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# Corporate & Commercial

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## SEBI marks lien on demat account

As per the new mechanism, upon finalization of the entitlement, only accepted quantity of shares will be debited from the demat account of the shareholders. This revised mechanism will be applicable to all the tender offers for which public announcement will be made on or after October 15, 2021. SEBI has decided that a lien shall be marked against the shares of the shareholders participating in the following offers:

- Tender offers made after open offers; Buy back offers; and Delisting of securities

Under the existing mechanism, the shares tendered by shareholders are required to be directly transferred to the account maintained by the clearing corporation. Such transfer involves systematic risk, substantial time, and cost. As per the new framework, only accepted quantity of shares shall be debited from the account holder's demat account and the lien marked against unaccepted shares shall be released. SEBI said that lien will be marked in the depository system by the depositories in the beneficial owner's demat account for the shares offered in tender offers.

The details of shares marked as lien in clients' demat account will be provided by respective depositories to clearing corporations (**CC**). Further, details regarding shareholder's entitlement for tender offer process will be provided to CCs by issue/registrar and share transfer agent handling respective tender offer.

The new mechanism will reduce the systemic risk and risks associated with the movement of securities from the demat account of shareholders to clearing corporation account and vice-versa and make the process more investor friendly, in addition to saving time and reducing the cost involved.

## RBI modifies current norms on round-tripping

Some of the largest Indian companies, start-ups and multinationals with an India presence have put their outbound investment, fundraising, and restructuring plans on hold as the RBI looks to introduce fresh regulations around 'round-tripping'. Round-tripping refers to money that leaves the country though various channels and makes its way back into the country, often as foreign investment. This mostly involves black money and is allegedly used for stock price manipulation.

RBI aims to tweak the existing regulations and has come up with draft rules around round-tripping. With a view to liberalize regulatory framework and promote ease of doing business, it has been decided to rationalize the existing provisions governing overseas investment. According to the draft rules, any entity making an any investment outside India, in turn, invests in India will be treated as round-tripping if the purpose is to escape tax. This is as the same rationale used by the tax department under General Anti-Avoidance Rule.

## White goods get PLI push

Government issued a corrigendum in relation to the PLI Scheme for white goods. The Department for Promotion of Industry and Internal Trade (**DPIIT**) offered specific relaxations as part of its revised guidelines to turn India into an integral part of the global supply chain initiative. Incentives worth INR 6283 crore will be provided over 5 years for manufacturing of white goods.

### Salient aspects

- The scheme will offer an incentive of 4-6% on incremental sales of goods manufactured in India to companies engaged in manufacturing of ACs and LED Lights
- Inclusion of more LED components such as resistors, fusers, LED transformers, among others, in the target segments and eligible products
- Pre-qualification criteria can be met based on audited financials for FY2020-21; however, for applicants meeting the pre-qualification criteria, the computation of net incremental sale of eligible product shall be done based on net sales turnover of eligible products in the base year of FY21, whichever is higher
- If a company availing benefits under scheme, fails to meet the committed investment and exits midway, the bank guarantee will also be invoked and the company will have to refund the incentives taken, including the interest

## Online gaming industry to be kept under 18% GST

According to a report launched by EY - All India Gaming Federation, the Indian online gaming sector reached USD1.027 billion (approximately INR 7500 crore) in 2020. The report recommended setting the Goods and Services Tax (**GST**) rate for this sector at 18% and sought clarity on tax applicability on platform fee.

In India, the classification of whether a game comprises a 'game of skill' or a 'game of chance' has wide consequences for legal implications. Among other aspects, a game of chance attracts a higher GST compared to a game of skill. Online games operate either on the 'rake fee' model wherein the gaming platform charges for facilitating games or 'freemium' model wherein the gameplay is free but additional features may require users to purchase specific items for a monetary price.

### Key mechanisms for rational levy of GST

- **GST on rake fee value:** This suggests a levy of GST only on the rake fee which is the consideration received by the gaming platform. It is presently being followed across the industry and aligned with existing GST mechanism to levy tax on consideration only.
- **Deemed credit model:** This has only two data metrics to be considered, stake and pay - outs. This mechanism makes it easier for the government to verify and audit entities. However, businesses would be required to undertake a change in their ERP systems to compute GST.
- **GST on entire stake value at a nominal rate of 1.8%:** This is simpler to calculate as it has only one data metric to be tracked by business for stake value. However, the mechanism would be discriminatory for industry players having low rake since GST outflow would be high whereas margins are lower. This method is also prone to manipulation where 'platform fee only' players without any prize - winning model may offer nominal winnings to lower tax outflow. The report recommends 18% GST to be levied to mitigate any risks of misclassification of the online gaming industry as betting or gambling. The tax rate should not exceed 20% as it could result in the gaming operators as well as consumers entering the grey market.

India is the fifth largest market globally for online gaming, a billion-dollar industry that could double to USD 2 billion (INR 14500 crore) by 2023. Strengthening the GST mechanism will put this sector at par with global practices.

# Trading in US stocks: NSE IFSC to break a new path

On August 9, 2021, NSE International Financial Services Centre (**NSE IFSC**) announced that it is now possible for Indian investors to trade in select US stocks. NSE IFSC, a wholly owned subsidiary of the National Stock Exchange of India Ltd (**NSE**), proposed to make the offering in the form of unsponsored depository receipts. These receipts are issued without approval of the issuer of underlying permissible securities. They simplify investment as Rupee is not required to be converted to Dollar.

## Salient aspects

- **Liberalised Remittance Scheme (LRS):** Indian retail investors will now be allowed to freely transact under the LRS as directed by RBI. Each financial year, LRS permits certain current or capital account transaction up to USD 2,50,000. This scheme excludes corporates, partnership firms, HUF, and trusts.
- **Regulatory Sandbox:** The International Financial Services Centres Authority (**IFSCA**), a unified regulator promoting ease of doing business in IFSC, will facilitate the trading, clearing, settlement and holding of US stocks under the Regulatory Sandbox, wherein certain regulatory relaxations may be permitted for testing of new products or services and containing their risks. Regulatory Sandbox refers to such live testing of new products or services in a controlled/test regulatory environment.
- **Operational details:**
  - You can trade through NSE IFSC platform
  - Once you have zeroed in on an international brokerage account, you can register online by filling basic information
  - When your account is ready, you can start adding funds, which you will later invest in US stocks
  - Before you start trading, please ensure that documentation concerning LRS has been considered
  - Exchange rates are crucial especially when you are planning to invest in US stocks – ask your brokerage firm if it has a tie-up with any bank and could help you secure a low rate; if not, your bank can directly transfer money to your brokerage account
  - Depository Receipts will be held by the investors in their own Demat accounts opened in the GIFT City, which will also entitle them to receive corporate action benefits pertaining to the underlying stock

The model offered by NSE IFSC provides an additional investment opportunity to the Indian investors. The ever-increasing connectivity of the global financial markets makes this move a step further towards portfolio diversification for Indian investors, in an environment where companies predominantly aim at diversification of fund-raising operations.

# RBI issues framework for outsourcing of payment and settlement-related activities

On August 3, 2021, RBI issued the 'Framework for Outsourcing of Payment and Settlement-related Activities by Payment System Operators' (**Framework**). The non-bank Payment System Operators (**PSOs**) primarily outsource their payment and settlement-related activities to several other entities. This Framework, issued under Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007 (**Act**), is meant to enable the effective management of certain attendant risks in such outsourcing. PSOs shall ensure that their outsourcing arrangements, including the existing ones, follow the Framework by March 31, 2022.

## Salient aspects

- **Applicability:**
  - PSOs
  - Non-bank PSOs
  - System providers located in India or elsewhere. A system provider means a person who operates an authorised payment system
  - Token requestors in tokenization services by card networks
  - Third-party service providers of unified payments interfaces
- **Outsourcing of core management functions:** The Framework bars PSOs from outsourcing their fundamental management responsibilities, such as risk management, internal audit, compliance, and decision - making processes including assessing KYC norms compliance. These restrictions are in accordance with the current regulations governing banks and non - bank financial companies (**NBFCs**). The circular clarifies that 'core management functions' should include, but not be limited to the following:
  - Management of payment system operations
  - Transaction management
  - Management of customer data
- **Customer rights and data protection:** PSOs must take steps to make sure that outsourcing does not damage any rights of customers or participants of the payment system. PSOs are also in charge of dealing with complaints, particularly those involving third - party service providers. On the customers' grievance redressal services being outsourced, they should be able to directly register any grievances with a PSO's nodal officers. PSOs must ensure that customers are aware of this option, such as through advertisements, and should present the details regarding their nodal officers on their websites and mobile applications.

As a welcome regulatory measure, the Framework lays importance on protecting customer rights and data by instituting norms on the usage of customer information by third - party service providers. Framework may increase compliance costs for PSOs, yet it will be instrumental in restricting data leaks attributed to mere regulatory loopholes.

## Top banks to create market for secondary loans

On August 11, 2021, ten major banks came together to set up a Secondary Loan Market Association (**SLMA**) for promoting growth of secondary market for loans in India. Recommended by RBI's task force on the development of secondary market for corporate loans, SLMA is a self- regulatory body consisting of members namely Kotak Mahindra Bank, Deutsche Bank, Bank of Baroda, Punjab National Bank, Axis Bank, HDFC Bank, Canara Bank and Standard Chartered Bank.

According to SLMA's memorandum, it will facilitate, promote, and set up an online system for the standardization and simplification of primary loan documentation and other trading mechanisms. Some of the key advantages of a secondary loan market are as follows:

- An active secondary market for loans in India will offer benefits to various stakeholders by way of capital optimization, liquidity management, risk management, exposure re-balancing and efficient price discovery mechanism.
- Smaller banks are constrained from participating in large and creditworthy lending exposures at the time of origination, the secondary market can enable them to participate in such exposures at a later stage and the constraints faced under the Large Exposure Framework will be a thing of the past.
- A vibrant secondary market creates an ecosystem of market intermediaries.

## SEBI amends AIF regulations

On August 3, 2021, SEBI declared amendments for Alternative Investment Fund (**AIFs**) in the form of the SEBI Alternative Investment Funds (**Third Amendment**) Regulations, 2021 (**AIF Amendment Regulations**), pursuant to suggestions received from several stakeholder groups including AIFs (domestic and global) and regulatory bodies. The changes are meant to ease compliance for AIFs, provide investment flexibility and streamline regulatory processes. This is likely to go a long way in bringing India at par with the global finance and securities market.

### Salient aspects

- The term 'Accredited Investor' (**AI**) was not previously defined. The current amendment has created a framework for certain investors to be identified as AI. An AI denotes a person who is granted a certificate of accreditation by an accreditation agency who, is an individual, Hindu Undivided Family, Family Trust, or a sole proprietor.
- Flexibility for IMs to take investment decisions, which were restricted or limited to various extents.
- In May 2021, the SEBI AIF Second Amendment Regulations was notified, which focused on determining the scope of the term 'start-up' by providing a comprehensive definition. It defined a code of conduct which laid down principles on accountability of AIFs, and allowing AIFs to invest in units of other AIFs, subject to fulfilment of certain requisites, and expanding the scope of 'Venture Capital Undertaking' through removal of its negative list.
- AIFs can now issue partly paid-up units to investors to represent the portion of committed capital invested.
- AIFs will have to file private placement memorandum with SEBI through registered merchant bankers.

As per SEBI data, AIFs saw commitments worth INR 82,228 crores in FY21 from Institutions, family offices and high net-worth individuals. On August 13, 2021, SEBI announced further amendments (**Fourth Amendment**) focusing on 'Debt Funds which invest primarily in debts securities of listed and unlisted investee companies.'

## RBI panel proposes merger of weaker urban co-operative banks

As per the recommendations of the Skilled Committee of Reserve Financial Institution, the weak urban co-operative banks (**UCBs**) might get to explore voluntary merger or conversion right into a non-banking society at an early stage. The committee emphasised that All-Inclusive Directions (**AID**) should be treated at par with moratorium under Section 45 of the Banking Regulation Act. If AID is imposed, a bank should not continue thereunder beyond the time permitted to keep a bank under moratorium, it is 3 months extendable by a maximum of another 3 months.

### Observations of the committee

- This recommendation is significant as some UCBs have been under AID for several years and deposit withdrawals are capped, causing hardship to depositors. Currently, about 50 UCBs are under AID.
- In view of the powers derived from the recent amendment to the Banking Regulation Act, the RBI may strive to begin the mandatory resolution process including reconstruction or compulsory merger as soon as a UCB reaches Stage III under the Supervisory Action Framework.
- RBI may also consider superseding the board if the bank fails to submit a merger/conversion proposal within the prescribed timeframe and take steps to avoid undue flight of deposits once the news becomes public.
- A Stage III UCB is one where its capital to risk-weighted assets ratio is less than 4.5% and/or net non-performing assets is greater than 12%.

## Sale of open parking spaces: Position under RERA Act

Ownership of common properties is an ephemeral and interminable issue. Open parking space is one such issue that has peppered the real estate sector for a long time, despite the statutes and the clarification of the Supreme Court (**SC**) that it is meant for communal usage. Time and again, promoters and real estate developers have attempted to sell or allot open parking spaces in exchange of pecuniary consideration.

Recently, the MahaRERA issued a Circular dated July 30, 2021, clarifying inter alia that promoters are not entitled to and allowed to allot open parking areas for monetary consideration. On the other hand, where a promoter has allotted garage or covered parking spaces in exchange of monetary consideration, the exact location of such space should be specified in the Agreement to Sell.

### Judicial deliberation prior to passing of RERA Act

The issue whether open parking spaces can be sold or not has been pondered upon by SC even prior to passing of the RERA Act and establishment of the RERA. In the below-mentioned cases, the SC had observed that common areas cannot be transferred, vested, or assigned to any person for personal possession.

- **Maharashtra Ownership of Flats Act, 1963:** This Act laid down the promoter can only 'charge the cost thereof in proportion to the carpet area of the flat from each flat purchaser.' The said judgement aimed to deter promoters and developers from selling any land/portion of such land which does not constitute a 'flat'.[1]
- **DLF Limited v Manmohan Lowe[2]:** In this case, SC observed that 'community and commercial facilities' provided to the flat owners cannot be a subject matter of individual interest or possession by the flat owners. Open parking spaces were held to be a part of the 'community and commercial facilities.'

### Position under RERA Act

- Section 2(n) of the RERA Act defines the term 'common areas.' As per clause (iii), open parking spaces are a part of common areas. The term 'garage' has been expressed under Section 2(y) of the RERA Act and clearly stipulates that open/uncovered parking spaces shall not form a part of garage. Thus, the legal import of the two definitions is to extricate covered/enclosed parking spaces from open parking spaces.
- Section 11(3)(f) entails the duty of the promoter to execute and register a conveyance deed in favour of the association of allottees for the proportionate title in the common areas. Furthermore, Section 17 deals with transfer of title. It emphasizes on the use of the term 'undivided proportionate title' and 'association of allottees or competent authority.' The implication of the aforesaid terms is to illuminate that open parking spaces, which form a part of the common areas, can only be conveyed in favour of an association of the allottees or the competent authority. Furthermore, the title would be a proportionate title, meaning that the area allotted must bear proportion to the area of the flats/plot/building.
- At this juncture, it is also apposite to note that under the rights of allottees as enshrined in Section 19 of the RERA Act, the right to get possession of common areas rests solely with the 'association of allottees.' A conjoint reading of the provisions of the RERA Act bolster the view that a promoter/real estate developer is not entitled to sell/allot open parking spaces in exchange of monetary consideration. This position furthers the stance that such restriction on sale of open parking spaces is applicable across the country, irrespective of the existence of any special circular stipulating the same (like that passed in Maharashtra).

The RERA Act has reflected on the restriction of sale of open parking spaces for personal possession. It is about time that real estate developers abide by the law laid down in the RERA Act. Creative interpretations of an otherwise clear statute to sidestep the rights as enshrined in the statute must be avoided.

## ATM cash–outs penalized by RBI

Effective October 1, 2021, RBI introduced a 'scheme of penalty for non-replenishment of ATMs' wherein banks and White Label ATM Operators (**WLAOs**) will be penalized, at the wake of cash-outs beyond the permissible limits. Unavailability of cash in ATMs for a total period of 10 hours in a month will be imposed with a flat penalty of INR 10,000 for each ATM. The officer-in-charge at the 'Issue Department' of RBI's regional office is the competent authority to levy the penalty within their jurisdiction.

- **Why is this penalty levied:** RBI has a mandate to issue banknotes and the banks are fulfilling this mandate by dispensing banknotes to the public through their network of branches and ATMs. In this connection, a review of downtime of ATMs due to cash-outs was undertaken and it was observed that non-availability of cash caused substantial inconvenience to public. At the end-June 2021, there were 2,13,766 ATMs of different banks which were not replenished timely.
- **How will it be executed?**
  - RBI have asked the banks to submit system-generated statements on the downtime of ATMs due to non-availability of cash to the 'Issue Department' of RBI, under whose jurisdiction the ATMs are located
  - For WLAOs, who depend on the banks to replenish their cash requirements, the banks should furnish a separate statement on cash-out of such ATMs due to non-replenishment of cash
  - Such statements shall be submitted for every month within five days of the following month
  - Appeal against the decision of the competent authority, if required, may be made by the banks/WLAOs to the Regional Director/Officer-in-charge of the regional office concerned, within one month from the date of imposition of penalty

## National Automobile Scrappage Policy

India's National Automobile Scrappage Policy (**Policy**) was announced on August 13, 2021. The Policy is a government-funded program to replace old vehicles from Indian roads. Initially, major automakers including Tata Motors have signed an MoU with the government that they will set up scrapping centre in Gujarat where close to 600 vehicles will be scrapped each year.

### Salient aspects

- Under its Voluntary Vehicle-Fleet Modernization program (**VVMP**), the government plans to set up between 450-500 automated vehicle fitness testing stations across India on a public-private partnership basis.
- Fitness tests will be mandatory for heavy commercial vehicles from April 1, 2023.
- Fitness tests will be mandatory for other vehicles from June 1, 2024 in a phased manner.

[1] Nahalchand Laloochand Pvt Ltd v. Panchali Cooperative Housing Society Ltd, (2010) 9 SCC 536

[2] (2014) 12 SCC 231

- A total of 60-70 vehicle scrapping centres will also be built within 150-200 kilometers away from any location.
- The scrappage policy leaves the choice of scrapping to the owner of the vehicle, while the automated tests will place emphasis on vehicle fitness and not its age.
- Private vehicles, which are over 20 years old, will have to undergo fitness tests, at an estimated cost of INR 300-400 per test. Vehicles that pass the automated tests will be subjected to a 'green tax', which will see owners shell out an additional 10-25% of road tax at the time of the renewal of the vehicle's fitness certificate, along with re-registration fees. However, those who choose to drive a vehicle that has failed the automated test will face penalties.
- Once the vehicle has been scrapped, the owner will receive anywhere between 4-6% of their old vehicle's ex-showroom price, and a scrappage certificate, which will make the individual eligible for a road tax rebate of 25%, a registration fee waiver and a discount of 5% of a new vehicle's ex-showroom cost, offered by the vehicle manufacturer. This will essentially make a new vehicle cheaper.
- The Policy will attract investment of over INR10,000 crore, and generate 50,000 jobs. Proper recycling of raw materials obtained from the scrapping will help reduce import of materials such as aluminium, copper and steel. With the potential to recycle up to 99% of materials used in a vehicle, raw material costs are estimated to drop by as much as 40% This will make components cheaper for vehicle manufacturers and will also lead to increased GST revenues for both state and central governments.
- There is also a possibility to derive materials needed for local production of lithium-ion batteries (to be used in electric vehicles) from scrapping older vehicles, which could help drive the growth of the EV business.
- Reduce emissions and enhance fuel efficiency.

# SC orders demolition of Supertech Towers

*Supertech Ltd v. Emerald Court Owner Resident Welfare Association* is a recent example of the stringency of land and building laws. In this landmark judgement, Supreme Court (**SC**) reinforced its stand that illegal/unauthorized constructions will be demolished.

## Background facts

- In 2012, Emerald Court Owner Resident Welfare Association (**Respondent**) filed a writ petition under Article 226 requesting the Court to issue a writ quashing the approval granted by Noida for construction of two additional towers. It was contended that this construction was in complete violation of the U.P. Apartments Act, 2010.
- In 2014, the High Court of Allahabad (**HC**) ordered the demolition of two towers constructed by Supertech Ltd (**Appellant**) in Noida and to refund the consideration received from the buyers of the flats of these towers with 14% p.a.
- Against this order, the Appellant filed an appeal before SC.

## The judgment

- SC found evidence of collusion between the authority and the Appellant in abundance. The sanctions were in clear violation of statutory provisions and regulations.
- SC observed that the entire procedure of construction is regulated for two reasons: protection of environment and ensuring safety of those who use/occupy the constructions. Such brazen violations and that too with the assistance of the regulatory authorities, not only causes harm to the environment but also compromises with public safety.
- Based on these considerations, SC upheld the decision of HC.

## Analysis

- The decision deserves due appreciation for yet again bolstering the position that illegal and unauthorized constructions will attract stringent punitive and castigatory responses. SC expounded upon this position frequently. Where the Municipality had approved construction of a cinema hall in a residential area which was found to be illegal, the Court observed that such illegal approvals materially affect the right of peaceful enjoyment of the residents residing in the residential area.[3]
- Furthermore, the court has also impressed upon the fact that mere demolition of illegal constructions would not resolve the root cause of the issue. Those officers who, either deliberately or due to carelessness, approve such constructions in collusion with the builders acting out of avarice and selfish motives are responsible too. Thus, even these builders and officers should be punished in accordance with law.[4]
- The Court has recommended three steps:
  - The construction must be demolished as a punitive action
  - The sufferers must be compensated
  - The builders as well as the officials who colluded over such illegality must be punished
- The Court has also cautioned against rampant and arbitrary regularization of illegal construction/land use. Regularization is meant to be exception to the rule and hence, must be treated like one. The affected buyers/allottees must avail appropriate remedies available under various laws.[5]

## Conclusion

The decision may seem harsh in the light of the fact that it orders demolition of two towers in which many persons have invested their hard - earned finances. However, the Court has justified the order by stating that in situations like these the private interest of the allottees and other interested persons must succumb to the public interest. The judgement serves a reminder for the land and building regulation authorities, including RERA, to ensure conformity with the laws.

[3] K. Ramadas Shenoy v. Chief Officer, Town Municipal Council, (1974) 2 SCC 506

[4] Dr G.N. Khajuria v. Delhi Development Authority, (1995) 5 SCC 762

[5] Esha Ekta Apartments Coop. Housing Society Ltd. v. Municipal Corpn. of Mumbai, (2013) 5 SCC 357

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