**Highlights**

- Draft SEBI (Infrastructure Investment Trusts) Regulations released.
- MCA clarifies related party transactions, Companies (Miscellaneous) Rules, 2014, etc.
- RBI revises Pricing guidelines in respect of transfer/ issue of shares, Liberalized Remittance Scheme, etc.
- Delhi High Court clarifies issues arising in execution of foreign arbitral awards in India.
- Competition Commission of India imposes penalty for delay in notifying the proposed acquisition deal.

# Corporate Brief

## ➲ *Draft SEBI (Infrastructure Investment Trusts) Regulations, 2014 released.*

**To** provide a suitable structure for financing/refinancing of infrastructure projects in India, SEBI has proposed and sought public comments on a regulatory framework for introduction of Infrastructure Investment Trusts ('InvITs') in India. Salient features of draft regulations include inter alia the following. An InvIT would essentially be a trust having parties such as Sponsor(s), Investment Manager, Trustee and Project Manager(s). Listing shall be mandatory for both publicly offered and privately placed InvITs. An InvIT which proposes to invest at least 80% of the value of assets in the completed and revenue generating Infrastructure assets, shall raise funds only through public issue of units. Minimum subscription size and trading lot for such InvIT shall be INR 5 Lac. A Maximum 10% (of the remaining 20% of the InvIT) can be invested in under construction projects and in other permissible investments. Proposed holding of an InvIT in the underlying assets shall be not less than INR 500 crore and the offer size of the InvIT shall not be less then INR 250 crore at the time of initial offer of units.

*[www.sebi.gov.in/cms/sebi_data/attachdocs/1405596795567.pdf dated July 17, 2014.]*

## ➲ *MCA clarifies related party transactions, Companies (Miscellaneous) Rules, 2014, etc.*

(i) **MCA** has clarified that resolutions approved/passed under the Companies Act, 1956 ('Old Act'), during the period from 1st September, 2013 to 31st March, 2014, can be implemented as per the Old Act, notwithstanding repeal of the relevant provision under the Old Act, provided that (a) implementation of such resolution had actually commenced before 1st April, 2014 and (b) that this transitional arrangement will be available up to expiry of one year from passing of the resolution, or six months from commencement of the corresponding provision in the Companies Act, 2013 ('New Act') whichever is later. Further, any amendment of the resolution must be as per the New Act. [*See General Circular No.32/2014 dated July 23, 2014].*

(ii) **MCA** has constituted an Expert Committee to examine various issues under Companies (Cost Records and Audit) Rules, 2014, viz. criteria to determine the basis of including/excluding a class of companies, filing of Cost Audit reports, etc. *[See Office Memorandum No.52/22/CAB/2014 dated July 19, 2014.]*

(iii) **Any** application/form filed with the Central Government or Regional Director or Registrar of Companies, prior to the commencement of Companies (Miscellaneous) Rules, 2014, but are yet to be disposed of, for want of any information, shall on its submission, to the satisfaction of the authority, be disposed of in accordance with rules made under the Companies Act, 1956**.** *[See Notification G.S.R. 506(E) dated July 17, 2014.]*

(iv) **As per** second proviso to Section 188(1) of the Companies Act, 2013, no member of the company shall vote on a special resolution to approve the contract or arrangement (referred to in the first proviso), if such a member is a related party. MCA has now clarified that the term 'related party' refers only to such related party as maybe related in the context of the contract or arrangement for which the said special resolution is being passed. Further, transactions arising out of Compromises, Arrangements and Amalgamations dealt with under Companies Act, 1956/Companies Act, 2013, will not attract the requirements of Section 188 of Companies Act, 2013. Lastly, contracts that were entered into and came into effect before commencement of Section 188, Companies Act, 2013, will not require fresh approval under said Section 188,

till expiry of original term of such contracts. In case any modification in the contract on/after 1st April, 2014, requirements under Section 188 are to be complied with. *[See General Circular No.30/2014 dated July 17, 2014.]*

➲ *RBI revises Pricing guidelines in respect of transfer/ issue of shares, Liberalized Remittance Scheme, etc.*

(i) **Pricing** guidelines in respect of transfer/issue of shares and for exit from investment in equity shares (with or without optionality clauses) of listed/unlisted Indian companies have been revised to provide greater flexibility to parties.

**Listed companies:** Issue and transfer of shares including compulsorily convertible preference shares and compulsorily convertible debentures shall be as per SEBI guidelines. For FDI instruments with optionality clauses, non-resident investors shall be eligible to exit at market price prevailing on recognised stock exchanges subject to lock-in period as stipulated, without any assured return.

**Unlisted companies:** Where the shares of the company are **not listed** on any recognized stock exchange in India:

**(i)** Issue of shares to non residents shall be at a price not less than the fair value worked out as per internationally accepted pricing methodology for valuation of shares on arm's length basis, as duly certified by a Chartered Accountant or a SEBI registered Merchant Banker (henceforth referred to as the "**Calculation Method**"),

**(ii)** Transfer of shares by a resident to non resident shall be at a price not less than the fair value arrived at as per the Calculation Method.

**(iii)** Transfer of share by a non resident investor to a resident it shall be at a price not exceeding the fair value arrived at by the Calculation Method. For FDI instruments with optionality clauses the non-resident shall be eligible to exit from the company at a price not exceeding the fair value arrived at by the Calculation Method. The Investor would not be guaranteed an assured exit price at the time of making investment/agreement and shall exit at a fair price, computed in the manner described at the time of exit, subject to lock-in period requirements, as applicable. *[See RBI/2014-15/129 A.P.(DIR Series) Circular No.4 dated July 15, 2014]*

(ii) **Under** the Liberalized Remittance Scheme (LRS), resident individuals may remit up to USD 125,000 per financial year (increased from earlier amount of USD 75,000) for any permitted current or capital account transaction or a combination of both. Further, the LRS can now be used to acquire immovable property outside India. *[See RBI/2014-15/132 A.P.(DIR Series) Circular No.5 dated July 17, 2014]*.

(iii) **Indian** companies are henceforth required to report NIC Codes in Forms FCGPR and FCTRS, as per the National Industrial Classification 2008, for the purpose of classification of activities under the industrial classification system. *[See RBI/2014-15/133 A.P.(DIR Series) Circular No.6 dated July 18, 2014]*.

# Litigation Brief

➲ *Delhi High Court clarifies issues arising in execution of foreign arbitral awards in India.*

**The** Hon'ble Delhi High Court in a recent Judgment in Progetto Grano S.P.A. v. Shri Lal Mahal Limited, (Judgment, dated 29.05.2014), has settled two very pertinent aspects of the execution of foreign arbitral awards in India.

In the present case, the decree-holders had filed an Execution Petition under Section 49 of the Arbitration and Conciliation Act, 1996 ("Act") before Delhi High Court, seeking execution of two foreign arbitral awards. The Judgment-debtor raised objections under Section 48 of the Act which was rejected by the High Court as well as the Hon'ble Supreme Court.

The question arose as to what should be the relevant date for application of rate of exchange (as the sum was awarded in a foreign currency). The Delhi High Court held that the date when all the objections to the award were finally overruled by the Supreme Court and the award attained finality and became enforceable,

and not the date of the award, would be the relevant date for applying the rate of exchange.

Another very pertinent issue that arose was whether the decree-holder was entitled to any post-award interest. The Delhi High Court held that the decree-holder was not entitled to any post-award interest as the same is not provided under Part II of the Act, which deals with the Foreign Arbitral Awards. Interestingly, the Hon'ble High Court observed that only provision in the Act providing for post-award interest, is Section 31(7) contained in Part I of the Act dealing with domestic arbitration. However, the same could not be imported under Part II of the Act in view of the Constitutional Bench decision of Hon'ble Supreme Court in Bharat Aluminium Company vs. Kaiser Aluminium Technical Services 2012 (9) SCC 552, which has clearly laid down that there cannot be intermingling of provisions of Part I and II of the Act.

The said Judgment has indeed crystallized the issue of relevant date for applying rate of foreign exchange. However, as regards non-entitlement of post-award interest, it has put a premium to dishonest objections being raised merely to delay the execution of a foreign arbitral award, which may have adverse consequences upon a decree-holder.

## ➲ Competition Commission of India imposes penalty for delay in notifying the proposed acquisition deal.

**In** a recent landmark decision, dated 27.05.2014, the Competition Commission of India ("CCI") has imposed a penalty of Rs. 3 Crores upon Tesco Overseas Investments Limited ("TOIL") for delay in notifying the proposed acquisition of 50% shares of Trent Hypermarket Limited.

The TOIL notified the CCI about the proposed acquisition, vide Notice, dated 31.03.2014, under Section 6(2) of the Competition Act, 2002 ("Act"), whereby it was learnt that it had sought the approval of the Department of Industrial Policy and Promotion, Ministry of Commerce & Industry ("DIPP") and Foreign Investment and Promotion Board, Ministry of Finance ("FIPB"), for the proposed transaction on 17.12.2013.

It is to be noted that as per Section 6(2) of the Act, any person or enterprise which proposes to enter into a combination has to notify the CCI within 30 days of approval of proposed transaction by the Board of Directors and/or execution of any definitive Agreement concerning the transaction. However, in the present case, TOIL issued statutory notice to CCI only on 31.03.2014, i.e. with a delay of 73 days.

It was contended on behalf of TOIL that merely seeking approval from DIPP and FIPB did not amount to any express intention to execute the proposed transaction. It was subject to execution of definitive Agreements between the parties. It was further contended that Notice without executing the definitive Agreements would have amounted to incomplete disclosure of information.

However, the CCI has overruled the aforesaid objections raised by TOIL. It observed that it was quite clear from Letters submitted before DIPP and FIPB that the parties sufficiently knew about the proposed business arrangement. The CCI has, however, imposed a meager penalty of INR 3 Crores upon TOIL, although Section 43A of the Act provides for a penalty extending upto one percent of the turnover or assets (INR 600 Crores in the present case).

The said Judgment is a slightly harsher application of the provisions of the Competition Act. The CCI has imposed the penalty even when it clearly observed that TOIL has acted in a bonafide manner. Such obligation upon the corporates to make pre-mature disclosures may adversely affect the business community.

***