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

REGULATORY & POLICY UPDATES

SEBI issued guidelines on borrowing limits for Category I and Category II AIFs and set a maximum permissible limit for extension of tenure by LVFs.

The Securities and Exchange Board of India ("SEBI") through its circular dated 19.08.2024 ("Circular on AIFs and LVFs")[1] issued the guidelines for borrowing by Category I and Category II Alternative Investment Funds ("AIFs") and the maximum permissible limit for extension of tenure by Large Value Fund for Accredited Investors ("LVFs"). The Circular on AIFs and LVFs came into force with immediate effect i.e., on 19.08.2024. Key highlights of the Circular on AIFs and LVFs are as follows:

(i) Category I and Category II AIFs are now permitted to borrow funds for meeting shortfall in drawdown amount subject to the following conditions:
   (a) borrowing shall be disclosed in the Private Placement Memorandum ("PPM") of the scheme;
   (b) such borrowing shall be done only in case of emergency and as a last recourse when the investment opportunity is about to be closed;
   (c) borrowed amount shall not exceed twenty per cent of the investment to be made in the investee company, or ten per cent of the investable funds of the scheme of AIF, or commitment pending from investors, whichever is lower;
   (d) the investor who has failed to provide the drawdown amount will be charged the cost for such borrowing.

[1] SEBI Circular on AIFs and LVFs

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(ii) The regulations applicable for the tenure of LVFs have been superseded by the Circular on AIFs and LVFs, providing the following conditions in this regard:
  (a) If existing LVF schemes have not disclosed a definite period of extension of tenure in the PPM or if the period of such extension is beyond the permissible five years, then the existing LVF is required to align the period of extension in tenure through approval of two-thirds of the unit holders by value of their investment in the LVF on or before 18.10.2024;
  (b) LVF schemes shall have the flexibility to revise their original tenure upon consent of all the investors of the scheme. LVF schemes will submit an undertaking to SEBI on or before 18.10.2024 stating that consent of all the investors of the scheme has been obtained for revising the original tenure.

(iii) Condition for extension of tenure for LVFs given in para 12.14 of Master Circular for AIFs dated 07.05.2024[2], shall not be applicable from the date of the Circular on AIFs and LVF.

SEBI notified amendments to the SEBI (Intermediaries) Regulations, 2008, SEBI (Depositories and Participants) Regulations, 2018, and the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018.

SEBI has notified amendments to the SEBI (Intermediaries) Regulations, 2008[3], SEBI (Depositories and Participants) Regulations, 2018[4], and the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018[5] (collectively referred to as "SEBI Amendment Regulations"). The SEBI Amendment Regulations were published in the official gazette and came into effect on 29.08.2024. Key amendments across the SEBI Amendment Regulations are as follows:

(i) A new chapter titled 'Restriction in dealing with Other Entities/Regulated Entities' has been incorporated within each of the aforementioned SEBI Regulations. The relevant chapter aims to restrict the Depositories, Intermediaries, Stock Exchanges, Clearing Corporations and their agents from having any direct or indirect association with any unregulated person/entity who (i) provides advice or recommendations either directly or indirectly related to securities without proper registration or permission from SEBI; or (ii) makes any claim regarding returns or performance related to securities without SEBI's authorisation. Additionally, an obligation on the relevant Intermediaries, Depositories, Stock Exchanges and Clearing Corporations has been included to ensure that any person associated with them, or their agents does not engage in the aforementioned activities.

(ii) Each of the aforementioned regulations also provides an exemption for associations through specified digital platforms, provided such platforms have adequate preventive and curative mechanisms to the satisfaction of SEBI.

(iii) An 'explanation' under each of the aforementioned regulations states that the term 'association' shall include transactions involving money or money's worth, referral of a client, interaction of information technology systems or any other association of a similar nature or character.

GOVERNMENT NOTIFICATIONS

Ministry of Finance issued Foreign Exchange Management (Non-debt Instruments) (Fourth Amendment) Rules, 2024.

The Ministry of Finance issued the Foreign Exchange Management (Non-debt Instruments) (Fourth Amendment) Rules, 2024, on 16.08.2024[6], amending the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 which came into force on 16.08.2024. Key highlights of the amendment are as mentioned below:

(i) The definition of "Control" has been included to align with the definition provided under the Companies Act, 2013. For Limited Liability Partnerships ("LLPs"), the definition refers to the right to appoint a majority of the designated partners, who control all LLP policies.

(ii) The definition of "Startup Company" has been amended to include private companies as defined under the Companies Act, 2013 and also to private companies identified as startups under the Government of India's 2019 notification[7], and all amendments thereof.

(iii) Prior Government approval is now required in all cases wherever Government approval is applicable involving the transfer of equity instruments of an Indian company or units by a person resident outside India, earlier such approval was only required when the company was engaged in a sector requiring Government approval.

(iv) The transfer of equity instruments of an Indian Company, between a person resident in India and person resident outside of India, *via* a swap of equity instruments or swap equity capital of a foreign company has been allowed subject to rules and regulations prescribed by the Central Government and the Reserve Bank of India.

[2] Master Circular for AIFs
[3] SEBI (Intermediaries) Regulations, 2008
[4] SEBI (Depositories and Participants) Regulations, 2018
[5] Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018
[6] FEMA NDI Fourth Amendment Rules
[7] G.S.R. 127 (E), dated 19.02.2019

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(v) Investments by Indian entities owned and controlled by Non-Resident Indians ("NRI") or Overseas Citizens of India ("OCI") including a company, partnership firm, and trust incorporated outside India which is owned and controlled by an NRI or OCI, on a non-repatriation basis, shall not be considered as indirect foreign investment.

Ministry of Finance issued Securities Contracts (Regulation) Amendment Rules, 2024.

The Department of Economic Affairs, Ministry of Finance, through its notification dated 29.08.2024 has notified the Securities Contracts (Regulation) Amendment Rules, 2024 ("SCRR Amendment") to amend the Securities Contracts Regulation Rules, 1956 ("SCRR")[8]. The SCRR Amendment will ease the listing requirements for Indian companies that intend to list on international exchanges within International Financial Service Centres ("IFSCs"). Key highlights of the SCRR Amendment are as mentioned below:

(i) The addition of new definitions under Rule 2 of SCRR, specifically defining "International Financial Services Centre" and "International Financial Services Centres Authority".
(ii) Rule 19 of SCRR which deals with the requirements with respect to the listing of securities on a recognised stock exchange is amended and an explanation has been added under Rule 19(2)(b) of SCRR to provide that for public Indian companies desiring to list solely on international exchanges in IFSCs, the minimum offer and allotment to the public as per the offer document shall be at least ten per cent of the post-issue capital.
(iii) Rule 19A of SCRR which talks about continuous listing requirements, an explanation has been inserted under its sub-rule (6), which provides that the continuous listing requirement for such companies has also been set at ten per cent.

Ministry of New and Renewable Energy issued an Office Memorandum.

The Ministry of New and Renewable Energy ("MNRE") on 28.08.2024 issued an Office Memorandum with respect to the updated List-I (Manufacturers and Models of Solar PV Modules) of Approved List of Models and Manufacturers ("ALMM") under the ALMM Order, 2019 ("ALMM OM")[9].

MNRE through the ALMM OM has revised List-I under the ALMM Order, 2019 providing the updated list of ALMM along with the details of the provisional enlistments granted by MNRE. Further, in terms of the ALMM OM, the ALMM enlistment validity is subject to valid BIS Registration, failing which the same shall be deemed to be delisted. The updated List – I of ALMM has been provided with the ALMM OM under Annexure I.

JUDICIAL PRONOUNCEMENTS

Supreme Court held that the decision in Mineral Area Development Authority & Anr v M/s. Steel Authority of India & Anr etc. cannot be given a prospective effect.

The Supreme Court of India through its order dated 14.08.2024 in *Mineral Area Development Authority & Anr* v. *M/s. Steel Authority of India & Anr Etc.,* held that the nine judge Constitution Bench decision in *Mineral Area Development Authority & Anr* v. *M/s. Steel Authority of India* ("MADA judgment") *& Anr.*[10] cannot be given a prospective effect. The Supreme Court in the MADA judgment overruled the *Indian Cement Ltd.* v. *State of Tamil Nadu*[11] ("Indian Cement judgment") which held that royalty is tax, and the State legislatures lacked competence to levy taxes on mineral rights.

In the present case, the question before the Supreme Court was whether the MADA judgment be given prospective effect. The Supreme Court held that a court generally does not declare prospective overruling while holding the legislative competence of the legislature. Further, it was observed that MADA judgment upheld the legislative competence of the States to levy taxes on mineral rights. Thus, in case a prospective effect is given to MADA judgment, the validity of all the legislation promulgated before the date of MADA judgment will have to be tested on the touchstone of the previous law, interpreting Entry 54 of List I and Entries of 23 and 50 of List II of the Seventh Schedule, however, the same was unsettled due to conflicting decisions.

The Court opined that if MADA judgment is applied prospectively, then the relevant tax legislation may be invalidated, requiring the respective State Governments to refund the amount collected by the assesses. Further, it would also result in a scenario where legislation enacted by the States under their plenary powers will be invalidated in light of the position of law which has been overruled and it will not result in a constitutionally justified outcome. Thus, having rejected the claim for giving prospective effect to MADA judgment, the Supreme Court prescribed that:

(i) The demand of tax shall not operate on transactions made before 01.04.2005, however, the States may levy/ renew demands of tax under Entries 49 and 50 of List II of the Seventh Schedules under the decision of MADA judgment after 01.04.2005;

[8] Securities Contracts (Regulation) Amendment Rules, 2024.
[9] Office Memorandum- Approved list of models and manufacturers.
[10] Civil Appeal Nos. 4056-4064 of 1999 and Batch
[11] (1990) 1 SCC 12

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(ii) The payment for the demand of tax shall be spread out in instalments for a period of 12 years beginning from 01.04.2026; and
(iii) The Levy of interest and penalty on demands made before 25.07.2024 will be waived off for all the assesses.

Supreme Court clarified that only a substantial question of law can be raised while challenging an order of APTEL under Section 125 of the Electricity Act, 2003.

The Supreme Court through its judgement dated 27.08.2024 in the matter of *Bangalore Electricity Supply Company Limited* v. *Hirehalli Solar Power Project LLP & Others*[12] held that the restrictive scope of appellate jurisdiction does not signify the statutory precondition but is also required to enable freedom to statutory regulator and tribunal to develop sectorial laws by way of a consistent approach.

In the present case, Bangalore Electricity Supply Company Limited ("BESCOM") challenged an order passed by the Appellate Tribunal for Electricity ("APTEL") which granted Hirehalli Solar Power Project LLP & Others ("SPDs") the benefit of the force majeure clause and an extension of Scheduled Commissioning Date ("SCD").

The Supreme Court, referring to the judgment of *SEBI* v. *Mega Corporation Limited (Civil Appeal No. 2104 of 2009)*, noted that appellate jurisdiction under Section 125 of the Electricity Act, 2003 ("Electricity Act"), requires addressing not just any legal question, but a substantial question of law. The Supreme Court also observed that the Electricity Act envisaged the establishment of State Electricity Regulatory Commissions and the Central Electricity Regulatory Commission as expert and specialized bodies discharging advisory, regulatory, and adjudicatory functions. Further, APTEL was formed to hear appeals against orders of the Appropriate Commission. Thus, in deciding appeals under Section 125 of the Electricity Act, it was held that the Supreme Court must be mindful so to enable a systematic and coherent development of electricity law by the Appropriate Commissions and APTEL.

The Supreme Court upheld the findings of APTEL and held that APTEL has duly reappreciated the evidence to find that the delay was not attributable to the SPDs but to the governing bodies and relevant authorities. Lastly, it was held that there is no substantial question of law in the present case and the findings of APTEL are neither illegal nor unreasonable.

High Court of Delhi held that terms of the settlement agreement should not be read as statute, intention has to be gathered from the terms of the agreement.

The High Court of Delhi through its order dated 20.08.2024 in the matter of *M/s Hotel Marina & Anr.* v. *Vibha Mehta*[13] held that the terms of the settlement agreement are not to be read as statute. The intention of the parties is to be gathered from the terms of the Agreement.

In the present case, dispute arose with respect to the execution of the decree, wherein the judgement debtor contended that decree holder has failed to fulfil its obligation under the settlement agreement. Thus, decree cannot be executed.

The Court observed that as per Section 51 of the Indian Contract Act, 1872 ("Contract Act"), where a contract consists of a reciprocal promise to be simultaneously performed, no promisor needs to perform his promise unless the promisee is ready and willing to perform his reciprocal promise. In the present case, the settlement agreement provided reciprocal promises to be performed by a judgment debtor and a decree holder. The failure on part of the judgment debtor to perform its obligation would not entitle it to claim that the decree cannot be executed.

Further, the court relied on the judgment of the Supreme Court in the matter *Chen Shen Ling* v. *Nand Kishore Jhajharia, ((1973) 3 SCC 376))*, wherein it was held that where the decree imposes mutual obligations on both the parties in such a way that the performance of one is conditional on the performance by the other, no execution can be ordered unless the party seeking execution offers to perform their part.

High Court of Delhi held that disputes related to excise duty are capable of being resolved by arbitration unless it involves sovereign function.

The High Court of Delhi through its order dated 22.08.2024 in the matter of *Bharat Broadband Network Ltd* v. *Paramount Communications Ltd*[14] held that disputes related to excise duty are arbitrable unless it involves a sovereign function such as the liability to pay tax or the rate at which the tax must be paid.

In the present case, Bharat Broadband Network Ltd ("Bharat Broadband") issued purchase orders to Paramount Communications ("Paramount"). The dispute arose between the parties with respect to the difference in classification of the excise duty payable on the goods by Bharat Broadband and the classification adopted by the Excise Department basis which Paramount raised the invoices.

[12] Civil Appeal No. 7595 of 2021
[13] Execution Petition 128/2012
[14] O.M.P. (COMM.) 355/2024 & I.As. 36554/2024, I.A. 36555/2024

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The Court held that the question of sovereign function would arise if the liability to tax or the rate at which the duty must be paid was in issue. Further, for a dispute relating to sovereign function, it must have some effect on the rights and liabilities of the State, however, in the present case the revenue authorities were not a part of the present dispute, and the dispute was between two commercial entities.

NCLAT held that a dispute regarding payment of GST dues is not a "pre-existing dispute" that would bar the initiation of CIRP under Section 9 of the Code.

The National Company Law Tribunal ("NCLAT"), Principal Bench, Delhi through its judgment dated 22.08.2024 in the matter of *Mr. Gulshan Kumar Ahuja v. Monika Garg and Anr*[15]. held that a dispute regarding payment of Good and Service Tax ("GST") dues is not a "pre-existing dispute" between the parties that would bar the initiation of the Corporate Insolvency Resolution Process (CIRP) under Section 9 of the Insolvency & Bankruptcy Code, 2016 ("Code").

NCLAT observed that the alleged dispute regarding the payment of GST dues is not a pre-existing dispute between the parties that would prevent the initiation of Section 9 proceedings as the alleged pre-existing dispute concerning GST dues was not between the parties (the Operational Creditor and the Corporate Debtor) but between the Corporate Debtor and the Directorate General of GST Intelligence.

NCLAT held that a bank cannot initiate action under the SARFAESI Act against a personal guarantor while an interim moratorium is in effect under the Code.

NCLAT through its judgment dated 28.08.2024 in the matter of *Indiabulls Asset Reconstruction Company Limited* v. *Pawan Kapoor*[16] held that once an interim moratorium is invoked under the Code against a personal guarantor, the bank is barred from further actions under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"), concerning the property mortgaged by the personal guarantor.

The present appeal challenged an order of NCLT, New Delhi directing immediate restoration of possession of Pawan Kapoor's property, previously taken over by Indiabulls Asset Reconstruction Company Limited ("Indiabulls"), to the Interim Resolution Professional. The key issue before NCLAT was whether the proceedings under SARFAESI Act were completed when Indiabulls took symbolic possession of the mortgaged property.

NCLAT relied on the ruling in *Sanjay Dhingra* v. *IDBI Bank Ltd. (WP(C) No. 8131/2020)* passed by High Court of Delhi, which held that applicability of interim moratorium under Section 96 of the Code on the proceedings initiated by a bank under SARFAESI Act, cannot be excluded merely because the bank has taken possession prior to commencement of insolvency proceedings against personal guarantor. Section 96 of the Code specifies that the interim moratorium applies to all debts of the personal guarantor, including the mortgage on the property in question, which is involved in the SARFAESI proceedings. Therefore, under the law, any legal action or proceeding related to any debt of the personal guarantor is automatically stayed once the interim moratorium begins. Therefore, the bank could not proceed with further actions under the SARFAESI Act after the insolvency proceedings commenced. Accordingly, relying on the above precedent, NCLAT dismissed the present appeal.

[15] Company Appeal (AT) (Insolvency) No.1202 of 2024

[16] Company Appeal (AT)(Insolvency) No.192/2021

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