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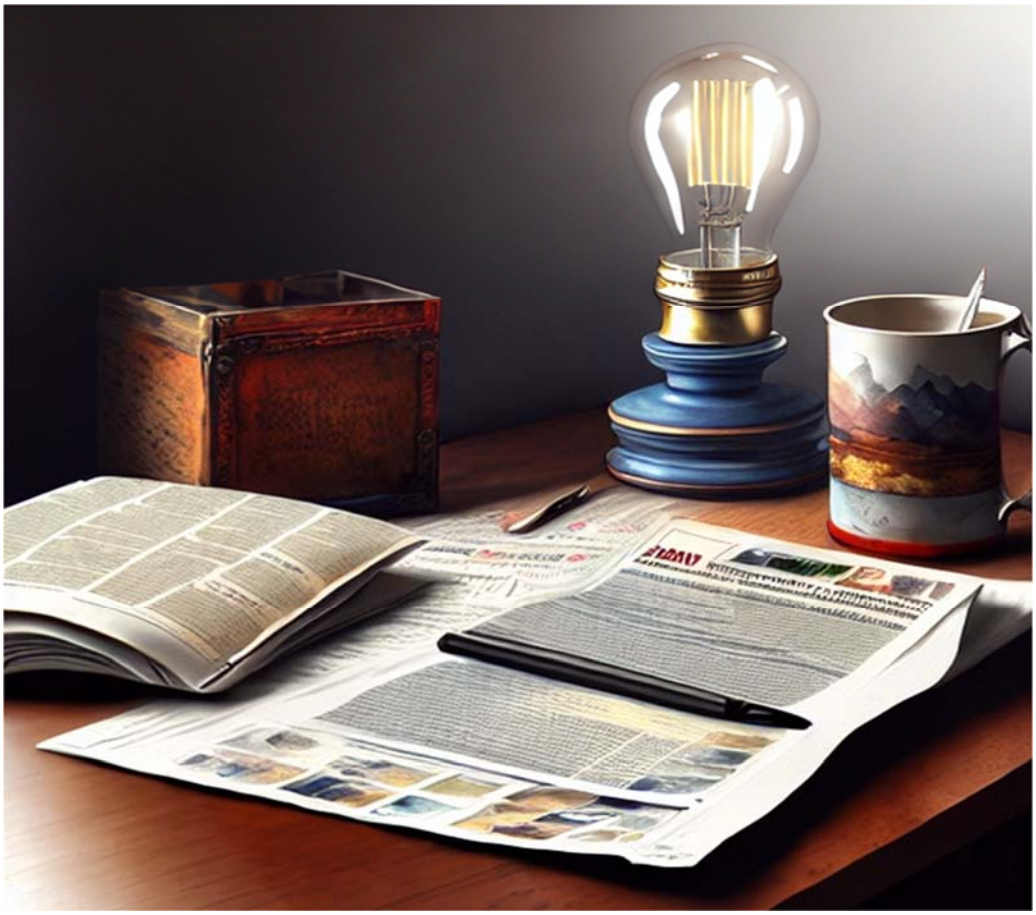

This Newsletter covers key Regulatory & Policy Updates, Government Notifications and Judicial Pronouncements.

REGULATORY & POLICY UPDATES

SEBI amended provisions of the AIF Regulations with respect to holding investments in dematerialized form and appointment of custodian and issued guidelines with compliance terms and timelines.

Security and Exchange Board of India ("SEBI") notified the SEBI (Alternative Investment Funds) (Amendment) Regulations, 2024 ("Amendment Regulations") dated 05.01.2024[1] amending certain provisions of SEBI (Alternative Investment Funds) Regulations, 2012 ("AIF Regulations"). The key highlights of the Amendment Regulations are as follows:

i. A new clause 15(1)(h)(i) in the AIF Regulations has been added which requires all Alternative Investment Funds ("AIFs") to hold their investments in dematerialized form. However, this requirement does not apply in case of (a) investment by AIFs in instruments that are not eligible for dematerialization; (b) investments held under liquidation schemes not available in dematerialization form; and (c) such other investments as specified by SEBI.

ii. Amendment Regulations also stipulate that all AIFs, irrespective of the size of the corpus of the AIF, are now required to appoint a custodian registered with SEBI for the safekeeping of the AIF's securities.

iii. A new provision, clause 20(11A), has been introduced which stipulates the conditions to be met where the

[1] AIF Amendment Regulations

custodian sought to be appointed in respect of an AIF is an associate of the sponsor or manager of such AIF.

Further, to the Amendment Regulations, SEBI issued guidelines specifying additional conditions for complying with the Amendment Regulations by its circular dated 12.01.2024[2]. The key highlights of the guidelines are as follows:

i. *AIF's Investment in Dematerialization*:
   - From 01.10.2024, all investments made by an AIF must be held in dematerialized form, regardless of whether the investment is direct or acquired from another entity.
   - Investments made by an AIF prior to 01.10.2024 are exempt from this requirement, except in cases where the investee company is mandated by applicable law to facilitate dematerialization or where the AIF, independently or with other SEBI-registered entities, exercises control over the investee company. Investments falling under these conditions must be dematerialized by January 31, 2025.
   - The dematerialization requirement does not apply to AIF schemes ending on or before January 31, 2025, or those in extended tenure as of the date of the circular.

ii. *Appointment of custodian:*
   - The custodian for a scheme of an AIF shall be appointed prior to the date of first investment of the scheme.
   - Existing schemes of category I and II AIFs with a corpus ≤ INR 500 crores and at least one investment as of the date of circular must appoint a custodian by January 31, 2025.
   - Regulation 20(11A) of AIF Regulations allows appointment of a custodian by an AIF who is an associate of its sponsor or manager, subject to satisfying the specified conditions. The circular provides that such conditions should be satisfied before January 31, 2025.

iii. *Reporting of investments of AIFs under custody*
   - Regulation 20(11) of AIF Regulations mandates custodians to report AIF investment information in the manner as prescribed by SEBI. In this regard, the Standard Setting Forum for AIFs (SFA), in consultation with SEBI, will create standards for reporting data, outlining formats for AIF managers to report to custodians and for custodians to report to SEBI. All AIF managers and custodians must adhere to these standards.
   - Trustees or Sponsors must ensure that the Compliance Test Report by the AIF's manager aligns with the Master Circular on AIFs dated 31.07.2023, encompassing compliance with these guidelines.

SEBI amended the Master Circular for AIFs to align provisions with PMLA Rules.

In light of the recent amendments to the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 ("PMLA Rules"), specifically revising thresholds for identifying beneficial ownership, SEBI has amended para 4.1.2. in Chapter 4 of the Master Circular for AIFs ("AIF Master Circular") by a circular dated 11.01.2024[3], which is effective immediately.

This amendment to the AIF Master Circular replaces the previous provision requiring AIF managers to ensure, at the time of onboarding of investors for fundraising in AIFs, that investors or their underlying investors contributing 25% or more to the corpus or identified on the basis of control, are not individuals listed in the United Nations Security Council Sanctions List or residents of countries identified by the Financial Action Task Force with strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies. The revised threshold now aligns with PMLA Rules, emphasizing compliance with the new criteria for determining investors or their beneficial owners on an ongoing basis.

RBI released a master direction on non-convertible debenture and commercial papers having an original or initial maturity up to one year.

RBI by its notification dated 03.01.2024 released the Master Direction – Reserve Bank of India (Commercial Paper and Non-Convertible Debentures of original or initial maturity up to one year) Directions, 2024[4] ("CP & NCD Master Directions") to introduce changes in the rules relating to non-convertible debenture ("NCD") and commercial papers ("CP") having an original or initial maturity up to one year.

The CP & NCD Master Directions have been issued in suppression of the following:

i. Notification No. FMD.MSRG.49/02.13.016/2010-2011 dated 28.07.2010 (Reporting of Issuance of Non-Convertible Debentures),
ii. Section IV of FMRD. Master Direction No. 2/2016-17 dated 07.07.2016 (Master Direction on Money Market Instruments: Non-Convertible Debentures (NCDs) of original or initial maturity up to one year), and

[2] SEBI/HO/AFD/PoD/CIR/2024/5 SEBI | Guidelines for AIFs with respect to holding their investments in dematerialised form and appointment of custodian

[3] SEBI | Foreign investment in Alternative Investment Funds (AIFs)

[4] CP & NCD Master Directions.

iii. Direction No. FMRD.DIRD.01/CGM (TRS) – 2017 dated 10.08.2017 (Reserve Bank Commercial Paper Directions, 2017).

The key highlights of CP & NCD Master Directions are:

i. Eligible Issuers: CPs and NCDs may be issued by (a) Companies; (b) NBFCs, including Housing Finance Companies; (c) Infrastructure Investment Trusts and Real Estate Investment Trusts; (d) All India Financial Institutions ("AIFIs"); (e) any other body corporate with a minimum net-worth of ₹100 crore, provided that the body corporate is statutorily permitted to incur debt or issue debt instruments in India; and (f) any other entity specifically permitted by the RBI. Additionally, co-operative societies and limited liability partnerships with a minimum net worth of ₹100 crore, may also issue CPs subject to the condition that all fund-based facilities availed, if any, by the issuer from banks/ AIFIs / NBFCs are classified as Standard at the time of issue.
ii. Eligible Investors: (a) All the residents; and (b) the non-resident permitted under the Foreign Exchange Management Act 1999, or the rules/ regulations framed thereunder.
iii. General Guidelines: CP & NCD Master Directions provide general guidelines such as primary issuance of CPs and NCDs to be issued in dematerialized form with a minimum denomination of ₹5 lakh and in multiples of ₹5 lakh thereafter, the tenor of a CP shall not be less than 7 days or more than 1 year, and for an NCD such tenor shall not be less than 90 days or more than 1 year and also provide for other norms with respect to discount/ coupon rate, credit enhancement, end-use, rating requirements, buyback of CPs and NCD, repayment, etc.
iv. Reporting Requirement: Details of all issuances in primary markets of the CPs and NCDs shall be reported by the IPA on the F-TRAC platform by 5:30 PM on the day of issuance and all secondary market transactions in CPs and NCDs, executed in the OTC market and/or on the recognized stock exchanges, shall be reported with a time stamp within 15 minutes of execution (the time when price is agreed) on the F-TRAC platform by each counterparty to the transaction.
v. Violation: In case of contravention of the CP & NCD Master Directions, the defaulting person shall disallow that person from participating in the CP and NCD markets for a period not exceeding one month at a time after providing a reasonable opportunity to the entity to defend its actions.

APERC amended the Compensation to Victims of Electrical Accidents Regulations, 2017.

Andhra Pradesh Electricity Regulatory Commission ("APERC") on 27.12.2023 issued APERC (Compensation to Victims of Electrical Accidents Regulations, 2017) First Amendment, 2023[5] ("Victim Compensation Amendment") to amend APERC Compensation to Victims of Electrical Accidents Regulations, 2017 ("Victim Compensation Regulation").

Erstwhile Clause 5(2) of the Victim Compensation Regulation provided that compensation for injury to property is provided only if there has been a wrongful act, omission, rashness, neglect, or default on the part of the licensee. The same has been substituted by the Victim Compensation Amendment to provide that an ex-gratia payment will be made even when there is no wrongful act, omission, rashness, neglect, or default by the licensee.

GOVERNMENT NOTIFICATIONS

Ministry of Power notified Electricity (Amendment) Rules, 2024.

The Ministry of Power ("MOP") by way of Notification dated 10.01.2024 notified the Electricity (Amendment) Rules, 2024[6] ("Amendment Rules") to amend the Electricity Rules, 2005 ("Electricity Rules"). Electricity Amendment Rules came into force on 11.01.2024 i.e., date of publication in official gazette. Rule 21 of the Electricity Rules, which provides for the issue of orders and practice directions, has been renumbered as Rule 24.

The Amendment Rules have inserted three rules in the Electricity Rules. Rule 21 of the Electricity Rules provides that a generating company or a person setting up a captive generating plant or an energy storage system or a consumer having load of not less than twenty five megawatt in case of Inter State Transmission System and ten megawatt in case of Intra-State Transmission System shall not be required to obtain license under the Electricity Act, 2003 ("Electricity Act") for establishing, operating or maintaining a dedicated transmission line to connect to the grid, if such company or person or consumer complies with the regulations, technical standards, guidelines and procedures issued under the provisions of the Electricity Act.

Rule 22 of the Electricity Rules provides for open access ("OA") charges, which covers wheeling charges, charges for using State Transmission Utility networks, and additional surcharges for OA Consumers. The formula for calculating wheeling charges is also provided. It is provided that for a person availing General Network Access ("GNA") or OA, the additional surcharge shall be linearly reduced from the value

[5] Victim Compensation Amendment.

[6] Electricity Amendment Rules 2024

in the year in which GNA or OA was granted so that, if it is continued to be availed by this person, the additional surcharge shall get eliminated within four years from the date of grant of GNA or OA. It is further provided that the additional surcharge shall not be applicable for OA Consumer to the extent of contract demand being maintained with the distribution licensees.

Rule 23 of the Electricity Rules provides that the tariff shall be cost reflective and there shall not be any gap between approved Annual Revenue Requirement ("ARR") and estimated annual revenue from approved tariff except under natural calamity conditions. It is provided that such gap shall not be more than three percent of the approved ARR. Further, the gap along with the carrying costs at the base rate of Late Payment Surcharge ("LPS") as specified in the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022 ("LPS Rules") shall be liquidated in maximum three numbers of equal yearly instalments from the next financial year. Lastly, it has been provided that the gap between the ARR and estimated annual revenue from approved tariff existing on the date of notification of Electricity Amendment Rules, along with the carrying costs at the base rate of LPS as specified in the LPS Rules, shall be liquidated in maximum seven numbers of equal yearly instalments starting from the next financial year.

JUDICIAL PRONOUNCEMENTS

Supreme Court refused to order a probe by a Special Investigation Team or CBI into the allegations levelled in the Hindenburg report on the allegations on the Adani group over stock manipulation.

The Hon'ble Supreme Court of India in its judgement dated 03.01.2024 in *Vishal Tiwari vs. Union of India & Others*[7] held that there is no ground to transfer the investigation from the SEBI to a Special Investigation Team or the Central Bureau of Investigation into the allegations that had been levelled in the Hindenburg Research report regarding stock price manipulations by the Adani group of companies.

Hindenburg Research had published a report on 24.01.2023, alleging that the Adani group of companies manipulated share prices and failed to disclose transactions with related parties and other relevant information in violation of the regulations framed by SEBI and provisions of securities' legislation. The report also claimed that the Adani family controlled the offshore shell entities which were used to facilitate corruption, money laundering and taxpayer theft, while siphoning-off money from the listed companies of the group.

Consequently, a batch of 4 writ petitions were filed before the Hon'ble Supreme Court of India under Article 32 of the Constitution of India in February 2023, the lead matter being *Vishal Tiwari vs. Union of India & Others* seeking certain directions due to concerns over the decline in the wealth of the investors and volatility in the share market due to a fall in the share prices of the Adani's group of companies.

It was alleged by the petitioners therein, *inter alia*, that the Adani group is in violation of Rule 19A of the Securities Contracts (Regulation) Rules, 1957 by 'surreptitiously controlling more than 75% of the shares of publicly listed Adani group companies, thereby manipulating the price of its shares in the market.' The petitioners sought, *inter alia*, a court-monitored investigation by a Special Investigation Team or by the CBI into the allegations of fraud and the purported role played by top officials of public sector banks and lender institutions. The petitioners also sought a direction to SEBI to revoke amendments to the FPI Regulations which had "done away with restrictions on opaque structures" and to revoke the amendment made to its LODR Regulations which had altered the definition of 'related party'.

The Hon'ble Supreme Court held that SEBI, established as India's principal capital markets regulator with the aim to protect the interest of investors in securities, has prime facie conducted a comprehensive investigation into the allegations and has already completed 22 out of the 24 investigations into the allegations levelled against the Adani group. That though the Court has the power under Article 32 and Article 142 of the Constitution to transfer an investigation from the authorized agency to the CBI or constitute an SIT, however, such powers must be exercised sparingly and in extraordinary circumstances. Unless the authority statutorily entrusted with the power to investigate portrays a glaring, willful and deliberate inaction in carrying out the investigation the court will ordinarily not supplant the authority which has been vested with the power to investigate.

The Hon'ble Supreme Court further held that there has been no regulatory failure on the part of SEBI and that no valid grounds were raised to direct SEBI to revoke its amendments to the FPI Regulations and the LODR Regulations which were made in exercise of its delegated legislative power. That the procedure followed in arriving at the current shape of the regulations does not suffer from any irregularity or illegality and that the amendments far from diluting, have tightened the regulatory framework by making the disclosure requirements mandatory and removing the requirement of it being disclosed only when sought.

The Hon'ble Supreme Court observed that the petitioner's case appears to rest solely on inferences from the report by the

[7] Writ Petition (Civil) No. 162 of 2023

OCCRP, a third-party organization involved in 'investigative reporting' and that such reports by 'independent' groups or investigative pieces by newspapers cannot be relied on as conclusive proof of the inadequacy of the investigation by SEBI. The Hon'ble Supreme Court further observed that the allegations of conflict of interest against the members of the Expert Committee are not substantiated. The Court further directed the Union Government and SEBI to constructively consider the suggestions of the Expert Committee in its report.

The Hon'ble Supreme Court gave a direction to SEBI to complete the 2 pending investigations expeditiously preferably within the next 3 , and also directed SEBI and the investigative agencies of the Union government to probe into whether the loss suffered by Indian investors due to the conduct of the Hindenburg research and any other entities in taking short position involved any infraction of law, and if so, to take further suitable actions.

Supreme Court held that State Commission can refuse to adopt tariff that is not aligned to market prices.

Supreme Court through its judgement dated 08.01.2024, in the matter of *Jaipur Vidyut Vitran Nigam Limited* v. *MB Power (Madhya Pradesh) Limited*[8] held that the State Commissions can refuse to adopt tariff under Section 63 of the Electricity Act obtained through competitive bidding process where the tariff is not aligned with the market prices.

Supreme Court observed that Section 86(1)(b) of the Electricity Act gives ample power on the State Commission to regulate electricity purchase and procurement process of distribution licensees. It also empowers the State Commission to regulate the matters including the price at which electricity shall be procured from the generating companies, etc..

The Supreme Court further noted that the Bidding Guidelines[9] specifically allow the evaluation committee to reject all price bids if the rates quoted are not aligned to the prevailing market prices.

Accordingly, the Supreme Court held that in the instant case APTEL had grossly erred in holding that the State Commission has no power to go into the question, as to whether the prices quoted are market aligned or not and also not to take into consideration the aspect of consumers' interest.

High Court of Delhi held that a petition under Section 34 of the A&C Act is *non-est*, if filed without the arbitral award.

The High Court of Delhi through its judgment dated 19.12.2023 in the matter of *Union of India* v. *M/s Panacea Biotec Ltd.*[10] held that non filing of arbitral award along with the petition under Section 34 of the A&C Act is a fatal defect, making such filing a *non-est*.

The High Court held that the objections under Section 34 of the A&C Act must be on justiciable grounds as prescribed under Section 34(2) of the A&C Act. Such grounds can be ascertained only by referring to the arbitral award. The filing of an arbitral award is not an empty procedural requirement since sans the award, the Court is left absolutely clueless to comprehend the grounds taken in the objection petition and thereby unable to decide whether the petition merits notice or outright rejection.

Applying the above principles, High Court held that the petition correctly filed along with award would be considered the first valid filing in the Court and accordingly limitation shall be applied.

High Court of Delhi held that service of the arbitral award to the lawyers/ advocates/ agents of a party to the arbitration proceeding would not constitute effective service.

The High Court at Delhi through its judgment dated 20.12.2023 in the matter of *Ministry of Health & Family Welfare* v. *M/s Hosmac Projects Division of Hosmac India Pvt Ltd.*[11] held that service of the arbitral award to the lawyers/ advocates/ agents of a party to the arbitration proceeding would not constitute effective service. The High Court held that as per the bare perusal of Section 31(5) of the A&C Act, the term party does not include the lawyers/ advocates/ agents acting on behalf of the party concerned.

The issue for consideration in the instant case was "whether delivery of true copy of Arbitral Award and copy of Corrigendum Order to an authorized representative would constitute delivery in accordance with Section 31(5) of the A&C Act for the purposes of calculating limitation under the Act?

The High Court highlighted that Section 31(5) of the A&C Act mandated the delivery of a signed copy of the Award to each 'party' once it is rendered. The High Court also ruled that for

[8] Civil Appeal No. 6503 of 2022
[9] Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19.01.2005.
[10] FAO (OS) (COMM) 81/2020, CM APPL. 14933/2020, CM APPL. 14933/2020, CM APPL. 32611/2020
[11] CM No. 49717of 2019

valid service under Section 34(3) of the A&C Act, each arbitral award and any correction must be delivered to all parties involved. It was held that a signed copy of the arbitral award served only to the lawyers/ advocates, or the agent of the party does not constitute a valid delivery. Further, the High Court observed that the term 'party' as provided under Section 31(5) of the A&C Act refers to the actual individual/ entity who executed the arbitration agreement and excludes agents or lawyers/ advocates representing the party.

NCLAT held that the Resolution Professional cannot be directed to hand over the charge of Corporate Debtor to the former management upon grant of stay on the CIRP.

NCLAT through its judgment dated 19.12.2023 in the matter of *Mr. Mukesh Kumar Jain* v. *Navin Kumar Upadhyay*[12] held that Resolution Professional ("RP") cannot be directed to hand over the charge of Corporate Debtor ("CD") to the Ex-management where the corporate insolvency resolution process has been stayed.

NCLAT also noted that transferring the charge of the CD to the former management could be dangerous and prone to the potential misuse of assets of the CD which could adversely affect the creditors of the CD.

NCLAT held that disallowing the RP to look after the day-to-day operations and affairs of the CD could create a situation where the possibility of reviving the CD shall be diminished. NCLAT further highlighted that the stay of CIRP would mean that the RP would have to await the order of the Appellate Court and cannot take any further steps with respect to the process of insolvency resolution and thus, such a direction to hand over the management to the suspended directors of the CD is wholly unjustified and is liable to be set aside.

Karnataka Electricity Regulatory Commission allowed the claim towards Goods and Service Tax impact subsequent to commercial operation date along with carrying cost.

Karnataka Electricity Regulatory Commission ("KERC") vide its judgment dated 28.12.2023 in the matter *of Adani Green Energy (UP) Limited v. Hubli Electricity Supply Company Limited*[13]allowed the claims towards GST impact subsequent to commercial operation date ("COD") on the goods purchased and services availed and on the Operation and Maintenance ("O&M") expenses along with carrying cost at 10% per annum on the additional expenditure incurred due to introduction of GST laws.

Originally, two petitions were filed against Hubli Electricity Supply Company Limited ("HESCL") seeking reimbursement for additional expenditures incurred in establishing solar power projects and for O&M charges due to the introduction of GST laws along with carrying cost. The initial petitions were partially allowed, therefore Adani filed appeals before the Appellate Tribunal for Electricity ("APTEL") against the disallowed claims.

APTEL *vide* its Order ("Remand Order") allowed the said appeals and remanded the matters back to KERC and directed KERC to decide the claims considering the Order dated 15.09.2022 passed in *Parampujya Solar Energy Private Limited* v. *Central Electricity Regulatory Commission*[14].

KERC also held that the reliefs pertaining to carrying cost and reimbursement of additional expenditures incurred subsequent to COD will be subject to the final outcome in *Telangana Northern Power Distribution Company Ltd.* v. *Parmpujya Solar Energy Pvt. Ltd.*[15]. Further, KERC directed Adani Green Energy to compute the carrying cost, and HESCL to pay the allowed amounts in quarterly instalments.

ABOUT SAGUS LEGAL

Sagus Legal is a full-service law firm that provides comprehensive legal advisory and advocacy services across multiple practice areas. We are skilled in assisting businesses spanning from start-ups to large business conglomerates including Navratna PSUs, in successfully navigating the complex legal and regulatory landscape of India. Our corporate and M&A, dispute resolution, energy, infrastructure, banking & finance, and insolvency & restructuring practices are ranked by several domestic and international publications. We also have an emerging privacy and technology law practice.

[12] Company Appeal (AT) (Insolvency) No. 930-931 of 2023
[13] O.P. No. 111 of 2018 and Batch
[14] Appeal No. 256/2019
[15] Civil Appeal No. 8880 of 2022.

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