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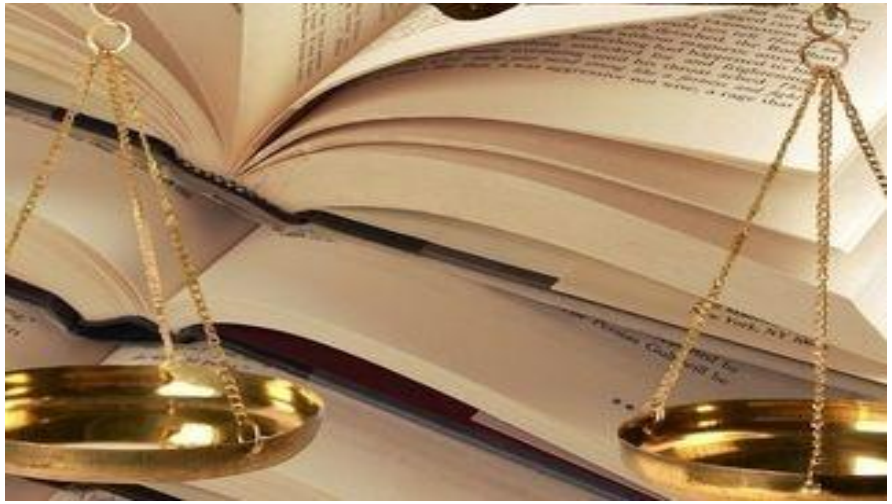
UKCA NEWSWIRE



PREFACE

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ABBREVIATIONS	
Company Law Board	CLB
Supreme Court	SC
High Court	HC
Securities and Exchange Board of India	SEBI
Letter Of Engagement	LOE
Letter Of Offer	LOO
Companies Bill, 2012	The Bill

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Dear Readers,

In the May 2013 issue of the Newsletter, we have discussed the concept of One Person Company which has been introduced in the Companies Bill 2012. The impact it might have on various corporate models has been explored in the newsletter.

The much talked about Supreme Court ruling in the BALCO case has been discussed at length in the newsletter. Its implication on the enforcement of Foreign Awards has also been deliberated.

We have concluded with some important Judgments and Orders of various Courts, SAT and SEBI, along with key notifications & circulars issued by SEBI, MCA and RBI.
Measures undertaken by the Government to boost service tax collections by introducing the Voluntary Compliance Encouragement Scheme (VCES) have been looked into in this edition.

Our endeavor is to provide latest news and analysis of corporate issues particularly matters related to Company Law.

We hope you find the Newsletter informative.

Best regards,

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COMPANY LAW

- The Companies Bill was passed in the Lok Sabha on 18 December, 2012, however it still needs approval of the Rajya Sabha to become a law.
- The Concept of One Person Company (OPC) has been discussed below.

ONE PERSON COMPANY

- One Person Company, a predominantly global phenomenon, has been introduced in the Companies Bill 2012.
- As the name suggests OPC means a company with a single shareholder. Presently, the Companies Act requires at least two members in case of a private company and seven in case of a public company to form a company.

Key Features of an OPC, as stated in the Bill, are :-

- A company with a single shareholder. However, number of directors can be more than one.
- The words 'One Person Company' needs to be affixed in brackets with the name of the company, wherever it is printed, affixed or engraved.
- Memorandum of the company shall indicate name of a person who shall in event of original subscribers death or in his incapacity to contract, become the member of the company. Notice of such an appointment is to be intimated to the Registrar of Companies at the time of incorporation.
- The Act confers some procedural concessions like
  - Holding an AGM is not mandatory
  - Meeting of a single shareholder/director is not required.
- However, all the business transacted by the company shall be authorized by resolutions passed by the member and the same shall be recorded in the minute book after affixing the sign and date. The date affixed shall be deemed to be the date of conducting the meetings.
- All companies are required to prepare their Annual Financial Statements that include the Profit and Loss Account, Balance Sheet, Director's Report, Auditors Report and Cash flow Statement. However One Person Companies have been exempted from preparation of Cash flow Statement.
- An OPC is required to conduct at least one meeting of its BODs in each half of a calendar year and the gap between 2 meetings must not be less than 90 days.

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- **The rationale behind having at least two shareholders for formation of a private company in the Companies Act was clearly to distinguish a company from a sole proprietorship - a corporate structure that has been emphatically excluded from the Act. However this did not deter many proprietors from running proprietorship in the guise of a company by appointing a lone member, usually a relative with a single share, and thereby retaining a substantial chunk to themselves. By doing so they availed the benefits and status of a company without having to run a company in practice.**
- **By acknowledging the concept of OPC, the bill confers upon the member of such a company, among other things, the benefit of limited liability and opens possibilities for more favorable banking facilities, particularly loans.**
- **Experts are anticipating a rise in registrations of one-person companies, particularly from those who run proprietorship in the guise of a company.**
- **A part from giving an option to proprietors to choose between the proprietorship model and OPC, it would drive many in the unorganized sector to enjoy the status of a company thereby encouraging entrepreneurship across the country.**

- **By inserting the provision for appointment of a nominee who shall become member of the company in case of death or incapacity of the original subscriber, the concept of 'perpetual succession' is upheld which is intrinsic to the existence of a company.**

NO ENTRY FOR FOREIGN LAW FIRMS IN INDIA

- It all began in the year 1994 when RBI granted permissions to three foreign law firms to establish their liaison offices in India to render non litigious service (i.e. other than appearing before the court in India).
- The move was met with relentless criticism and was subsequently challenged by "lawyers Collective" before the Bombay High Court.
- The Bombay HC held that RBI was not justified in granting permission to foreign law firms as Section 29 of the Advocates Act provides that only an Advocate enrolled in the State Bar Council can practice law in India and ' practice of law ' comprises of both litigious and non litigious services.
- The matter again came up in the Madras High Court wherein the HC permitted foreign lawyers and law firms to visit India for a temporary period, on a 'fly in and fly out' basis, in order to render legal advisory services to their clients in India.
- The verdict was challenged by the BCI. SC in BCI Vs A.K. Balaji issued an interim order prohibiting foreign firms and lawyers from practicing in India even for a temporary period on 'a 'fly In and Fly out ' basis.
- Although Foreign Law firms are barred from opening offices and practicing in India, the same has not stopped them from entering into 'non merger arrangements' with their Indian counterparts.
- Over the years, they have made indirect presence through such affiliations with an intention to serve their clientele and to understand the Indian market and subsequently merge (usually with their Best friend) in case India's legal sector opens up to foreign firms.
- Some common and well known Models of affiliations are Ad hoc, Best Friend Arrangement and Surrogates.
- **Ad hoc** - A traditional way for firms to operate in countries where they cannot or do not have an office. Foreign firms keep a record of law firms and refer to them their clients in need of any legal help in that country.
- **Best Friend Arrangement -** A foreign firm working in close cooperation with a single Indian firm. A close association where by the Indian firm would get work exclusively.
- **Surrogates** - A foreign firm essentially turns an Indian firm into an overseas office, while the Indian firm continues to operate under its original Indian name. This model was common in the 1990s and early 2000. However, it is largely discontinued now. A strongly criticized model which is looked upon with suspicion by the Bar council of India.
- Best friend model is the most common and certainly the most preferred one out of the lot. Many top Indian law firms have entered into Best Friend Arrangements with their Foreign counterparts.
- Such arrangements are clean in legal terms as foreign law firms are not directly practicing in India and continue to remain a separate entity.
- In addition they have non financial client referral arrangements, which ensure strict adherence to the requisite provisions of the Advocate Act, 1961.

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- **The debate as to whether Foreign Law Firms should be permitted to enter the Indian legal market has been going on for quite some time now.**
- **Those in favour often propagate that liberalization would result in increasing professionalism, greater competition and certainly generate more employment avenues for professionals.**
- **Those against it have expressed concerns over the likely demise of small Indian law firms in an attempt to match up to international standards.**
- **The prospect of liberalization of Indian legal market seems highly unlikely, more so after SCs order in the BCI Vs A.K. Balaji case. The order, prohibiting foreign firms from providing legal services, is seen as a big set back to International law firms who have long lobbied for entry into the Indian legal market. This is evident from the fact that following the order, one has witnessed an increase in termination of 'non merger' affiliations.**

- **In view of the differing judgment by the two HCs, the interim order does bring out some precision, however, several issues require clarification which would hopefully be addressed in SCs final ruling.**
- **It remains to be seen what happens next, in case liberalization does take place, then Indian law firms will have to prepare themselves for a major transition in order to match up to global standards.**

ANALYSIS OF THE LANDMARK BALCO JUDGEMENT

- There has been a lot of judicial deliberation over the applicability of Part I of the Arbitration and Conciliation Act to foreign awards. This issue was raised before the SC in the Bhatia International Vs Bulk Trading S.A. (Bhatia Case). The case elaborately discussed the issue of applicability of sections 9, 11 and 34 of Part I of the Act dealing with the competence of Indian Courts to grant interim reliefs pending arbitral proceedings, appointment of arbitrators and setting aside arbitral awards. Court observed that although Part I mandatorily applies to all arbitrations held in India, it also applies to arbitrations conducted outside India unless expressly or impliedly excluded.
- A decade latter the matter again came up for consideration before the SC. However this time, the decision of the Bhatia case was overruled in Bharat Aluminum Co. Vs Kaiser Aluminum Technical services (BALCO Judgment). It was held that – Part I and Part II of the Act are mutually exclusive of each other and their provisions cannot be applied interchangeably. The SC observed that the definition section (section 2) in Part I begins with the line " this Part, unless the context otherwise requires", and as a result these definitions are not applicable to Part II.
- Section 44 and 53 of the Act defines a foreign award for the purposes of Part II only and have no bearing with Part I of the Act.

- The intension of the Legislature is to make the Act territorial in nature and section 9 and 34 of Part I of the Act, will apply only when the seat of arbitration is in India. The "territoriality principle " means that law of the seat is normally the law that governs the arbitration proceedings. That being the case, any arbitration to be conducted in India would be governed by Part I of the Act, irrespective of the nationalities of the parties concerned and by virtue of section 2(7) of the Act, the award passed in such an arbitral proceeding would be a domestic award.
- BALCO judgment shall apply prospectively and the doctrine laid down in the Bhatia case shall hold good for arbitration agreements entered prior to the said ruling.
- From the above analysis, it is clear that there is no overlapping and intermingling of provisions of Part I and Part II of the Arbitration Act and Part I is not applicable to Foreign Awards.

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- **Companies for long have expressed apprehensions over conducting arbitration in India as court proceedings in India have a reputation of being rather slow when it comes to disposing off cases. As a result most of them prefer the seat of arbitration to be outside India.**
- **Even then, there was not much respite since Bhatia Judgment permitted intervention by Indian Courts in so far as issues regarding granting interim orders, setting aside of awards and appointment of arbitrators with respect to foreign awards were concerned. However, following the BALCO ruling India has reverted to the position prior to the Bhatia case.**
- **BALCO ensures minimum intervention by Indian courts thereby ensuring speedy disposal of disputes.**
- **It is pertinent to note that the judgment shall apply prospectively which means that all agreements entered prior to the BALCO ruling shall still be governed by the Bhatia judgment.**
- **Taking into account the fact that the Bhatia judgment has now been held to be incorrect, applicability of the same to prior entered agreements does not make much sense. Practically, in few years to come there shall be two parallel legal precedents governing arbitration proceedings in India.**

CLARIFICATIONS REGARDING THE SERVICE TAX VOLUNTARY COMPLIANCE ENCOURAGEMENT SCHEME

- The Service Tax Voluntary Compliance Encouragement Scheme (VCES) has come into effect upon enactment of the Finance Bill 2013 on the 10th May, 2013. The Service Tax Voluntary Compliance Encouragement Rules, 2013 has been issued to bring into effect the Scheme. Some clarification as regards the scope and applicability of the Scheme have been made , vide notification no.169/3 /2013 –ST dated 13-05-2013

Issues 1. Whether a person who has not obtained service tax registration so far can make a declaration under VCES?

Any person who has tax dues to declare can make a declaration in terms of the provisions of VCES. If such person does not already have a service tax registration he will be required to take registration before making such declaration.

Issue 2. Whether a declarant shall get immunity from payment of late fee/penalty for having not taken registration earlier or not filed the return or for delay in filing of return.

Yes. It has been provided in VCES that, beside interest and penalty, immunity would also be available from any other proceeding under the Finance Act, 1994 and Rules made thereunder.

Issue 3. Whether an assessee to whom show cause notice or order of determination has been issued can file declaration in respect of tax dues which are not covered by such SCN or order of determination?

- In terms of section 106 (1) of the Finance Act, 2013 and second proviso thereto, the tax dues in respect of which any show cause notice or order of determination under section 72, section 73 or section 73A has been issued or which pertains to the same issue for the subsequent period are excluded from the ambit of the Scheme.

Any other tax dues could be declared under the Scheme subject to the other provisions of the Scheme

Issue 4. What is the scope of section 106 (2)(a)(iii)?

- Whether a communication from department seeking general information from the declarant would lead to invoking of section 106 (2) (a)(iii) for rejection of declaration under the said section? Section 106 (2) (a)(iii) of the Finance Act, 2013 provides for rejection of declaration if such declaration is made by a person against whom an inquiry or investigation in respect of service tax not levied or not paid or short-levied or short paid, has been initiated by way of requiring production of accounts, documents or other evidence under the chapter or the rules made thereunder, and such inquiry or investigation is pending as on the 1st day of March, 2013.
- The relevant provisions, beside section 14 of the Central Excise Act as made applicable to service tax vide section 83 of the Finance Act, under which accounts, documents or other evidences can be requisitioned by the Central Excise Officer for the purposes of inquiry or investigation, are as follows-

(i) Section 72 of the Act envisages requisition of documents and evidences by the Central Excise Officer if any person liable to pay service tax fails to furnish the return or having made a return fails to assess the tax in accordance with the provision of the Chapter or rules made thereunder.

(ii) Rule 5A of the Service tax rules 1994 prescribes for requisition of specified documents by an officer authorised by the Commissioner for the purposes specified therein. The provision of section 106 (2)(a)(iii) shall be attracted only in such cases where accounts, documents or other evidences are requisitioned by the authorised officer from the declarant under the authority of any of the above stated statutory provisions and the inquiry so initiated against the declarant is pending as on the 1st day of March, 2013

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No other communication from the department would attract the provisions of section 106 (2)(a)(iii) and thus would not lead to rejection of the declaration.3. Trade Notice/Public Notice may be issued to the field formations and tax payers.

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- **The VCE scheme has been introduced to provide an opportunity to defaulting tax payers to voluntarily declare and pay their outstanding service tax dues for the period October 01, 2007 to December 31, 2012.**
- **It is worth mentioning that if the requisite conditions are complied with it would immune the defaulter from penalties, interest and other proceedings which were a definite consequence of the default.**
- **However this amnesty scheme is not available to defaulters against whom any inquiry or investigation is pending by way of audit, search warrant or summons.**
- **Undoubtedly, a well envisaged scheme which appears to be a constructive way to boost service tax collections. The clarifications issued above will only help in bringing about more precision to the same. However its efficacy depends on the manner in which it is actually implemented.**

GUIDELINES ON ALGORITHMIC TRADING

SEBI vide circular no. CIR/MRD/DP/16/2013 dated 21.05.2013

Issued Broad guidelines on Algorithmic Trading

- The stock brokers/trading members that provide the facility of algorithmic trading shall subject their algorithmic trading system to a system audit every six months in order to ensure that the requirements prescribed by SEBI/stock exchanges with regard to algorithmic trading are effectively implemented.
- Such system audit of algorithmic trading system shall be undertaken by a system auditor who possess any of the following certifications:

(a) CISA (Certified Information System Auditors) from ISACA;

(b) DISA (Post Qualification Certification in Information Systems Audit) from Institute of Chartered Accountants of India (ICAI);

(c) CISM (Certified Information Securities Manager) from ISACA;

(d) CISSP (Certified Information Systems Security Professional) from International Information Systems Security Certification Consortium, commonly known as (ISC)

- Deficiencies or issues identified during the process of system audit of trading algorithm/software shall be reported by the stock broker/trading member to the stock exchange immediately on completion of the system audit. Further, the stock broker/trading member shall take immediate corrective actions to rectify such deficiencies/issues.
- In case of serious deficiencies/issues or failure of the stock broker/trading member to take satisfactory corrective action, the stock exchange shall not allow the stock broker/trading member to use the trading software till deficiencies/issues with the trading software are rectified and a satisfactory system audit report is submitted to the stock exchange. Stock exchanges may also consider imposing suitable penalties in case of failure of the stock broker/trading member to take satisfactory corrective action to its system within the time-period specified by the stock exchanges.
- Further, stock exchanges are directed to take necessary steps to ensure effective monitoring and surveillance of orders and trades resulting from trading algorithms.

- Stock exchanges shall periodically review their surveillance arrangements in order to better detect and investigate market manipulation and market disruptions.
- As directed vide circular dated March 30, 2012 stock exchanges have implemented a framework of economic disincentives for high daily order-to-trade ratio of orders placed from trading algorithms by prescribing penalties in form of 'charges to be levied per algo orders' at various levels of daily order-to-trade ratio. The penalty rates specified by the stock exchanges have been reviewed and in order to provide sufficient deterrence, stock exchanges are directed to double the existing rates of 'charges to be levied per algo orders' specified in their circulars/notices.
- In order to discourage repetitive instances of high daily order-to-trade ratio, stock exchanges shall impose an additional penalty in form of suspension of proprietary trading right of the stock broker/trading member for the first trading hour on the next trading day in case a stock broker/trading member is penalized for maintaining high daily order-to-trade ratio, provided penalty was imposed on the stock broker/trading member on more than ten occasions in the previous thirty trading days.
- Stock Exchanges are directed to: take necessary steps for implementation of the above and make necessary amendments to the relevant bye-laws, rules and regulations for the implementation of the above decision.

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- **The move was in the wake of receipt of comments by investors regarding the algorithmic trading system.**
- **Measures undertaken by SEBI will strengthen the overall surveillance mechanism and help in preventing market manipulation.**

RBI AND SELECT BRANCHES OF BANKS TO ACCEPT ADVANCE INCOME TAX

- RBI vide press release no. 2012-2013/1933 dated 20.05.201 advised assesses to remit their Income Tax dues sufficiently in advance of the due date in order to avoid the last minute rush .
- The Reserve Bank has also authorized select branches of accredited agency banks as indicated below at Mumbai to accept payments of Income Tax dues. Most of these banks are also providing facilities for on-line payment of taxes. The assessees may take advantage of these arrangements for their convenience.

Allahabad Bank	Indian Bank	State Bank of India
Andhra Bank	Indian Overseas Bank	State Bank of Bikaner & Jaipur
Bank of Baroda	Oriental Bank of Commerce	State Bank of Hyderabad
Bank of India	Punjab & Sindh Bank	State Bank of Travancore
Bank of Maharashtra	Punjab National Bank	State Bank of Mysore
Canara Bank	Syndicate Bank	State Bank of Patiala
Central Bank of India	UCO Bank	HDFC Bank Ltd
Corporation Bank	Union Bank of India	Axis Bank Ltd
Dena Bank	United Bank of India	ICICI Bank Ltd
IDBI Bank	Vijay Bank	

CASE LAWS

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- **The rush for remitting IT dues is quite large in the month of june, which not only imposes a burden on the banks but also causes inconvenience to public at large.**
- **A welcome step indeed as it reduces burden on authorities and ensures requisite compliance in an organized manner.**

V.L.S. FINANCE LTD. VS. UNION OF INDIA (UOI) AND ORS.

- Sunair Hotel (hereinafter referred to as the Company) had acquired a piece of land from NDMC on license. Without any right, the land was shown as land in the schedule of fixed assets, which is not correct and therefore, punishable under section 211(7) of the Companies Act. A complaint was filed in view of the same.

- Before the Court could proceed with the complaint, Company and its Managing Director jointly filed an application before the Company Law Board for compounding the offence. CLB, by its order acceded to the prayer and compounded the offence against the Managing Director.

- Aggrieved by the same, Appellant preferred an appeal before the High Court, contending that the power of compounding could be exercised by a Criminal Court and not by the Company Law Board. The appeal was subsequently dismissed and the matter came before the SC.

- The Appellant contended that the Company Law Board has no jurisdiction to compound an offence punishable Under Section 211(7) of the Act as the punishment provided is imprisonment also. The respondent however, submitted that imprisonment is not mandatory punishment under Section 211(7) of the Act and hence, the Company Law Board has the authority to compound the same. He also pointed out that the above submission was not at all advanced before the Company Law Board and, therefore, the Appellant cannot be permitted to raise this question for the first time before the SC. SC rejecting this plea observed that in case, facts pleaded give rise to a pure question of law going to the root of the matter, SC possesses discretion to go into that. The position would have been different had the Appellant for the first time prayed before the SC for adjudication on an issue of fact.

- In so far as the first issue was concerned, it is observed that Section 621A was inserted by the Companies Amendment Act, 1988 on the recommendation of the Sachar Committee. It was felt that leniency is required in the administration of the provisions of the Act, particularly those involving issues of penalty because a large number of defaults are of technical nature and arise out of ignorance on account of complexity of the provisions.

CASE LAWS

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- Court Observed that a person seeking compounding of an offence in accordance with the procedure laid down in the Code of Criminal Procedure can do so before the criminal court with the permission of the Court under Sub-section (7) of Section 621A of the Act, which normally cannot be done under the provisions of the Code of Criminal Procedure. Such compounding of offence would always be relatable to the offence punishable with imprisonment or with fine or with both as is made clear under Clauses (a) and (b) of Sub-section (7).
- However the Company Law Board can compound an offence of the nature prescribed under Sub-section (1) of section 621(A) either before the institution of the criminal proceeding or even after institution of the criminal proceeding and the said power is not subject to the provisions of Sub-section (7).
- Both are parallel powers to be exercised by the prescribed authorities who have been empowered under the statute and one power is not dependent on the other.
- Offence punishable Under Section 211(7) not being an offence punishable with imprisonment only or imprisonment and also with fine, is permissible to be compounded by the Company Law Board either before or after the institution of any prosecution. In view of Sub-section (7) of Section 621A, the Criminal Court also possesses similar power to compound an offence after institution of the prosecution.
- In addition, both Sub-section (1) and Sub-section (7) of Section 621A of the Act start with a non-obstante clause.
- Ordinarily, the offence is compounded under the provisions of the Code of Criminal Procedure and the power to accord permission is conferred on the court excepting those offences for which the permission is not required.
- However, in view of the non-obstante clause, the power of composition can be exercised by the court or the Company Law Board. The legislature has conferred the same power to the Company Law Board which can exercise its power either before or after the institution of any prosecution.
- When the language is clear and unambiguous, it must be interpreted in its ordinary sense and no addition or alteration of the words or expressions used is permissible.

SEBI VS INDO GREEN PROJECTS LIMITED (presently known as IITL projects limited)

- SEBI noticed that Indo Green Projects (hereinafter referred to as IGPL or the noticee) had failed to make disclosures as per SEBIs Takeover Code. An Adjudicating Officer was appointed to inquire into the non compliance of Regulation 7 (3) of the Takeover Regulations, alleged to have been committed by the noticee.
- A Show cause notice was served on the noticee alleging that IITL had acquired 50.17% of the share capital of IGPL from its former promoters, namely Shri Kamal Singhania and Ms. Usha Singhania (hereinafter referred to as Singhanias) in the year 2008.

- Pursuant to the said acquisition, IITL filed a draft Letter of Offer (LoO) with SEBI for acquiring additional 20% of shares of IGPL through an open offer. While examining the LoO, SEBI observed that Singhanias had together acquired 4,00,000 shares of IGPL constituting 7.92% of the share capital on March 31, 2002 as persons acting in concert. The said acquisition increased their joint shareholding in IGPL from 21,28,900 shares constituting 42.15% to 25,28,900 shares constituting 50.07%. However, no disclosure was made by the noticee to the stock exchanges in respect of the aggregate shareholding of Singhanias as required under Regulation 7 (3) of the Takeover Regulations.
- Noticee denied the allegation and submitted that Singhanias had not made the disclosure in respect of their acquisition of 4,00,000 shares, constituting 7.92% of the share capital of IGPL. The disclosure about such non compliance was made in the LoO issued by IITL while making the open offer. Singhanias were required to disclose the above referred acquisition to the target company within two days of acquisition under Regulation 7(1) of the Takeover Regulations.
- This disclosure is a pre-requisite for the disclosure to be made by the target company under Regulation 7(3) of the Takeover Regulations. As the said provision clearly stipulates that target company shall make a disclosure within seven days of receipt of disclosure from the acquirer. Since no disclosure was made by Singhanias, the target company was not in a position to file the disclosure under Regulation 7(3) of the Takeover Regulations to the concerned stock exchange.
- The noticee placed reliance on *SEBI vs Dagger Forst Tools* wherein it was observed that the obligation on the target company to make disclosure under Regulation 7(3) of the Takeover Regulations arises only on receipt of the disclosure from the acquirer.
- After going through the requisite provisions, SEBI concluded that the noticee had not received any disclosure under Regulation 7(1) or 7 (1A) of the Takeover Regulations from Singhanias in respect of their acquisition of 4,00,000 shares of IGPL. In order to substantiate the same, the noticee produced a copy of declaration dated May 14, 2008 submitted by Singhanias to SEBI, on the "Status of Compliance with the Provisions of Chapter II of the Takeover Regulations". And the said disclosure was signed by Singhanias. Hence, the obligation to make disclosure under Regulation 7(3) of the Takeover Regulations by IGPL does not arise
- Since non compliance of Regulation 7(3) of the Takeover Regulations is not established against Indo Green Projects Limited, SEBI disposed off the matter.

ERNST & YOUNG PVT. LTD. Vs JAGSON INTERNATIONAL LTD.

- A Petition under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956 was filed by Ernst and Young Pvt. Ltd (E&Y), seeking winding up of the Respondent company Jagson International Ltd (JIL) on grounds of its inability to pay debts.
- JIL contacted E&Y seeking its assistance in arranging adequate finance through debt\equity in order to help JIL in expanding its offshore oil drilling services. JIL needed financial assistance of $ 330 million. A Letter of Engagement (LOE) dated 1st April 2008 was executed between E&Y and JIL in view of the same.
- Clause 3.3 of the LOE sets out the fees and expenses payable. The fees payable by JIL to E&Y was structured as 'engagement fees' and 'success fees'. Clause 3.3.3 provided for termination fee. Termination fee of Rs.30 lakhs in addition to the engagement fee for debt\equity was to be raised separately.

CASE LAWS

- On 11th June 2008 E&Y raised an invoice of Rs.5,61,800 for rendering professional services. Another invoice in Phase-II of Rs.11,23,600 was raised. Milestone fee on 22nd june 2009 of Rs. 17,81,681.48 and out of pocket expenses on 18th march 2010 Rs. 3,23,667.91 were raised including another success fee of Rs. 2,30,52,700.
- E&Y addressed a letter dated 22.04.2010 to JIL stating about assisting JIL in successful acquisition/ financing 2 jack-up rigs and requested for additional 0.25% success fee (1.15% total)
- Letter dated 4th October 2012 addressed to the Chairman, and a copy marked to Mr. Pradeep Gupta, Director of JIL, E&Y reminded that its invoices dated 18th march & 4th June 2010 remained unpaid. It also reminded about the letter dated 22nd April 2010 whereby enhancement of the rate of success fee by 0.25% had been requested. Along with that it also referred to the previous meeting dated 21st September 2010, during which JIL had reassured that the outstanding amount would be cleared by 30th September 2010.
- JIL wrote a letter on 27th January 2011 stating that the "Company is currently facing some cash flow mismatch, which is expected to be cleared by February 2011, we acknowledge the receipt of invoice of INR 4,90,04,429 from E&Y Pvt. Ltd. and the same would be cleared."
- With no payment coming forth for some time, a legal notice was issued on 31st August 2011 by E&Y to JIL.
- The respondent contended that the engagement fee was to be set of against the success fee and that the original purpose that was sought could not be achieved and assistance provided by E&Y to enable JIL to obtain loan was not even 1/6th of the original sum 330 million. It was further submitted that JIL never agreed to enhanced success fee rate of 1.15%. Respondent relied on the decision in *Madison communications Pvt. Ltd V. Som Distilleries and Breweries Ltd.* Reliance was also placed on the decision in *Patel Investments V. Credential Finance Ltd.*
- It is seen that at no point in time did JIL terminate the LOE. It also did not write to E&Y in response to the invoices received by it after 10th April 2010 protesting that the success fee claimed was either not payable or that the rate was not 1.15%.
- Clauses of the LOE states that E&Y will still be entitled to the success fee in relation to any transaction on which E&Y advices. Further, there is an unequivocal admission of liability by JIL in its letter 27th January 2011 acknowledging receipt of Rs.4,90,04,429 from E&Y. The e-mail dated 26th May 2011 from JIL also seeks some more time to make payment. The defence of JIL to the petition did not appear to the court to be bonafide.
- Court being satisfied that the petitioner has made out a case for admission of the Official Liquidator attached to the court as Provisional Liquidator of JIL. Thus directing the OL to take over all the assets, books of accounts and records of the JIL immediately. In addition, OL shall also prepare a complete inventory of all assets of the JIL before sealing the premises in which they are kept and seek the assistance of a valuer to value the assets.
- The HC Directed the Directors of JIL to strictly Comply with the requirements of section 454 of the Act and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from the date that this order become operative.
- Order is kept in abeyance for a period of 8 weeks and one last opportunity is provided to JIL to make payment to E&Y of its admitted liability to the satisfaction of E&Y. If the payment as directed above, is made by JIL to E&Y within 8 weeks, then the present petition will be disposed of leaving it open to E&Y to institute other appropriate proceeding in accordance with law to recover the balance amount claimed by it. If such payment is not made within 8 weeks then this order will become immediately operational.

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