Lakshmikumaran & Sridharan attorneys

# corporate amicus

An e-newsletter from
**Lakshmikumaran & Sridharan**, India

January 2018 / Issue–76

**Lakshmikumaran & Sridharan wishes you a very happy and prosperous New Year 2018**

## Contents



**January**
**2018**

# Articles

## Aiming greater transparency on sale of packaged commodity online

By **Rohit Subramanian**

The e-commerce sector has witnessed a phenomenal growth in the past few years resulting in the Central Government hightailing numerous legislative actions, initiatives and policies to regulate e-commerce companies. The Government *vide* these measures seek to ensure transparent and hassle-free operation of the e-commerce industry. Typically, foreign funded e-commerce operators are subject to further scrutiny to monitor their adherence to permissible business models. Given the remoteness of e-commerce operations, it is even more important to develop a strong regulatory framework to protect consumer interests.

The Legal Metrology Act, 2009 (LM Act) read with the Legal Metrology (Packaged Commodities) Rules, 2011 (PC Rules) prescribe standard measures and quantity for sale, manufacture, packing and import of commodities and labelling and declaration requirements to be fulfilled by the manufacturer/packer. The primary objective of these legislations is to ensure that the consumer of a "*pre-packaged commodity*" is aware of product and manufacturer's information and, accordingly, makes an informed purchase. The term "*pre-packaged commodity*" means a commodity, which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity.

Until recently neither the LM Act nor the PC Rules recognized or prescribed compliances for "*e-commerce*" or "*e-commerce entities*". However, the PC Rules were amended *vide* the Legal Metrology (Packaged Commodities) Amendment Rules, 2017 ("Amendment Rules") introducing substantive changes to bring e-commerce entities under its ambit. The proposed amendment shall come into effect as on January 1, 2018. This Article seeks to capture the impact of these amendments on e-commerce entities.

### *Applicability*

The terms "*consumer*", "*e-commerce"*, "*e-commerce entity*" and "*marketplace based model of e-commerce"* have been introduced in the PC Rules, which replicate the definitions used in the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (TISPRO Regulations). As a result, entities owned and controlled by non-residents, conducting e-commerce business shall now have to conform to the requirements prescribed in the PC Rules. Both inventory and marketplace models of e-commerce business have been covered by the aforesaid definitions. Therefore, sale and purchase transactions of goods/services over a digital electronic network as well as the provision of such network to facilitate the sale between buyer and seller shall be construed as e-commerce business for the purposes of PC Rules.

The definition of "Institutional Consumer" has been amended to mean the institution, which buys packaged commodities bearing a declaration 'not for retail sale', directly from the manufacturer or from an importer or from wholesale dealer for use by that institution and not for commercial or trade purposes.

The medical devices that have been in the past notified[1] as drugs have also been brought within the ambit of the PC Rules and shall have to adhere to the labelling requirements.

The Amendment Rules brought in certain additional exclusions w.r.t. the applicability of the PC Rules, which shall now not apply to (a) packages of commodities containing quantity of more than 25 kilograms or 25 litre; (b) cement, fertilizer and agricultural farm produce sold in bags above 50 kilograms; and (c) packaged commodities meant for industrial consumers or institutional consumers.

## *Declarations*

Rule 6 of the PC rules stipulates that every package or a label securely affixed on the package shall bear such prescribed declarations, which are definite, plain and conspicuous in nature. Rule 6(10) has been inserted *vide* the Amendment Rules stipulating an e-commerce entity to mandatorily display declarations specified in Rule 6(1) of the PC Rules on the digital and electronic network used by such entity for e-commerce transactions. In this regard, details with respect to the month and year of manufacture or packing can be omitted. Some of the declarations to be mandatorily displayed by e-commerce operators are as stated in the table below:

| # | DECLARATIONS |
|---|---|
| 1. | **Name and address of manufacturer/packer/importer** |
| 2. | Name of the **country of origin** or manufacture or assembly in case of imported products |
| 3. | **Common or generic names of the Commodity** |
| 4. | Net quantity/standard unit of weight or measure/number of units in the package |
| 5. | If the packaged commodity can become unfit for human consumption after a period, the "**best before**" or "**use by date**" must be mentioned on the label. |
| 6. | **Retail sale price** of the package indicating the maximum retail price inclusive of all taxes in the manner illustrated in the PC Rules |
| 7. | **Dimensions** of the commodity(s) contained in the package if the size of the commodity is relevant |

Apart from the mandatory declarations, the Amendment Rules provides that the package can also have the following declarations – (a) Barcode or GTIN or QR Code; (b) "e-code" for net quantity assurance of the commodity and other required declarations, after obtaining the same in the manner as specified by the Central Government; (c) logos of Government schemes, such as Swatch Bharat Mission, where such use is authorised by the Central Government.

The Amendment Rules have also attended to two most crucial issues of – (i) legible declarations and, therefore, it has increased the size of letters & numerals in the declarations; and (ii) dual MRP on the labels, so, it has inserted that unless otherwise specifically provided under any other law, no manufacturer or packer or importer shall declare different MRPs on an identical pre-packaged commodity.

Notwithstanding the display of the aforesaid information by the e-commerce entity on the digital or electronic network, the packaged commodities delivered to the consumer shall mandatorily contain all the declaration(s) prescribed under PC Rules. Compliance with the Amendment Rules, shall undoubtedly add on to the operational costs of the e-commerce entity

[1] For the list of notified medical devices please visit http://www.cdsco.nic.in/writereaddata/list-of-notified-medical-device(1).pdf (Last visited on Dec 28, 2017)

but shall also result in greater accountability to the consumers. Ideally e-commerce operators should revise their contract with their vendors, suppliers etc. for more stringent representations and warranties specifically related to the accuracy of information displayed on the e-commerce platform. In the event, any claim or action is initiated under the LM Act against the e-commerce operator, indemnity protection should be sought from the seller or vendor of the product in this regard.

### *Validity of packaging material*

Proviso (B) to Rule 6 of the PC Rules provides for situations wherein the manufacturer/packer/importer is unable to exhaust the packaging material during the relevant month. In such cases, the packaging material can be used for pre-packing the commodity produced or manufactured in the succeeding month and not thereafter. In such cases, the Central Government also has the authority to further extend the period for revising the declarations on the package, based on facts and circumstances of the delay.

Exercising this authority, the Central Government issued a notification[2], allowing industries to use old packaging material till March 31, 2018 or till such date the packing material or wrapper is exhausted to enable the clearance of old stocks. It is to be noted that the benefit of the said relaxation is yet to be extended to e-commerce entities. Given the objective of the Amendment Rules is to ensure that consumers get a true picture of the products purchased through e-commerce platforms, further clarity should be provided on the treatment of such excess packaging material. In the event, information as per the old packaging material is displayed on the digital platform, the information viewed by the consumer shall be inaccurate, whereas in case correct information is displayed on the e-commerce platform, there will be a mismatch between the information displayed on the platform and declarations on the package delivered to the consumer.

### *Market place model of e-commerce*

The Amendment Rules cull out an exemption for e-commerce entities, which have adopted a market place model of e-commerce. For them, the responsibility for the correctness of declarations shifts on the manufacturer, seller, packer or importer who transacts with the commodities on the digital or electronic network on the fulfillment of the following conditions:

a. The entity's role is restricted to providing access to communication system(s) over which information made available by the manufacturer or seller or dealer or importer is temporarily stored or hosted.
b. The entity does not engage in (a) initiation of transmission; (b) selecting the receiver of transmission or (c) modifying the information contained in the transmission.
c. The entity adheres to the guidelines prescribed under the Information Technology (Intermediaries guidelines) Rules, 2011 and any other guidelines issued by the Government in this behalf.

Further, the amended PC Rules is also mindful of unlawful activities committed by e-commerce entities and does not accord any protection to them if found to have conspired, abetted, aided or induced the commission of an unlawful act or despite being notified by the appropriate government, has failed to remove such information, data or communication link residing in or connected to a computer resource controlled by the entity which was used to commit the unlawful act.

Going forward, it would be interesting to note whether e-commerce entities operating a market-

[2] WM-10 (65)/2017 dated 19.12.2017 issued by Legal Metrology Division to the Controllers of Legal Metrology

place model would fit itself within the contours of exemptions stated hereinabove. Considering that such e-commerce platforms do fulfill compliances befitting an Intermediary under the relevant rules and regulations, the role of these entities often stretch beyond providing mere communication access.

### *Conclusion*

The Amendment Rules do well to protect and enhance consumer interests. The PC Rules accounts for requirements and compliances under other laws and, accordingly, exemptions have been incorporated to exclude commodities governed by the Food Safety and Standards Act, 2006 and the rules made thereunder from displaying any of the declarations stipulated in the PC Rules. Parallelly, the Food Safety and Standards Authority of India have also issued guidelines on February 2, 2017 for the operation of e-commerce "food business operators". The guideline *inter alia* also mandates the sellers/brand owners/ manufacturers displaying or offering "pre-packaged food" for sale, to ensure that legible and clear picture of the "principal display panel" is made available for viewing by the customers. Pursuant to these amendments, it is safe to say that a Legal Metrology officer is empowered to act against an e-commerce operator, however only the manner of implementation of these rules in the times to come shall reveal whether the government is considerate towards the practical difficulties faced by e-commerce operators in complying with the declaration requirements under PC Rules.

**[The author is Senior Associate in Corporate law Practice, Lakshmikumaran & Sridharan, Bangalore]**

## Condonation of Delay Scheme, 2018

By **Pulkit Chaturvedi**

Statutorily, Companies are required to file their annual financial statements and annual returns with the Registrar of Companies of their respective jurisdictions ("RoC") in the forms as prescribed and rolled out by Ministry of Corporate Affairs ("MCA") from time to time. Consequently, any non-filing of these documents is construed as an offence under the provisions of Companies Act, 2013 (or its predecessor act), as the case may be ("Act") and the rules framed thereunder. Section 164(2) of the Act read with Section 167[3] provides for disqualification of a director on account of default by a company in filing an annual return or a financial statement for a continuous period of three financial years.

Whereas, consequent upon notification of provisions of section 164(2), MCA had noticed that a large number of companies had not filed their financial statements. To rectify this, and to provide an opportunity to the defaulting companies, the MCA launched a Company Law Settlement Scheme, 2014 ("CLSS") providing an opportunity to the defaulting companies to clear their defaults within a 3 month period from August 2014 to October 2014.

Subsequent to CLSS, the MCA in September 2017, identified around 2.09 lakh companies that had failed to file financial statements or annual returns for a continuous period of three financial years 2013-14 to 2015-16. In accordance with Section 248 of the Act, these companies were struck off from the register of companies. The MCA further

[3] Both sections were notified and commenced with effect from April 1, 2014.

identified 3,09,614 directors associated with such companies and in terms of provisions of Section 164 (2) read with Section 167 (1) (a) of the Act, they were barred from accessing the online registry and were disqualified to act as directors. A list of the struck off companies and the disqualified directors was uploaded by the MCA on its portal. The Ministry of Finance, after this decision by the MCA had directed the banks to restrict operations of bank accounts associated with such companies. This action of striking-off defaulting companies and blocking their bank accounts was done with a view to combat the issue of black money and illicit fund flows, disguised in the form of shell companies.

Due to this, a number of writ petitions in various High Courts, petitions in the National Company Law Tribunal and representations were made by various stakeholders including representations from industries, defaulting companies and their directors seeking an opportunity for the defaulting companies to complete their compliant and normalize operations. The MCA, through General Circular No.16/2017 ("Circular") has notified the Condonation of Delay Scheme, 2018 ("Scheme") for providing relief to the directors of the companies that had been disqualified, in the month of September, 2017, due to their failure to file financial statements or annual returns.

Based on various representations received by the aggrieved parties and with a view to giving an opportunity to the non-compliant, defaulting companies to rectify the default, MCA in exercise of its powers conferred under sections 403, 459 and 460 of the Act, has notified the Scheme which has come into force with effect from January 1, 2018 and shall remain in force up to March 31, 2018.

The Delhi High Court in the Case of *Shikha Pahuja and Ors*. v. *Ministry of Corporate Affairs and Anr.* wherein the Petitioner had approached the Delhi High Court against her disqualification by the MCA, had stayed the impugned list of disqualified directors so far as it included the names of the petitioners while issuing notices to the respondents[4]. Similar actions were taken by the Madras High Court[5] and the Kerala High Court[6]. It was alleged in the petitions, among other things, that the action of such disqualification and striking off amounts to retrospective application of a penal act and violation of principles of natural justice. The MCA, in reply to the notice, had informed the Court of its intentions to introduce the present Scheme, and upon the petitioner withdrawing its petition due to such intention, the Court had directed the MCA to give wide publicity to the Scheme.[7]

This Scheme is only applicable for a defaulting company and has defined such a company as *"a company which has not filed its financial statements or annual returns as required under the Companies Act, 1956 or Companies Act, 2013, as the case may be, and the Rules made thereunder for a continuous period of three years"*. A defaulting company is permitted to file its overdue documents which were due for filing till June 30, 2017 in accordance with the provisions of Scheme.

The Scheme also provides that it is not applicable to defaulting companies that have been stuck off or whose names have been removed from the register of companies under section 248(5). Section 248 of the Act provides the power to the RoC to remove name of

[4] Order dated October 30, 2017 in *Shikha Pahuja and Ors*. v. *Ministry of Corporate Affairs and Anr*, W.P. (C) 9501/2017 & CM No. 38623/2917, High Court of Delhi

[5] Order dated September 22, 2017 in *R. Ganapathi* v. *Union of India*, WMP 25729 of 2017, High Court of Madras

[6] Order dated September 21, 2017 in *Dr. Azad Moopen* v. *Union of India,* W.P. (C) 30316 of 2017, High Court of Kerala

[7] Order dated December 19, 2017 in *Shikha Pahuja and Ors*. v. *Ministry of Corporate Affairs and Anr*, W.P. (C) 9501/2017 & CM No. 38623/2917, High Court of Delhi

company from register of companies if the company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application to obtain the status of a dormant company.

The Scheme provides for temporary activation of the Director Identification Numbers ("DIN") of the concerned disqualified directors of defaulting companies whose names have not been removed from register of companies, and had been de-activated pursuant to striking off in September 2017, during the validity of the scheme to enable them to file the overdue documents. The defaulting company is then required to file the overdue documents in the respective prescribed eForms by paying the statutory filing fee and additional fee payable as per Section 403 of the Act for filing these overdue documents.

The defaulting company after filing such documents, has to seek condonation of delay by filing form e-CODS online on the MCA portal. The Scheme provides that this form shall be available to be filed from February 20, 2018 and upon payment of the fee of Rs. 30,000/- (Rs. Thirty Thousand only). Although the form will only be available after February, MCA has recommended that the defaulting companies should complete the necessary procedural requirements and file overdue documents without waiting for e-CODS form to be rolled out.

The Scheme however puts a condition upon the defaulting companies whose names have been removed from the register of companies and have filed applications for revival under section 252 of the Act with the NCLT till December 31, 2017. For such companies, the Director's DIN shall be re-activated only upon an order by the NCLT ordering revival subject to the company having filled all overdue documents. Such companies also have to provide the proof of the order of the NCLT or proof of withdrawal of application before the NCLT. It seems likely that the MCA has put this restriction so that there is no conflict of interest between the RoC and the NCLT and the RoC does not take any decisions that are sub-judice.

Any of the defaulting companies or the Directors and the DINs associated with such companies that do not file their overdue documents and the eform CODS, and are not taken on record in the MCA21 registry, shall continue to be disqualified on the conclusion of the scheme and their associated DINs shall be liable to be deactivated. Further, the RoC shall also take all necessary actions under the Companies Act, 1956/ 2013 against the companies who have not availed themselves of this Scheme and continue to be in default in filing the overdue documents and may lead to strike-off of these companies.

The Scheme specifies that the defaulting companies can only file the following documents in pursuance of the Scheme:

i. Form Number 20B/ MGT-7- Form for filing annual return by a company having share capital.

ii. Form 21 A/ MGT-7- Particulars of annual return for the company not having share capital.

iii. Form 23AC, 23ACA, 23AC-XBRL, 23ACA-XBRL, AOC-4, AOC-4(CFS), AOC (XBRL) and AOC-4(non-XBRL) - Forms for filing Balance Sheet/ Financial Statement and profit and loss account.

iv. Form 66 - Form for submission of Compliance Certificate with the Registrar.

v. Form 23B/ ADT-1- Form for intimation for Appointment of Auditors.

The Scheme instructs that the concerned RoC shall withdraw any prosecution(s) pending before the concerned court(s) for all documents filed under the scheme. However, the withdrawal of such prosecutions or the Scheme shall not prevent the RoC to take any action under Section 167(2) of the Act or any civil and criminal liabilities, if any, of such disqualified directors during the period they remained disqualified. Section 167(2) states that if a person functions as a director after being aware about his disqualifications, he shall be punishable with imprisonment for a term of up to one year or with fine of up to Rs. 5,00,000 (Rupees Five Lakhs Only) or both. Thus there is a high possibility that the Directors, even though are provided relief to continue to act as directors, may be subject to criminal liabilities at a later point of time.

This Scheme may prove beneficial for bonafide directors who found themselves suddenly disqualified to act as directors and even to be appointed as a director in any other company for the next five years due to their association with the defaulting companies. It may also prove beneficial for defaulting companies who had not been aware of the notice or had not been able to file the financial statements due to any other genuine reasons. It is appreciable to note that the MCA has heard the representations by the stakeholders and has decided to bring this Scheme to prevent any injustice happening to the innocent directors and defaulting companies who got caught in the larger net laid to catch companies with illicit funding.

**[The author is Associate in Corporate law Practice, Lakshmikumaran & Sridharan, Mumbai]**

# Notifications

**SEBI (Real Estate Investment Trusts) (Amendment) Regulations, 2017:** The Securities and Exchange Board of India ("SEBI") has recently notified the Securities and Exchange Board of India (Real Estate Investment Trusts) (Amendment) Regulations, 2017 *vide* Notification dated December 15, 2017. The Notification aims to streamline and provide clarity on the SEBI (Real Estate Investments Trusts) Regulations, 2014 ("Principal Regulations"). A brief summary of some key amendments to the Principal Regulations is as follows:

A new definition of "strategic investor" has been introduced to mean the following 5 (five) categories of investors who invest, either jointly or severally, not less than 5 (five) percent of the total offer size of the Real Estate Investment Trust ("REIT") or such amount as may be specified by SEBI:

(a) Infrastructure finance company registered with the Reserve Bank of India as a Non-Banking Financial Company;
(b) Scheduled commercial bank;
(c) Multilateral and bilateral development financial institution;
(d) Systematically important NBFC registered with the RBI; and
(e) Foreign Portfolio Investor.

SEBI has streamlined the eligibility criteria for grant of certificate of registration to a REIT. Henceforth, SEBI will consider previous applications of only a 'REIT or the parties to the REIT or their directors/members of governing board' and not the related party of the applicant.

Further, SEBI has tightened the conditions for issuance of units of REIT for sale to the public. SEBI has also included compulsorily convertible securities (from the date such securities are fully paid-up), in addition to equity shares and partnership interest, for the purpose of calculating the 1 (one) year holding period by the existing unit holders prior to the filing of draft offer document with SEBI. Compulsorily convertible securities, whose holding period has been included for the purpose of calculation for offer for sale, are to be converted to equity shares of the holding company or special purpose vehicle ("SPV"), prior to filing of offer document.

The investment conditions and distribution policy have been amended as follows:

(a) Previously, a REIT was required to invest at least 80 percent of value of REIT assets in completed and rent generating properties. The provision has been clarified to mean that a REIT is required to invest in rent and/or <u>income</u> generating properties.
(b) The stringent requirement that a REIT should hold at least two projects, directly or through holding company and/or SPV, has been omitted.

A new provision has been inserted which deals with borrowings and deferred payments. Henceforth, a REIT, whose units are listed on a recognized stock exchange, can also issue debt securities in the manner specified by the SEBI, provided such debt securities are listed on recognized stock exchanges.

Certain additional mandatory disclosures are required to be made by REITs as follows:

- in initial public document or follow on offer document, an additional disclosure '*commitment received from strategic investors, if any*'.

- in its annual report, an additional disclosure of monies lent by REIT to its holding company or the SPV in which it has investments has been inserted.

**SEBI (Infrastructure Investment Trusts) (Amendment) Regulations, 2017:** SEBI has recently notified the Securities and Exchange Board of India (Infrastructure Investment Trusts) (Amendment) Regulations, 2017 *vide* Notification dated December 15, 2017 ("Notification"). The Notification aims to streamline and provide clarity on the SEBI (Infrastructure Investments Trusts) Regulations, 2014 ("Principal Regulations"). A brief summary of some key amendments to the Principal Regulations is as follows:

SEBI has streamlined the eligibility criteria for grant of certificate of registration to an InvIT. Henceforth, SEBI will consider previous applications of only an 'InvIT or the parties to the InvIT or their directors/members of governing board' and not the related party of the applicant.

Further, SEBI has tightened the conditions for issuance of units of InvIT for sale to the public. SEBI has also included compulsorily convertible securities (from the date such securities are fully paid-up), in addition to equity shares and partnership interest, for the purpose of calculating the 1 (one) year holding period by the existing unitholders of InvIT prior to the filing of draft offer document with SEBI. Compulsorily convertible securities, whose holding period has been included for the purpose of calculation for offer for sale, are to be converted to equity shares of the holding company or special purpose vehicle ("SPV"), prior to filing of offer document.

A new provision has been inserted which deals with borrowings and deferred payments. Henceforth an InvIT, whose units are listed on a recognized stock exchange, can also issue debt securities in the manner specified by the SEBI, provided such debt securities are listed on recognized stock exchanges.

REITs shall be required to make an additional disclosure in relation to details regarding the monies lent by InvIT to the holding company or the SPV in which it has investments

**Enhancing Fund Governance for Mutual Funds, 2017:** SEBI has issued Circular No. SEBI/HO/IMD/DF2/CIR/P/2017/125, dated 30-11-2017 aimed at protecting the interests of investors in securities and enhancing the governance structure for Mutual Funds (MFs) in India.

- *Tenure of Independent Trustees and Independent Directors* – The SEBI (Mutual Funds) Regulations, 1996 mandate the appointment of independent trustees of MFs and independent directors. On the issue of tenure of such independent trustees and independent directors, the latest Circular mandates that:
  - ✓ They shall hold office for a maximum of 2 terms with each term not exceeding a period of 5 consecutive years.
  - ✓ They shall not hold office for more than two consecutive terms. However, such individuals shall be eligible for re-appointment after a cooling-off period of 3 years.
  - ✓ Existing independent trustees and independent directors shall hold office for a maximum of 10 years (including all preceding years for which such individual has held office).
- *Auditors of MFs* – The SEBI (Mutual Funds) Regulations, 1996 also mandate the appointment of an auditor. On the issue of tenure of appointment of such auditor, the latest Circular mandates that,
  - ✓ No MF shall appoint an auditor for more than 2 terms of maximum five consecutive years. Such auditor may be re-appointed after a cooling-off period of 5 years.
  - ✓ Existing auditors may be appointed for a maximum of 10 years (including all preceding years for which an auditor has been appointed).

**IRDAI (Investment by Private Equity Funds in Indian Insurance Companies) Guidelines, 2017:** IRDAI has issued certain guidelines [Circular No. IRDA/F&A/GDL/PEF/263/12/2017, dated 5-12-2017] with respect to investment in insurance companies either as an investor or as a promoter. These Guidelines provide clarity as they set out a regulatory framework that will now apply, and which will enable increased flow of Foreign Direct Investment into the country and will also unleash a new era for formation of new-age insurance companies that will lead to deeper penetration and growth of the insurance industry.

- *Applicability* – These Guidelines are applicable to unlisted Indian insurance companies and to the Private Equity Funds ("PEFs/ Funds") who have invested in the unlisted Indian insurance companies, either as an investor or as a promoter.

  PEFs include an Alternative Investment Fund ("AIF") registered with the Securities and Exchange Board of India ("SEBI") and/or a Fund specifically formed for investment in one or more entities by one or more persons.
- *Investment by PEF* – A PEF can, in the capacity of an investor, make direct investments in an Indian insurance company subject to the following conditions:
  1. Investment shall be as per the fund's strategy reflected in its placement memorandum to its investors;

ii. The Fund shall not hold shares in the insurance company exceeding 10% of the paid up equity share capital of insurance company;
iii. All Indian investors including the investment by the PEFs jointly shall not hold more than 25% of paid up equity share capital of the insurance company;
iv. The minimum shareholding by promoters/promoter group shall at all times be maintained at 50% of the paid up equity capital of the insurer. However, where the present holding of the promoters is below 50%, such holding shall be the minimum holding.
v. The investment shall be subject to compliance of Fit and Proper criteria. A self-certification for "Fit & Proper" shall be filed along with the application for transfer of the shares. The conditions required to be fulfilled for the self-certification and the format for such declaration has also been provided in the Guidelines.
vi. A specific undertaking is to be given by the PEFs to not to create any encumbrance on or leverage the investment;
vii. In case the investment is onetime, then the PEF shall make an upfront disclosure to this effect.

Where a PEF (through an SPV) invests in an insurance company in the capacity of an Indian investor, then such PEF shall also be required to comply with the stipulations, as provided above.

- *Investment by PEF through SPV in Indian Insurance Company as Promoter* – The Guidelines prohibit PEFs from investing directly in an Indian insurance company in the capacity of Promoter. However, PEFs can invest through an SPV in an Indian insurance company in the capacity of Promoter, subject to certain conditions:

i. A PEF shall not be a promoter for more than one life insurer, one general insurer, one health insurer and one reinsurer;
ii. investment to be made entirely out of its own funds and not from borrowed funds;
iii. the investments shall be subject to a lock-in period of five years applicable on SPV and also on the shareholders of the SPV holding more than 10% share capital of the SPV;
iv. any induction of new shareholder/s in SPV by issue of fresh shares beyond 25% shall require the prior approval of IRDAI;
v. the minimum shareholding by promoters/ promoter group shall at all times be maintained at 50% of the paid-up capital of the insurer (however, where present holding of promoters is below 50%, such holding shall be the minimum holding) ;
vi. at least one-third of the directors on the Board of the insurance company must be independent directors.

In addition to the above, PEFs are required to comply with the provisions of IRDAI (Transfer of Equity Shares of Insurer) Regulations, 2015 including the filing of application for transfer of equity shares.

# Ratio Decidendi

## Illegal removal of Managing Director and transfer of shares to third party

*Key Points:*

The following amount to grave mismanagement in the company:

i) Illegal removal of the Managing Director ("MD") without serving due notice; and
ii) Violation of the status quo order of the Company Law Board ("CLB")

*Facts:*

The Appellant was a promoter and MD in Naraingarh Distillery Ltd. ("the Company"), holding 19.2 percent equity shares. Disputes arose in the Company and one of the respondents (there were 9 respondents in this case) filed an FIR against the Appellant, as a result of which, the Appellant was imprisoned.

Taking advantage of the fact, an Extraordinary General Meeting ("EGM") was convened and held, the information of which had been published in newspapers, and the Appellant was removed from the position of MD of the Company. The Appellant, once out on bail, initially filed a petition before the Company Law Board, which passed an order to maintain "status quo" ("Status Quo Order / SQO") regarding immovable property and shareholding of the Company.

However, the Respondents transferred their shares to a third party and also increased the shareholding of the Company. The National Company Law Tribunal ("NCLT") to whom the petition was subsequently transferred, dismissed the Appellant's petition challenging such transfer. Hence, the present appeal was made before the National Company Law Appellate Tribunal ("NCLAT").

*Observations:*

1. Whether the Respondents violated the SQO by transferring their shares to third party and changing the shareholding of the Company?
   **Held:** NCLAT held that the Respondents had violated the status quo as they were already aware of the SQO and the pending petition, but had still entered into agreements for transferring their shares and changing the shareholding of the Company.
2. Whether the Respondents acted in an oppressive manner by taking advantage of the Appellant being sent behind bars and convened an EGM to illegally remove the Appellant from the post of MD?
   **Held:** NCLAT held that the Respondents acted in an oppressive manner because there was no special notice or a chance to respond, given to the Appellant, as was required under Section 284 of the Companies Act, 1956. Even the information of the EGM, which had been published in the newspapers, was not according to prescribed norms.
3. Whether the impugned order passed by the NCLT was to be quashed and the transfer of shares as well as their allotment to third party was to be set aside?
   **Held:** NCLAT held that the impugned order passed by the NCLT is to be quashed and the transfer of shares as well as their allotment to third party is to be set aside, as the Respondents continued to act in violation of the SQO and there was a change of shareholding of the Company in spite of the SQO.

*Order:*

The appeal was allowed and the impugned judgment and order passed by the NCLT was quashed and set aside. Transfer of shares to the third party were quashed and set aside. Consideration received by the Company for allotment of said shares was ordered to be refunded within 30 days without any interest. [*Hem Raj Singh* v. *Naraingarh Distillery Ltd.*, Company Appeal (AT) No. 181 of 2017, Order dated 14-11-2017, National Company Law Appellate Tribunal, New Delhi Bench]

## Non-restoration of name of company in Register of Companies

*Key Points:*

Where a company, whose name is struck-off from the Register of Companies for not filing annual return, has failed to prove that at the time of striking-off of the name of the Company, it was carrying on business operations, its name cannot be restored in the Register of Companies.

*Facts:*

The Company had failed to file its annual return since its incorporation in 1998 to 2014. As a result, the name of the Company was struck-off vide Notification dated 23-06-2007.Subsequently, the directors of the Company filed a petition for restoration of the name of the Company.

*Observations:*

Whether the name of the Company could be restored in the register of Registrar of Companies if it is carrying on business or is in operation?

**Held**: Section 560(6) of the Act provides the grounds on which a company could be revived and its name restored in the register of Registrar of Companies. The name of a company could be restored if it is carrying on business or is in operation (the relevant time for proving the operation or business has to be in the year when its name was struck off). A company that has been struck off the register, could be revived on an application made by such company/its member/creditor, before the expiry of twenty years from the date of publication (i.e. relevant Notification striking its name from the register of Registrar of Companies) in the Official Gazette. In this case, there was no explanation put forward by the Company as to why it remained in slumber from 1998 to 2014.

In the present case, the petitioner-Company failed to satisfy the Tribunal that the Company, at the time of striking-off of its name from the Register of Companies, had been carrying on business or was in operation. Further, the Company had failed to enhance its share capital to maintain the prescribed minimum paid-up capital requirements under the Act, as a consequence of which the Company was deemed to be defunct within the meaning of Section 560 of the Act and the Registrar was under a legal obligation to strike-off its name. The petition was dismissed and Notification dated 23-06-2007 upheld. [*Navbharat Gasflame Marketing Co. (P.) Ltd.* v. *Registrar of Companies*, Civil Petition No. 9 of 2015, Order dated 27-10-2017, National Company Law Tribunal, New Delhi Bench]

**NEW DELHI**
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811
-----
B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

**MUMBAI**
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

**CHENNAI**
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

**BENGALURU**
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Ph: +91(80) 49331800
Fax:+91(80) 49331899
E-mail : lsblr@lakshmisri.com

**HYDERABAD**
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail :lshyd@lakshmisri.com

**AHMEDABAD**
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

**PUNE**
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail :lspune@lakshmisri.com

**KOLKATA**
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

**CHANDIGARH**
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

**GURGAON**
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300
Email: lsgurgaon@lakshmisri.com

**ALLAHABAD**
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
phone . +91-0532 - 2421037, 2420359
Email:lsallahabad@lakshmisri.com



**www.lakshmisri.com** **www.gst.lakshmisri.com**
**www.addb.lakshmisri.com** **www.lakshmisri.cn**