

Highlights

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- MCA revises the process for incorporation of companies
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- Petroleum and Natural gas regulatory board Vs. Indraprastha gas Limited and Others

Corporate Brief

➔ **Real Estate (Regulation and Development) Act, 2016 notified**

The Real Estate (Regulation and Development) Act, 2016 ('the Act') has been notified. Highlights of the Act are: (a) The Act is applicable to both residential and commercial real estate projects: (i) where the area of land proposed to be developed exceeds 500 (Five Hundred) square meters; and/or (ii) where the number of apartments proposed to be developed exceeds 8 (Eight). (b) Real Estate Regulatory Authority ('the Authority') to be established by the appropriate Government at the state level within a period of 1 (One) year. (c) The Act has prescribed responsibilities on developer, real estate agents and on allottee / buyer. (d) Developer's responsibilities *inter alia* include: (i) Registration of real estate projects, (ii) Carpet area of the project to be disclosed in the application for registration. (iii) Deposit of 70% of the amount realized for real estate project in an Escrow account, which can be utilized only for construction of the project and land cost; (iv) Prior consent of allottee to be obtained for making changes in the sanctioned plans, layout plans and specifications of apartment, plot or building; (v) Developer not to accept more than 10% of the cost of apartment as an advance payment without entering into a written agreement for sale with the buyer. (e) The Act also requires real estate agents to be registered with the Authority. (f) The Act also prescribes adjudicating mechanism for redressal of disputes and provides for establishment of Appellate Tribunal for hearing of appeals. [The Real Estate (Regulation and Development) Act, 2016, the Gazette of India, Ministry of Law and Justice (Legislative Department) dated March 26th, 2016]

➔ **DIPP issues guidelines for FDI in e-commerce sector**

DIPP has notified guidelines on FDI in e-commerce sector ('the Guidelines'). Highlights of the Guidelines are: (a) 100% FDI is permitted in Market Place Model. (b) Marketplace ecommerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis. (c) Such entities may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre etc. (d) Such entities cannot exercise ownership over the inventory. (e) Warrantee and guarantee of goods will be responsibility of the seller of goods. (f) Such entities have to display name, address and other contact

details of the seller on its website. (g) Such entities cannot directly or indirectly influence the sale price of goods or services and shall maintain minimum level playing field. [See DIPP Press Note 3 (2016 Series) dated March 29th, 2016]

➔ **DIPP liberalizes FDI Policy on Insurance and Pension Sector**

DIPP has liberalized its Foreign Direct Investment ('FDI') Policy on Insurance sector and Pension Sector by permitting FDI in Insurance and Pension Sector upto 49% under automatic route. Earlier FDI in Insurance Sector and Pension Sector upto 26% was permitted under automatic route and government approval was required for FDI beyond 26% and upto 49%. [See DIPP Press Note No 1 (2016 Series) and DIPP Press Note No. 2 (2016 Series) dated March 23rd, 2016]

➔ **RBI revises ECB guidelines for Infrastructure Sector**

RBI has revised the extant ECB guidelines after taking into account prevailing external funding sources, particularly for long term lending and critical needs of infrastructure sector of the country. Highlights of the amendments are: (a) Companies in infrastructure sector, NBFCs, infrastructure finance companies, NBFCs-Asset finance companies, holding companies and core investment companies are eligible to raise ECB under Track I of the framework subject to 100% hedging. Such companies can now raise medium term foreign currency denominated ECB with minimum average maturity of 3-5 years. (b) Individual limit of borrowing under the automatic route for such companies will be as applicable to the companies in the infrastructure sector (currently USD 750 million). (c) Companies in infrastructure sector, holding companies and CICs will continue to have the facility of raising ECB under Track II of the ECB framework. [See RBI A.P.P (DIR Series) Circular No. 56 dated March 30th, 2016]

➔ **MCA notifies higher ratio of debt to capital for a class of companies**

MCA has exercised the power conferred under the proviso to Section 68(2)(d) of the Companies Act, 2013 ('The Act') and notified the debt to capital ratio and free reserve ratio for government companies carrying on non-banking finance institution activities and housing finance activities to be 6:1. Section 68(2)(d) of the Act provides that the ratio of the aggregate of secured and unsecured debts owed by the company after buy-back shall not be more than twice the paid-up capital and its free reserves. Proviso to Section 68(2)(d) empowers central government to notify a higher ratio of the debt to capital and free reserve for a class or classes of companies. [See MCA Order F.No.01/04/2013 CL-V (Pt-II) dated March 10, 2016]

➔ **MCA permits calculation of buy back on the basis of un-audited accounts**

MCA has amended the Companies (Share Capital and Debentures) Rules, 2014 and permitted company's auditors to make calculations with reference to buy back of securities of private companies and unlisted public companies on the basis of un-audited accounts not older than six months from the date of offer document which will be subject to limited review by the company's auditors.

Earlier calculation with reference to buy back was to be done only on the basis of audited accounts not more than six months old from the date of offer document. [See MCA Notification F.No.01/04/2013 CL-V (Pt-II) dated March 10, 2016]

➔ MCA revises the process for incorporation of companies

MCA has permitted Central Registration Centre (CRC) to exercise functional jurisdiction of processing and disposal of e-forms pertaining to registration of companies (i.e. e-form INC-2, INC-7, INC-29, INC-22, DIR-12 and URC-1 and any other forms as may be notified by central government) having territorial jurisdiction all over India. CRC will exercise the jurisdiction, processing and approval of name proposed in e-Form number INC-29. The jurisdictional ROC, other than Registrar CRC, will continue to have jurisdiction over the companies incorporated by the Registrar, CRC. [See MCA Notification F.No.A-42011/03/2016-Ad.II dated March 23, 2016]

➔ SEBI introduces exchange traded cross-currency futures and options contracts

SEBI has permitted recognized stock exchanges to introduce cross-currency futures and options contracts on EUR-USD, GBP-USD and USD-JPY. Recognized stock exchanges have also been permitted to introduce currency options on EUR-INR, GBP-INR and JPY-INR currency pairs. SEBI has also provided the details in terms of product design, margins and position limits for the specified currency pairs. [See SEBI Circular SEBI/HO/MRD/DP/CIR/P/2016/0000000038 dated March 09, 2016]

➔ SEBI permits investment by FPIs in REITs, InvIts, AIFs and corporate bonds under default

SEBI has issued circular to permit FPIs to invest in units of REITs, InvIts and Category-III AIFs and corporate bonds under default. Highlights of the circular are: (a) In line with the RBI notification no. FEMA.355/2015-RB dated November 16, 2015, SEBI has permitted FPIs to invest in units of REITs, InvIts and Category III AIFs, subject to the terms and conditions as may be prescribed by SEBI from time to time. (b) FPI cannot hold more than twenty five percent stake in a category III AIF. (c) In line with the RBI circular RBI/2015-16/253 dated November 26, 2015, SEBI has permitted FPIs to acquire NCDs/bonds, which are under default, either fully or partly, in the repayment of principal on maturity or principal installment in the case of an amortizing bond. Such NCDs/bonds restructured based on negotiations with the issuing Indian company shall have a minimum revised maturity period of three years. [SEBI Circular CIR/IMD/FPIC/39/2016 dated March 15, 2016]

➔ SEBI issues notification on mutual funds

SEBI has issued notification on mutual funds. Highlights of the notification are: (a) Consolidated Account Statement (CAS): To increase transparency of information to investors, SEBI has decided that CAS issued to investors shall also provide the total purchase value / cost of investment in each scheme. CAS issued for the half year shall also provide (i) amount of actual commission paid by AMCs/MFs to distributors during the half year period against the concerned investor's total investments in each MF scheme; (ii) scheme's average total expense ratio for the half year period, of

both direct plan and regular plan. (b) Enhancing scheme related disclosures: To improve transparency and ease of access to mutual fund scheme related information, SEBI has decided that MFs shall provide the disclosures in the offer documents, *inter alia*, including the following: (i) the tenure for which the fund manager has been managing the scheme and the name of scheme's fund manager, (ii) scheme's portfolio holdings, and (iii) scheme's portfolio turnover ratio. (c) Disclosure of Executive Remuneration: To promote transparency in remuneration policies, disclosure pertaining to a financial year on the MF/AMC website under a separate head- 'Remuneration' shall be given, *inter alia* including the following: (i) name, designation and remuneration of CEO, CIO and COO, (ii) name, designation and remuneration received from all employees of MF/AMC whose annual remuneration was equal to or above INR 60 lakh for that year, and monthly remuneration in the aggregate is not less than INR 5 lakh per month, if the employee is employed for a part of the financial year. [See SEBI Circular CIR/MRD/DSA/41/2016 dated March 17, 2016]

➔ GOI clarifies on providing benefits of Public Procurement Policy for MSE

Ministry of Micro, Small & Medium Enterprise, Government of India clarifies on providing benefits of the public procurement policy ('the Policy') for Micro and Small Enterprise (MSEs) Order, 2012 to the MSEs having Udyog Aadhaar Memorandum. Under the policy every central government ministries, departments and public sector undertakings are mandatorily required to procure minimum 20% of their total annual value of goods or services from MSEs. MSEs having registration with District Industries Centre or Khadi and Village Industries Commission or Khadi Village and Industries Board or Coir Board or National Small Industries Commission or Directorate of Handicrafts and Handlooms or any other body specified by Ministry of MSME are provided certain benefits under the policy.

For ease of registration for MSEs, Udyog Aadhaar Memorandum, an online registration system has been started w.e.f. September 18th, 2015. It has been clarified that the MSEs having Udyog Aadhaar Memorandum will also be provided with all the benefits available for MSEs under the policy. [See Office of the Development Commissioner, Ministry of Micro, Small & Medium Enterprises, Government of India dated February 18, 2016]

➔ GOI withdraws recognition of Delhi Stock Exchange

Government of India withdraws the recognition granted to Delhi Stock Exchange Limited. Section 5(2) of the Securities Contracts (Regulation) Act, 1956 provides that where a recognized stock exchange has not been corporatized and demutualized within the specified time, the recognition granted to such stock exchange will stand withdrawn. The Delhi Stock Exchange has failed to be demutualized within the specified time, i.e. on or before August 28th, 2007.

Litigation Brief

➔ *Petroleum and Natural Gas Regulatory Board Vs. Indraprastha Gas Limited and Others*

IGL invoked the jurisdiction of the High Court under Article 226 of the Constitution assailing the Order, dated 09.04.2012 ("Order") issued by the Petroleum and Natural Gas Regulatory Board ("Board") under Section 22 of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("Act").

Vide the said Order, the Board issued Petroleum and Natural Gas Regulatory Board (Determination of Network Tariff for City or Local Natural Gas Distribution Networks and Compression Charge for CNG) Regulations, 2008 ("Regulations") stating that the Board has the power to fix or regulate maximum retail price of network tariff and compression charges for CNG with effect from 01.04.2008.

The said Order directed IGL therein to recover the said network tariff and compression charges for CNG from the date of issuance of the Order. Be it noted, the Board left the modalities and time frame for refund of differential network tariff and the compression charges for CNG recovered by the Respondent therein with effect from 01.04.2008, in excess from its consumers to be decided subsequently.

The High Court of Delhi in its judgment, dated 01.06.2012 held that the Board was not empowered to fix any component of network tariff or compression charge for an entity having its own distribution network. The High Court further held that the provisions of the said Regulations could not empower the Board to fix the tariff and accordingly the Order, dated 09.04.2012, to the extent of fixing the maximum retail price or requiring the Respondents to disclose the entire tariff and the compression charges to its consumers, was not in consonance with the said Act.

Aggrieved by the judgment of the Delhi High Court, the Board filed an Appeal in the Supreme Court.

Supreme Court by upholding the decision of High Court declared the said Regulations ultra vires the parent Act in their entirety. The Supreme Court concluded that the Board could not frame a regulation for determination of network tariff for city or local gas distribution network and compression charge for CNG. Supreme Court's conclusion was primarily based on the following reasoning:

There was a noticeable difference between common carrier pipeline/contract carrier pipeline and "a city or local natural gas distribution network". Section 11(e)(ii) only conferred power on the Board to determine transport rates for common carrier or contract carrier only.

The entities, which were not "common carriers" or "contract carriers", have deliberately been excluded under section 11(e) of the said Act by the legislature and the exclusion did not lead to any absurdity.

Consequently, when the Board was not empowered under the said Act, it was not possible for the Board to regulate tariff and compression charges, particularly when a carrier was transporting gas in city or local natural gas distribution network.



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