ZEUS Law

e-NewsE

www.zeus.firm.in

Vol. I January 2014

Highlights

- Zero-Interest loans among those disallowed by RBI.
- Demat account opening norms simplified.
- M&A rules for telecom cleared by EGoM.
- Core investment companies can raise ECB for SPVs.
- India signs WTO Trade Facilitation Agreement.
- Ministry clarifies SAD exemption availability.
- Appeal of CLB order under Section 8 of Arbitration and Conciliation Act, 1996 held not maintainable.

Corporate Brief

➲ *Zero-Interest loans among those disallowed by RBI.*

The Reserve Bank of India ('RBI') has stated that certain practices of banks such as zero-interest loans, discounted rate of interest on products impinge on customer protection, accounting integrity and fair market practices which banks should follow. In zero-Interest schemes banks usually charge a processing fee. The RBI views this as camouflaging the interest element, and insists that the rate of interest and processing charge should be kept uniform product/ segment-wise irrespective of the loan sourcing channel. The only factor banks use to provide a differential rate of interest is on the basis of the risk-rating of the customer.

The RBI has also cracked down on the practise of providing discounted loans on products. The RBI has directed that if there is a discount offered in the price of a product, the loan amount sanctioned for the purchase should be after taking into account the discount, rather than giving effect to the benefit by reducing the rate of interest. If there is a moratorium period for payment available, the benefit should be passed on to the customer by ensuring that the repayment schedule, including the interest serving, shall commence after the moratorium period only, rather than adjusting the rate of interest. The RBI has directed banks to not resort to any practise that distorts the interest rate structure of a product and this vitiates the transparency in pricing mechanism.

Additionally, RBI has also mandated that fees levied by merchants on the payments for goods bought on debit cards are not permissible, and banks must terminate relationship with such offending merchants.
[See RBI Circular DBS.CO.PPD No. 3578/11.01.005/2013-14]

➲ *Demat account opening norms simplified.*

The Securities and Exchange Board of India ('SEBI') has taken further steps to simplify and rationalise the Demat account opening process. The Owner-Depository Participant Agreements have been replaced with a common document titled 'Rights and Obligations of the Beneficial Owner and Depository Participant'. The document is mandatory and binding on all existing and new clients and depository participants.

SEBI requires the Depository Participant to provide a copy of the Rights and Obligations Document to the beneficial owner and to take an acknowledgment of the same. This is also meant to ensure that no clause in any voluntary document dilutes the responsibility of the Depository Participant, nor are they in conflict with any of the clauses in the Rights and Obligations Document, or any rules, bye-laws, regulations, notices, guidelines and circulars issued by SEBI and Depositories. Any such conflicting clause in any new or existing document shall stand null and void.
[SEBI Circular CIR/MIRSD/12/2013 dated 04.12.2013]

➲ *M&A rules for telecom cleared by EGoM.*

The empowered group of ministers (EGoM) has approved changes to the rules on mergers and acquisition in the telecom sector that will allow top operators to acquire smaller rivals, or smaller operators to sign deals with each other. The approved rules also raise the cap on the market share of the merged entity in a circle from 35% to 50%. However on the 3 year lock-in period during which companies are not allowed to transfer equities, the EGoM has decided to maintain the status quo. Under the new rules, an operator will be entitled to only one block of spectrum which had been allotted at an administrative price. The merged entity would need to pay the market price for any additional bandwidth beyond that one block.

The EGoM has also decided to allow a merged entity to hold up to 2 blocks of 3G and broadband wireless access spectrum as against 1 block each currently. The EGoM has also decided to retain the spectrum cap of a merged entity at 25% of the total airwaves assigned for access service, and 50% of the bandwidth assigned in a given band in the concerned service area.

➲ *Core investment companies can raise ECB for SPVs.*

In order to strengthen the flow of resources to the infrastructure, RBI has permitted holding companies and core investment companies ('CIC') to raise external commercial borrowings ('EBC') for project use in special purpose vehicles ('SPV').

The conditions prescribed for raising and utilisation on such ECB are: (i) The business activity of the SPV should be in the infrastructure sector where "infrastructure" is defined as per the extant ECB guidelines; (ii) The infrastructure project is required to be implemented by the SPV established exclusively for implementing the project; (iii) The ECB proceeds is utilized either for fresh capital expenditure or for refinancing of existing Rupee loans (under the approval route) availed from the domestic banking system for capital expenditure as per the extant norms on refinancing; (iv) The ECB for SPV can be raised up to 3 years after the Commercial Operations Date of the SPV; (v) The SPV should give an undertaking that no other method of funding, such as, trade credit (if for import of capital goods), etc. will be utilized for that portion of fresh capital expenditure financed through ECB proceeds; (vi) The ECB proceeds should be kept in a separate escrow account as per the extant guidelines on parking of ECB proceeds pending utilization for permissible end-uses and use of such proceeds should be strictly monitored by the AD banks for permissible uses.

Further, in case of holding companies that come under the core investment company regulatory framework of the RBI, the ECB availed should be within the ceiling of leverage stipulated for CICs, i.e., their outside liabilities including ECB cannot be more than 2.5 times of their adjusted net worth as on the date of the last audited balance sheet; and in case of CICs with asset size below INR 100 crore, the ECB availed of should be on fully hedged basis.

➲ *India signs WTO Trade Facilitation Agreement.*

India along with other World Trade Organisation members has signed a Trade Facilitation Agreement that aims to streamline customs clearance procedures around the world by ensuring uniform, transparent, and efficient transactions at customs and port operations across the world. The agreement will impose new multilateral disciplines and uniform principles for transparency, due process, and reasonableness in development and implementation of required procedures related to such customs clearances.

Under the agreement, members are required to publish online all import, export and transit procedures, applied rates of duties and taxes, fees and charges associated with import and export, all rules for classification and evaluation of goods for customs purposes, penalty provisions, etc. Members are also required to issue advance rulings regarding classification and origin of goods to be imported into their territory, and publish procedures for customs appealing. Members are also required to provide greater transparency in procedures for inspection, detention and audits of goods crossing their territories.

Other commitments include low documentary and data requirements, low rates of inspection and rapid release of goods to authorised operators. A committee has also been formed to co-ordinate the implementation of the agreement by 2015.

Taxation Brief

➲ *Ministry clarifies SAD exemption availability.*

The Ministry of Finance has clarified that the exemption benefit of Special Additional Duty of Customs ('SAD') is not available on goods cleared from SEZ/ FTWZ units into DTA unit on stock transfer basis for self-consumption, i.e. otherwise than for sale as such.

Earlier on 16.05.2005, the Ministry of Finance issued a Notification No. 45/2005-Customs that exempted goods cleared from SEZ/ FTWZ and brought into DTA from SAD. The notification provided that the SAD exemption will not be available to goods which, when sold in DTA, are exempt from the payment of sales tax/ VAT. This condition was mandated since in some States sales tax is exempted in respect of DTA clearances by SEZ units. Further, in certain cases, such as stock transfer of goods from an SEZ unit to its unit in the DTA, no sales tax is levied. In such cases, SAD will be leviable.
[*See Circular No. 44/2013 dated 30.12.2013*]

Litigation Brief

➲ *Appeal of CLB order under section 8 of Arbitration and Conciliation Act, 1996 held not maintainable.*

In *Masusmi SA Investment LLC v. Keystone Realtors P. Ltd. & Ors.*, [2013] 181 Comp Cas 525 (Bom), the Hon'ble High Court of Bombay has laid down an interesting legal proposition which may have far reaching consequences, upon the legitimate rights of shareholders under the Companies Act, 1956 ('Act'). In a Company Petition filed under Sections 397, 398 & 402 of the Act before Company Law Board, one of the Respondents filed an application under Section 8 of Arbitration and Conciliation Act, 1996 ('Arbitration Act') seeking referral of the dispute to Arbitration Proceedings, which was allowed.

The Petitioner/Appellant preferred an appeal under Section 10F of the Act assailing the order of referral of the matter to Arbitration. The Hon'ble High Court of Bombay after re-visiting the arbitration jurisprudence evolved by the Hon'ble Supreme Court and various High Courts, held the Appeal as non-maintainable. The Hon'ble High Court based its decision on the combined reading of Sections 5 and 37 of the Arbitration Act, to hold that a judicial authority cannot interfere in arbitration proceedings save as provided under the Arbitration Act itself. And since Section 37 of the Arbitration Act does not cover appeal against such orders, the company appeal was held non-maintainable.

Interestingly, the Special Leave Petitions challenging this judgment before the Hon'ble Supreme Court were dismissed as withdrawn on 06.12.2013, owing to the settlement between the parties. It is pertinent to note that in the absence of a precedent to the contrary, the view adopted by Hon'ble High Court of Bombay is going to hold ground for at least some time to come.

The most obvious consequence that follows is that it can severely jeopardize the interest of minority shareholders as they may be deprived of their legitimate rights and remedies under the Companies Act, 2013 against the oppression and mismanagement committed by majority shareholders due to their inability to appeal an order passed by the Company Law Board under Section 8 of the Arbitration Act.