power plant will be consumed by them. It was also submitted that the generating capacity of the plant set up by SBPIL would be 103.68 MU per annum and out of the said generated power, 13.22 MU per annum would be utilized in its sponge iron plant. Also, 54 MU per annum would be supplied to SBMPL through Appellant grid and the balance would be sold to the Appellant.
2. The Appellant contested the aforementioned petition, by submitting that when SBPIL holds more than seventy two percent (72%) of the shares of the company, its consumption would be limited only to 14.16% (13.22 MU) whereas the consumption of SBMPL holding 26.67% shares would be 57.87% (54 MU), and this would not be proportionate to the ownership of the power plant.
3. CSERC vide its Order dated October 14, 2005 ("**CSERC Order**") rejected

Appellant's contentions and held that under the ambit of Section 9 read with Section 2(8) of the Electricity Act, 2003 (**"EA, 2003"**) and Rule 3 of the Electricity Rules, 2005 (**"Rules, 2005"**), SBPIL was entitled to supply electricity to SBMPL and that would qualify to be treated as 'own consumption'.

4. Being aggrieved by the CSERC's order, the Appellant filed an appeals before the Hon'ble Appellate Tribunal for Electricity ("**APTEL**"). However, the Hon'ble APTEL dismissed the appeals vide Order dated December 06, 2007("**APTEL Order**") and hence, the Appellant filed the present appeal.

**Issue Before the Hon'ble Supreme Court of India:**

1. Whether the open access for transmitting electricity from SBPIL to SBMPL would be for own use or not.

**Decision of Hon'ble Supreme Court of India:**

1. Before arriving at its decision, the Hon'ble Supreme Court analyzed Section 2(8) of EA, 2003, Section 2(49) of EA, 2003, Section 9 of EA, 2003, Section 42 (1) of EA, 2003 and Section 42(2) of EA, 2003 and observed that a person, to get benefit under Section 9 of EA, 2003coudl be an individual or a body corporate or association or body of individuals whether incorporate or not. Thus, an association of corporate bodies can establish a captive power plant.

2. The only requirement would be that such power plant must be established for their own use and according to Section 42(2) of EA, 2003, surcharge would not be applicable in case of open access provided to person who has established a captive generating plant.

3. Placing reliance upon Rule 3 of Rules, 2005, the Hon'ble Supreme Court held that second proviso to Rule 3(1)(a)(ii) of Rules, 2005 is clear which lays down two (2) requirements viz. not less than twenty six percent (26%) of the ownership of the plant in aggregate and such captive users shall consume fifty one percent (51%) of electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant with a variation not exceeding ten percent (10%).

**4.** Therefore, in view of the above, the Hon'ble Supreme Court held that since SBMPL holds 27.6% equity shares in SBPIL and joint consumption by SBPIL and SBMPL is more than 51% and both the requirements mentioned under

Rule 3 of Rules, 2005 are fulfilled.

5. The Hon'ble Supreme Court also referred to Clauses 5.2.24 to 5.2.26 of National Electricity Policy, 2005 (**"NEP, 2005"**) dated February 12, 2005 pertaining to 'captive generation' and observed that provision for captive power plant is made with a view to not only securing reliable, quality and cost-effective power but also to facilitate creation of employment opportunities along with efficient growth of industry. The NEP, 2005 states that the provision relating to group of consumers for setting up of captive power plants was made primarily for delegating small and medium industries or other consumers to set up plant of optimal size in a cost-effective manner and such expansion across the country would lead to creation of employment opportunities. The NEP, 2005 is in accordance with the provisions mentioned in Section 9 and Section 2(8) of the EA, 2003. A liberal provision has been added in Section 9 of EA, 2003 to promote establishment of captive power plants. In view thereof, the Hon'ble Supreme Court has also relied upon decisions in ***Administrator, Municipal Corporation, Bilaspur Vs. Dattatraya Dahankar, Advocate and Another (1992) 1 SCC 361, S. Gopal Reddy Vs. State of A.P. (1996) 4 SCC 596*** and b***Ahmedabad Municipal Corporation and Anr. Vs. Nilaybhai R. Thakore and Anr. (1999) 8 SCC 139*** by observing that interpretation shall be preferred which advances the object and purpose of act.

In view of the foregoing, the Hon'ble Supreme Court held that the appeals are filed without merit and thus, no inference of Hon'ble Supreme Court is required with CSERC Order and APTEL Order.

## CASE SUMMARY

***Case Name*** *: In the matter of M/s. Azure Power Thirty Four Private Limited Vs. Maharashtra State Electricity Distribution Company Limited in Case No. 147 of 2020*

***Court Name*** *: Maharashtra Electricity Regulatory Commission*

***Order Dated*** *: May 04, 2022*

**Facts of the Case:**

1. In the present case, Azure Power Thirty-Four Private Limited ("**Appellant**''/ "**APTFPL**") approached the Maharashtra Electricity Regulatory Commission ("**MERC**" **/ "Commission"**) for implementation of the Judgement dated November 08, 2021 passed by the Hon'ble Appellate Tribunal for Electricity (**"APTEL"**) in DFR No. 270 of 2021 & IA No. 1187 of 2021 & IA No. 1188 of 2021 against the Maharashtra State Electricity Distribution Company Limited (**"Respondent"/ "MSEDCL"**). In this matter the Hon'ble APTEL has allowed the Appeal filed by APTFPL and remanded the matter back to the Commission.
2. The Appellant filed a Petition in Case No 147 of 2020 seeking compensation due to increase in costs on account of change in rate of Goods & Service Tax (**"GST"**) amounting to change in law event in terms of the Power Purchase Agreement (**"PPA"**) dated July 30, 2018. However, the Hon'ble Commission in its Order dated May 10, 2021 ("**Impugned Order**") held that APTFPL was required to build solar plant and by not entering into a contract of supply of goods it l.ost the opportunity of using legitimate lower tax rate of five (5) percent and as the contracting practice followed by APTFPL cannot be considered as economical and prudent, hence, the commission rejected compensation under change in law.
3. The Appellant being aggrieved by the Impugned Order filed an appeal before the Hon'ble APTEL vide DFR No. 270 of 2021. Hon'ble APTEL vide its judgement dated November 08, 2021, ("**APTEL Order**") held that, the Appeal was allowed and the Impugned Order passed by the Commission was held aside. The matter was remitted back to the Hon'ble Commission for re-consideration and Hon'ble Commission was directed to pass appropriate orders in accordance with law after affording reasonable

opportunity of hearing to the Appellant and the Respondent and dispose of the matter as expeditiously as possible at any rate within the period of three (3) months from the date of appearance of the parties before the Hon'ble Commission.

**Issues before the Hon'ble MERC:**

A. Whether claim of Rs.5.01 Crores is admissible in view of documentary evidence placed on record?

B. Whether claim of Rs.4.04 Crores, which is post COD of the project is admissible?

C. What are the modalities of carrying cost?

D. What should be the frequency of payment of compensation amount?

**Held by the Hon'ble MERC:**

1. The Hon'ble Commission vide its Order dated May 04, 2022 ("**Order**") held that the exercise of establishing one-to-one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services is pre-requisite for the claim settlement. The Hon'ble Commission was of the view that any delay in such exercise will only increase the carrying cost component of the change in law compensation. The Hon'ble Commission also held that the claims of the Appellant are supported with CA Certificate and hence, there is no point in delaying change in law compensation which will increase in carrying cost burden on the consumers and the PPA between the Appellant and Respondent is twenty-five (25) years long so any adjustment in claim amount can easily be made. Hence, the Hon'ble Commission held that it is appropriate to allow the claim of Rs.5.01 Crores towards change in law compensation with the condition that the one-to-one correlation exercise be completed within three (3) months from the date of the Order and any adjustment in claim be carried out with associated carrying cost/ holding cost.

2. With relation to second issue the Hon'ble Commission noted that it was difficult to identify the invoices as supply invoice or service invoice which made it difficult to quantify impact of change in law in this respect. However, parties were directed mutually scrutinize these invoices within three (3) weeks from the date of Order. Further, the Hon'ble Commission

also held that the scrutinized amount shall be eligible as compensation for change in law event of increased GST rate whose invoices has been raised post commissioning date and within outer date limit stipulated above. In case of dispute in quantification of claim, aggrieved party may file appropriate petition before this Hon'ble Commission for adjudication of dispute.

3. With relation to the third issue Hon'ble Commission held that it was a well settled principle that compensation on account of change in law provisions has to be granted along with carrying cost so as to restore the affected party to same economic position as if such change in law event has not occurred. However, Hon'ble Commission was of the view that APTFPL has failed to demonstrate actual rate of interest incurred on additional expenses on account of change in law event therefore the Hon'ble Commission allowed interest only on working capital loan.

4. Regarding the frequency of payment of compensation amount the Hon'ble Commission has provided liberty to the Respondent to decide whether it opts to pay the compensation on lump sum basis or per unit basis over the PPA period.

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Warm Regards,

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