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Highlights

- SEBI allows pre-emption and options in securities.
- SMEs allowed to tap into institutional trading platforms.
- Govt. may allow unlisted Indian companies to list abroad.
- SEBI to allow real estate investment trusts in India.
- Medical, not tourist, visa for foreigners seeking surrogate mothers in India.
- SEBI issues draft regulations for settlements.
- CESTAT: The same activity cannot be 'manufacture' and 'service' at the same time.

Corporate Brief

➲ *SEBI allows pre-emption and options in securities.*

After months of intense speculation, the Securities and Exchange Board of India ('SEBI') has finally approved the use of pre-emption and options in securities. A notification dated 03.10.2013 issued by SEBI rescinds the earlier SEBI notification [No. S.O.184(E) dated 01.03.2000] which prohibited such contracts involving options, and pre-emptive rights.

Under the new Notification, it is now possible to enter into the following types of contract, without requiring the prior permission of SEBI: (i) spot delivery contracts; (ii) contracts for sale or purchase of securities or contracts in derivatives, (iii) contracts for pre-emption including right of first refusal, tag-along or drag-along rights and (iv) contracts for purchase or sale of securities pursuant to exercise of an option to buy or sell securities.

The new Notification provides that such options can be exercised only where (i) such securities are held by the seller for a minimum 1 year from the date of contract, (ii) the price payable for such securities is as per applicable laws, and (iii) the contract is settled by way of actual delivery of the securities.
[See SEBI Notification No. LAD-NRO/GN/2013-14/26/6667]

➲ *SMEs allowed to tap into institutional trading platforms.*

The Securities and Exchange Board of India has allowed SMEs to list on institutional trading platforms without requiring to issue an Initial Public Offering. A Notification issued by SEBI on 08.10.2013 provides that SMEs will be eligible for listing of its securities on an institutional trading platform if it satisfies the following conditions: (i) the company, its promoter, group company, or director does not appear in the willful defaulters list of the Reserve Bank of India, (ii) there is no winding-up petition against the company, (iii) the company, group companies, or subsidiaries have not been referred to the Board for Industrial and Financial Reconstruction within a period of 5 previous years, (iv) no regulatory action has been taken against the company, its promoter or director, by SEBI, Reserve Bank of India, Insurance Regulatory and Development Authority, or by the Ministry of Corporate Affairs within the 5 previous years, (v) the company has not completed 10 years after incorporation and its revenues have not exceeded 100 crore rupee in any previous financial years, (vi) the paid-up capital of the company has not exceeded INR 25 crore in any previous financial year, (vii) the company has at least 1 year's audited balance sheet.
[See SEBI Notification No. LAD-NRO/GN/2013-14/27/6720]

➲ *Govt. may allow unlisted Indian companies to list abroad.*

Currently, unlisted Indian companies are not allowed to list in overseas markets without prior or simultaneous listing in Indian markets. However, the Ministry of Finance has issued a press release dated 27.09.2013 wherein it has granted in-principle approval to allow unlisted companies to raise capital abroad without the requirement of prior or subsequent listing in India. The scheme is to be implemented on a pilot-basis for an initial term of 2 years, after which the arrangement will be reviewed.

The approval to list abroad is subject to the fulfillment of the following conditions: (i) Unlisted companies will be allowed to list only in IOSCO/FAFT compliant jurisdictions, or such jurisdictions with which SEBI has signed a bilateral agreement, (ii) companies shall comply with SEBI's disclosure requirements, and file returns as required under the Prevention of Money Laundering Act, (iii) companies will be fully FDI Policy compliant.

The press release provides that the capital raised abroad may be utilised for retiring outstanding overseas debt, or for operations abroad including for acquisitions; and in case the funds raised are not utilised abroad, the same is to be repatriated to India within 15 days and parked in AD category banks.

➲ *SEBI to allow real estate investment trusts in India.*

The Securities and Exchange Board of India has issued draft guidelines on Real Estate Investment Trusts ('REIT') and invited feedback on the same. REITs are a form of securitised investment into real estate. REITs are commonly used internationally to invest in completed, revenue-generating real estate assets. The income generally accrues from rentals received from the real estate properties. As per the draft guidelines, REITs would require to be registered with SEBI, and be set up as a trust. The trustee shall be responsible for the overall operations of the REIT. Additionally, a sponsor shall hold a minimum of 25% share in the REIT at all times.

A REIT trust will require to be registered with SEBI, and will be able to offer units to the public and have units listed only upon obtaining approval of SEBI. Listing of units is compulsory for REITs, and they may subsequently raise funds through follow-on offers. For floating an initial offer of REIT units, the size of assets under the REIT shall have to be a minimum of INR 1000 crore. Initially only large assets, and established entities would be allowed to enter the market; and only wealthy individuals and institutions will be allowed to subscribe to REIT.

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Unit offers, and the minimum subscription size will be INR 2 lakh and unit size will be INR 1 lakh.

REITs may invest in properties either directly or through special purpose vehicles, provided that such special purpose vehicle should hold at least 90% of the REIT's assets. REITs will not be allowed to invest in vacant or agricultural land, or mortgages other than mortgage-backed securities.
[See SEBI Press Release PR No. 101/2013]

➲ *Medical, not tourist, visa for foreigners seeking surrogate mothers in India.*

Foreign nationals visiting India for commissioning surrogacy will now require a medical visa. The Ministry of Home Affairs has directed that the tourist visa earlier granted for such foreign nationals is not the appropriate category of visa. The ministry has also directed clinics to accept samples only in the presence of the couples in India with a proper visa. Further such visa will only be given to foreigners who are married for at least 2 years. The visa application must contain a letter from the embassy of the foreign country or its foreign ministry that the country recognizes surrogacy, and that the children born will be permitted entry into such country as the biological child of the couple commissioning the surrogacy.

➲ *SEBI issues draft regulations for settlements.*

The Securities and Exchange Board of India has issued the draft regulations on the settlement of administrative and civil proceedings. Formally known as the Securities and Exchange Board of India (Settlement of Administrative and Civil Proceedings) Regulations, 2013, the regulations provide for the terms of settlement and the procedure of settlement proceedings.

Application can be made by any person against whom any proceedings have been initiated by SEBI under the Securities and Exchange Board of India Act, 1992. Applications can only be made within 60 days from the date of service of show-cause notice or supplementary show-cause notice issued by SEBI. Application fees is INR 5000/-. However SEBI may not settle a proceeding if it involves (i) commission of insider trading; (ii) fraudulent and unfair trade practices; (iii) failure to make an open offer in accordance with the provisions of the Securities and Exchange Board of India Act, 1992; (iv) defaults or manipulative practices by mutual funds; (v) failure to redress investor grievances; (vi) failure to make required disclosures, (vi) raising of monies in violation of securities laws, among others.

The draft regulations also propose the creation of a high-powered advisory committee to consider and recommend on the terms of the settlement. The high-powered advisory committee is to be assisted by internal committees. The settlement applications will be referred to the internal committee for determination of the settlement terms, which shall be placed before the high-powered advisory committee. The high-powered advisory committee may ask the applicant to revise the settlement amount, or refer the application back to the internal committee.

Taxation Brief

➲ *CESTAT: The same activity cannot be 'manufacture' and 'service' at the same time.*

The Hon'ble CESTAT, New Delhi, has held recently in the case of *Jubiliant Industries Limited v. CCE, Ghaziabad* [2013 (9) – CESTAT New Delhi] that "the same activity cannot be considered as manufacturing and subjected to excise duty and at the same time considered to be a service and subjected to service tax".

In the present case one party was manufacturing excisable goods for another party. The second party was providing the first party with all the requisite raw materials, and the manufacturing was being carried out in the presence of the managerial staff of the second party. Initially, the excise duty registration was obtained in the name of the first party; however upon advice from the Excise Department, the Excise registration was surrendered and a fresh Excise registration was taken in the name of the second party. However, the Revenue Department was of the view that the first party was providing 'business support services' as defined under Section 65(104c) of the Finance Act, 1994 made taxable under Section 65(105)(zzzq) of the said Act.

The Hon'ble CESTAT, New Delhi held as stated above, and has further stated that the activity is recognised under 'business auxiliary services' defined under Section 65(19) and excluded from the scope of service tax, and that therefore the process amounts to manufacture, and the same is kept specifically out of the scope of service tax.

It is important to note that upon the introduction of the Negative List (wef. 01.07.2012), any process amounting to manufacture or production of goods falls under the Negative List of Services (vide Section 66D(f) of the Finance Act, 1994, effective from 01.07.2013).

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