

LUTHRA & LUTHRA LLP

CHARTERED ACCOUNTANTS



**A MONTHLY NEWSLETTER BY
CORPORATE LAW TEAM
DECEMBER 2023**

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*"Action is the
foundational key to all
success."*

– Pablo Picasso





COMPANIES ACT, 2013



SECTION I- COMPANIES ACT, 2013

I. REGULATORY INSIGHTS

Name of the Act/Rules/Regulations etc	Heading	Notification/circular No and Date	Details
Ministry of Corporate Affairs	LLP (Significant Beneficial Owner) Rules, 2023	Notification dated 9th November, 2023	DUTY OF REPORTING LIMITED LIABILITY PARTNERSHIP – RULE 4 1. Every reporting LLP shall take necessary steps to find out if there is any individual who is a significant beneficial owner, in relation to that reporting limited liability partnership and if so, identify him and cause such individual to make a declaration in form LLP BEN-01.

Name of the Act/Rules/Regulations etc	Heading	Notification/circular No and Date	Details
			2. Every reporting LLP shall give notice to partner in Form LLP BEN-04 in relation to partner (other than an individual), where such partner holds not less than 10% of its: • Contribution • Voting rights • Right to receive or participate in the distributable profits or any other distribution payable in a financial year, for seeking information in accordance with section 90(5) of Companies act, 2013. DECLARATION OF SIGNIFICANT BENEFICIAL OWNERSHIP – RULE 5 Every individual: • Who is significant beneficial owner in a reporting LLP shall file declaration in Form LLP BEN-01 to the reporting LLP within 30 days of commencement of LLP (Significant Beneficial Owner) Rules, 2023. • Who subsequently becomes a Significant beneficial owner (SBO) or where there is change in the significant beneficial ownership shall file declaration in Form LLP BEN-01 within 30 days of acquiring such significant beneficial ownership.

Name of the Act/Rules/Regulations etc	Heading	Notification/circular No and Date	Details
			2. Where an individual becomes a SBO, or where his significant beneficial ownership changes within 90 days of commencement of LLP (Significant beneficial owner) Rules, 2023, it shall be deemed that such individual became the SBO or any change therein happened on expiry of 90 form commencement of such rules and period of 30 days will be reckoned accordingly. REGISTER AND RETURN OF SIGNIFICANT BENEFICIAL OWNERS – RULE 6 AND 7 The reporting LLP shall file a return in Form LLP BEN-02 with registrar in respect of declaration received in Form LLP BEN-01 within 30 days from the date of receipt of such declaration. 2. The LLP shall maintain a register of SBO in Form LLP BEN -03, which shall be open for inspection during business hours at reasonable time of not less than 2 hours on every working day on payment of fee as specified by LLP but not exceeding Rs.50 for each inspection.

II. CHECKLIST

CHECKLIST FOR ALTERATION OF AUTHORISED SHARE CAPITAL					
Compliance title	Description	Section/ rule/ regulation	Name of section/rule/ regulation	Timeline	Prescribed form
Calling Board Meeting	Issue Notice of Board Meeting to all the directors of company at least 7 days before the date of Board Meeting. Attachments to Notice: - Agenda - Notes to Agenda and - Draft Resolution to approve the following: (i) Alteration of authorised share capital.	Section 173(3) and Secretarial Standard-1	Companies Act, 2013	At least 7 days before the date of Board Meeting *Board Meeting can be conducted on Shorter Notice with the consent of directors	NA
Convene Board Meeting	Board shall: i. pass the Board resolution for alteration of authorised share capital.	Section 173 and Secretarial Standard-1	Companies Act, 2013	Within 7 days from the date of issue of notice	NA

CHECKLIST FOR AMENDMENT IN OBJECT CLAUSE OF MOA

Compliance title	Description	Section/ rule/ regulation	Name of section/rule/ regulation	Timeline	Prescribed form
	Fix the day, date, time and venue of general meeting and authorising director or any other person to send the notice for the same to the members.				
Preparation and circulation of Draft Minutes	Draft minutes shall be prepared and circulated to all the members of the Board by Hand/- Speed Post/Registered post/Courier/E-mail for their comments.	Clause 7.4	Secretarial Standard-1	Within 15 days from the date of Board Meeting	NA
Issue Notice of Extra-ordinary General Meeting	Notice of Extra-ordinary General Meeting shall be given at least clear 21 days before the actual date of a General Meeting in writing, by hand or by ordinary post or by	Section 101	Companies Act, 2013	Before 21 clear days from the date of General Meeting	NA

CHECKLIST FOR AMENDMENT IN OBJECT CLAUSE OF MOA

Compliance title	Description	Section/ rule/ regulation	Name of section/rule/ regulation	Timeline	Prescribed form
	speed post or by registered post or by courier or by facsimile or by e-mail or by any other electronic means A General Meeting may be conducted at shorter notice with the consent of at least majority in number and ninety five percent of such part of the paid-up share capital of the company.				
To whom the Notice of Extra-ordinary General Meeting to be sent	Notice will be sent to -Directors -Members -Auditors of Company and - to others who are entitled to receive the notice of the General Meeting.	Section 101	Companies Act, 2013	-	NA

CHECKLIST FOR AMENDMENT IN OBJECT CLAUSE OF MOA

Compliance title	Description	Section/ rule/ regulation	Name of section/rule/ regulation	Timeline	Prescribed form
Contents of Notice of Extra-ordinary General Meeting	Notice of General Meeting shall specify the following: - Date - Day - Time - Venue of Meeting - Explanatory Statement	Section 101 and 102 read with section 61	Companies Act, 2013	-	NA
Convene Extra-ordinary General Meeting	Hold the General Meeting and pass ordinary Resolution for approval of alteration of MOA.	Section 61	Companies Act, 2013	-	NA
Minutes of General Meeting	Prepare and arrange for signing of the minutes of the General Meeting.	Secretarial Standard -2	Secretarial Standard -2	Within 30 days from the Date of General Meeting	NA
Filing of Form SH-07	File E-form SH-7 with the ROC within 30 days from the date of passing the resolution.	Section 61	Companies Act, 2013	-	E-Form SH-7

CHECKLIST FOR AMENDMENT IN OBJECT CLAUSE OF MOA

Compliance title	Description	Section/ rule/ regulation	Name of section/rule/ regulation	Timeline	Prescribed form
Filing of Form INC-33	File form INC-33 (for amendment of MOA) with the ROC within 30 days from the date of passing the resolution.	Section 61	Companies Act, 2013	-	E-Form INC-33



III. CASE LAW

ORDER OF HON'BLE HIGH COURT OF DELHI

DATED 01ST DECEMBER 2023

ARB.P. 753/2023

In the matter of:

J.S.R. Constructions

..... Petitioner

Versus

**National Highways Authority
Of India and Anr.**

..... Respondents

Facts of the Case

1. The petitioner filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, related to a construction contract for a road over bridge in Maharashtra. Disputes arose, leading to arbitration proceedings.

2. A notice invoking the arbitration clause was sent by the petitioner to the respondent no.1 on 30.04.2022, seeking to raise certain claims upon the respondent no.1 and appointing its nominee arbitrator and in response thereto dated 23.05.2023, the respondent no.1 also appointed its nominee arbitrator.

3. As per the agreement, the nominee arbitrators appointed by each party had to mutually nominate a presiding arbitrator but both the nominee arbitrators have failed to

agree on a presiding arbitrator and hence, requested the parties to take further action as per the due procedure.

4. In case the two Arbitrators appointed by the parties fail to reach upon a consensus, the presiding arbitrator shall be appointed by the Appointing Authority as specified in the Appendix to Bid.

5. As per the Appendix to Bid, the Appointing Authority is "Director General (Road Development and Special Secretary), Ministry of Shipping, Road Transport & Highways" i.e. the respondent no. 2/MoRTH.

6. Thereafter, the respondent no.1 vide letter dated 12.07.2023 informed that the matter was referred to the Director General, MoRTH; accordingly, the Director General,

MoRTH has appointed a presiding arbitrator in the matter and the petitioner objected to the appointment of the presiding arbitrator vide its letter dated 13.07.2023.

7. The presiding arbitrator issued a communication dated 19.07.2023, stating that the Arbitral Tribunal stands constituted despite of the objection of petitioner.

Petitioner Contentions:

Placed reliance on decisions held in the case of **Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited, Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited, and Bharat Broadband Network Limited v. United Telecoms Limited** and contends that any party having an interest in the outcome of the dispute can neither act as the arbitrator nor appoint an arbitrator.

Also, the appointing authority i.e. Director General of MoRTH is a part time member of the respondent no.1. As such, he is ineligible to be himself appointed as an arbitrator in terms of the aforesaid observation in Perkins (supra). Consequently, such a person is also ineligible to appoint any member of the arbitral tribunal.

Respondent Contentions:

1. The Arbitral Tribunal has already been duly constituted; the present petition is not maintainable.

2. Placed reliance on **Central Organisation for Railway Electrification v. ECISPIC-SMO-MCML (JV)** and contended that the appointment procedure in the present case is valid.

3. Both the parties stand on an equal footing as both the parties have the right to nominate their respective Arbitrators of their own choice and if both the nominee Arbitrators do not agree with a name of a presiding arbitrator, the power to appoint the presiding arbitrator is given to the Director General, which is a different entity from the respondent no. 1.

Issue Involved:

1. Whether the power given to the Director General, MoRTH in the arbitration clause to appoint the presiding arbitrator, when the two Arbitrators appointed by the parties fail to reach upon a consensus, is a valid procedure?

2. Whether a petition under Section 11 of the A&C is maintainable once an Arbitral Tribunal has been constituted?

Hon'ble High Court held that:

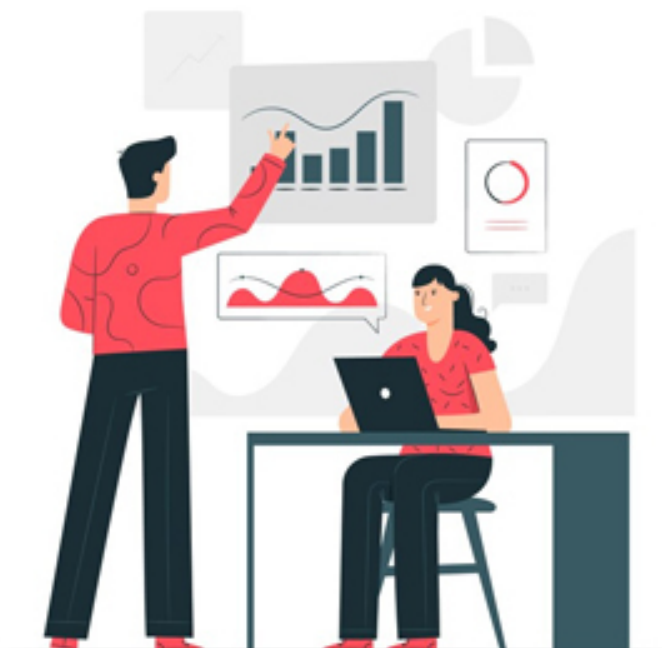
1. Any person who is ineligible to act as arbitrator must also not be eligible to appoint anyone else as an arbitrator; such person cannot be and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator.

2. In the present case, the respondent No.1/NHAI is under the administrative control of the respondent No.2/MoRTH. Also, the appointing authority i.e. Director General of MoRTH is a part time member of the respondent No.1. As such, he is ineligible to be himself appointed as an arbitrator. Consequently, such a person is also ineligible to appoint any member of the arbitral tribunal.

3. The appointment procedure, while conferring power upon the Director General of MoRTH to appoint the presiding arbitrator (despite being a part-time member of the respondent No.1 itself), in effect, gives a greater say to the respondents in constitution of the arbitral tribunal. Normally, in an appointment procedure where both the parties have the right to nominate the respective arbitrators, any advantage a party may drive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where one of the contracting parties has a further right to appoint a presiding arbitrator, this equilibrium gets disturbed. A presiding arbitrator must not be appointed by a person who has an interest in the outcome or decision of the dispute, as the same would defeat the purpose of unbiased adjudication of the disputes between the parties.

4. Notwithstanding the parties' agreement, the arbitral process is expected to uphold certain minimum standards of independence and impartiality. Thus, a presiding arbitrator must not be appointed by only one of the contracting parties.

5. The present petition is maintainable. There is no merit in the argument of the respondents that since an Arbitral Tribunal has been constituted to adjudicate the disputes between the parties, the present petition is not maintainable.



IV. SECTION ANALYSIS

Director – Appointment, Qualifications and Duties

Applicable Law:

1. Companies act, 2013

Definitions:

1. "Director" (Section 2(34) of the Companies Act, 2013), means a director appointed to the Board of the company.
2. "Board of Directors" or "Board" (Section 2(10) of the Companies Act, 2013), in relation to a company, means the collective body of the Directors of the company.

Positions held by directors:

1. **Managing director**" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

Explanation.—For the purposes of this clause, the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of

transfer of any share, shall not be deemed to be included within the substantial powers of management.

2. **Whole-time director**" includes a director in the whole-time employment of the company.

3. **Key managerial personnel**", in relation to a company, means—

- the Chief Executive Officer or the managing director or the manager;
- the company secretary;
- the whole-time director;
- the Chief Financial Officer;
- such other officer, not more than one level below the Directors who is in whole-time employment, designated as key managerial personnel by the Board; and
- such other officer as may be prescribed;

4. **"Officer who is in default"**, for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely: —

- whole-time director;
- key managerial personnel;
- where there is no key managerial personnel, such director or Directors as specified by the Board in this behalf and who has or have given his or their consent in writing to

the Board to such specification, or all the Directors, if no director is so specified;

- any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
- any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
- every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;
- in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer.

Appointment of Additional Director, Alternate Director, Nominee Director, Woman Director and Independent Director (Section 161):

1. Alternate Director:

- Appointment by the Board of Directors of a company, if so, authorised by its articles; or

- by a resolution passed by the company in general meeting.

2. Additional Director:

- The articles of a company may confer on its Board of Directors the power to appoint any person as an Additional Director at any time.
- The additional director shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.
- He should be other than a person who fails to get appointed as a director in a general meeting.
- Appointment needs to be regularized in the Annual General Meeting.

3. Nominee Director:

- Appointment should be authorised in AOA of the Company;
- The Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

4. Independent Director:

- Separate definition of Independent Director under Companies Act and SEBI LODR Regulations;
- Listed public companies to have at least 1/3rd of the total number of directors as independent directors.

- The following class or classes of companies shall have at least two directors as independent directors -

I. the Public Companies having paid up share capital of ten crore rupees or more; or
 II. the Public Companies having turnover of one hundred crore rupees or more; or
 III. the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees:

- For appointment of Independent Directors, Board shall give a declaration for satisfaction of appointment conditions and criteria.

- Limited liability of Independent Directors – Liability only for such Acts of omission or commission by a company which had occurred with his knowledge, attributable through Board Processes, and with his consent or connivance or where he had not acted diligently.

- Every independent director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided u/s 149 (6).

- The appointment of independent director of the company shall be approved at the meeting of the shareholders.

- The explanatory statement attached to the notice of the meeting for approving the appointment of independent director shall include a statement that in the opinion of the Board, the independent director proposed to be appointed fulfils the specified conditions. The explanatory statement shall mention that the proposed director is independent of the management.

- The appointment of independent directors shall be formalized through a letter of appointment.

5. **Woman Director:** The following class of companies shall appoint at least one woman director-

- every listed company;
- every other public company having –
 I. paid-up share capital of one hundred crore rupees or more; or
 II. turnover of three hundred crore rupees or more

Any **intermittent vacancy** of a woman director shall be filled-up by the Board at the earliest but **not later than immediate next Board meeting or three months** from the date of such vacancy whichever is later.

Duties of Directors:

1. A director of a company shall act in accordance with the articles of the company.
2. A director of a company shall act in good faith in order to promote the objects of

the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

3. A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

4. A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

5. A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

6. A director of a company shall not assign his office and any assignment so made shall be void.

Disqualification of Director (Section 164):

1. A person shall not be eligible for appointment as a director of a company, if —

- he is of unsound mind and stands so declared by a competent court;
- he is an undischarged insolvent;
- he has applied to be adjudicated as an insolvent and his application is pending;

- he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence:

Note: If a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

- an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;
- he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;
- he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or
- he has not complied with sub-section (3) of section 152.
- he has not complied with the provisions of sub-section (1) of section 165.

2. No person who is or has been a director of a company which—

- has not filed financial statements or annual returns for any continuous period of three financial years; or
- has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared

and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Vacation of Office of Director

The office of a director shall become vacant in case—

- he incurs any of the **disqualifications** specified in **section 164**;
- he **absents himself** from **all the meetings of the Board of Directors held during a period of twelve months** with or without seeking leave of absence of the Board;
- he acts in **contravention of the provisions of section 184** relating to entering into contracts or arrangements in which he is directly or indirectly interested;
- he **fails to disclose his interest** in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;
- he becomes **disqualified by an order of a court or the Tribunal**;
- he is **convicted by a court of any offence**, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months;
- he is **removed in pursuance of the provisions of this Act**;
- he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

Important Points

- Minimum number of Directors:
 - o 3 Directors in the case of a public company;
 - o 2 Directors in the case of a private company; and
 - o 1 director in the case of a One Person Company.
- Maximum number of Directors: 15 Directors.
- Maximum number of directors may be increased beyond 15 after passing a special resolution.
- Every company shall have at least one director who has stayed in India for a total period of not less than 182 days during the financial year.
- **Maximum number of directorships:**
 - o No person shall hold office as a director, including any alternate Directorship, in more than **twenty companies** at the same time:
 - o The maximum number of **public companies** in which a person can be appointed as a director shall not **exceed ten**.
 - o For reckoning the **limit of public companies** in which a person can be appointed as director, **Directorship in private companies that are either holding or subsidiary company of a public company** shall be **included**.
 - o For reckoning the **limit of Directorships of twenty companies**, the Directorship in a **dormant company** shall **not be included**.



SEBI



V. REGULATORY INSIGHT

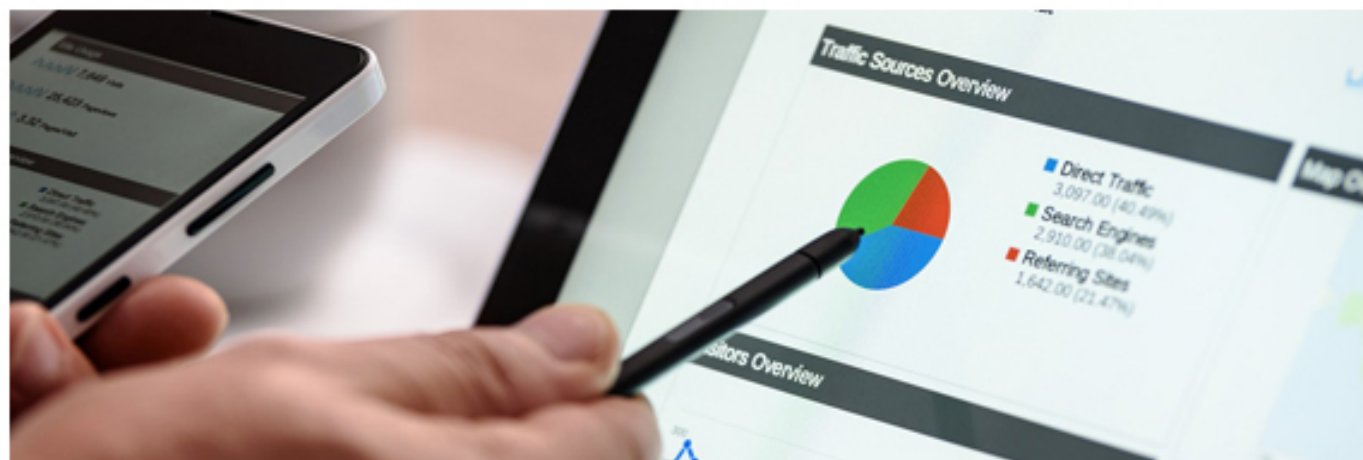
Name of the Act/Rules/ Regulations etc	Heading	Notification/ circular No and Date	Details
Securities and Exchange Board of India	Framework for dealing with unclaimed amounts	Circular No. SEBI/HO/D-DHS/D-DHS-RAC-1/P /- CIR/2023/17 6 dated November 08, 2023	Procedural framework for dealing with unclaimed amounts lying with entities having listed non-convertible securities and manner of claiming such amounts by investors. In order to standardize the process to be followed by listed entities for transfer of unclaimed amounts, a framework has been created for defining the manner of transfer of such unclaimed amounts provided in Annexure-A to this circular.

			Annexure- B of the circular provides the procedure to be followed by the listed entities which are not companies for transfer of unclaimed amounts from the escrow account to the IEPF and claim thereof by investor.
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FEMA/FCRA



VI. FAQs

FAQ's ON FOREIGN CONTRIBUTION (REGULATION) ACT, 2010

Key Definitions and Concepts under FCRA, 2010

Q.1. Can foreign contribution be received in rupees?

Ans. Yes. Any donation, delivery or transfer received from a 'foreign source' whether in rupees or in foreign currency is construed as 'foreign contribution' under FCRA, 2010. Such transactions including interest on foreign contribution or income derived from foreign contribution even in rupees term are considered as foreign contribution.

Q.2. Will interest or any other income earned from foreign contribution (FC) be considered foreign contribution?

Ans. Yes. It will become part of Foreign contribution.

Q3. Whether interest or any other income earned out of foreign contribution be shown as fresh foreign contribution receipt during that year or not?

Ans. No. The interest or any other income earned out of foreign contribution should be shown against Column 2(i)(b) in the annual return (Form FC-4) during the year in which it is earned. Such interest or income would be considered as Foreign contribution.

Q4. Whether earnings from foreign client(s) by a person in lieu of goods sold or a service rendered by it is treated as foreign contribution?

Ans. No. Foreign contribution excludes earnings from foreign client(s) by a person in lieu of goods sold or services rendered by it as this is a transaction of commercial nature/quid pro quo in the normal course of business trade etc. within or outside India.

Q.5. Whether donation given by Non-Resident Indians (NRIs) is treated as 'foreign contribution'?

Ans. Contributions made by a citizen of India living in another country (i.e., Non-Resident Indian), from his personal savings, through the normal banking channels, is not treated as foreign contribution. However, while accepting any donations from such NRI, it is advisable to obtain his/her passport details to ascertain that he/she is actually an Indian citizen.

Q.6. Whether donation given by an individual of Indian origin and having foreign nationality is treated as 'foreign contribution'?

Ans. Yes. Donation from an Indian origin person who has acquired foreign citizenship is treated as foreign contribution. This will also apply to PIO / OCI cardholders. They are foreigners. However, this will not apply to 'Non-resident Indians', who still hold Indian citizenship as they are not foreigners.

Q.7. Whether foreign remittances received from a relative are to be treated as foreign contribution as per FCRA, 2010?

Ans. No. As per section 4(e) of FCRA, 2010 and Rule 6 of FCRR, 2011, even the persons prohibited under section 3, i.e., persons not permitted to accept foreign contribution, are allowed to accept foreign contribution from their relatives. However, in terms of Rule 6 of FCRR, 2011, any person receiving foreign contribution in excess of ten lakh rupees or

equivalent thereto in a financial year from any of his relatives shall inform the Central Government in electronic Form FC-1 within three months from the date of receipt of such contribution. This form may be filled online on the website: <https://fcraonline.nic.in>.

Q.8. Whether individuals not covered under Section 3 or a HUF can accept foreign contribution freely for the purposes listed in section 4 of FCRA, 2010?

Ans. Yes. Since, subject to the provisions of Section 10, even the persons specified under section 3, i.e., persons not permitted to accept foreign contribution, are allowed to receive foreign contribution for the purposes listed in section 4, it is obvious that Individuals in general and a HUF are permitted to accept foreign contribution without permission for the purposes listed in section 4. However, it should be borne in mind that the monetary limit for acceptance of foreign contribution in the form of any article given as gift to a person for his personal use has been specified as Rs. one lakh vide FCR Amendment Rules, 2019.

Q.9. Can the fee paid by the foreign delegates/participants attending/participating in a conference/seminar etc. be termed as foreign contribution and thus require permission from FCRA?

Ans. No. "Delegate/participation Fees" paid by foreign delegates/participants for participation in a conference/seminar and which is utilized for the purpose of meeting the

expenditure of hosting the conference/seminar is not treated as foreign contribution and as such no permission under FCRA is required by the recipient.

Q.10. Section 2(c)(i) of repealed FCRA, 1976 inter alia defined foreign contribution as the donation, delivery or transfer made by any foreign source of any article, not given to a person as a gift for personal use, if the market value, in India, of such article exceeds one thousand rupees. What limit has been prescribed in FCRA, 2010 in respect of such articles?

Ans. The limit has been specified as Rs. One lakh through insertion of the following Rule 6A in FCRR, 2011 vide the Foreign Contribution (Regulation) (Second Amendment) Rules, 2019 [G.S.R. 659 (E) dated 16th September, 2019]: "6A. When articles gifted for personal use do not amount to foreign contribution. - Any article gifted to a person for his personal use whose market value in India on the date of such gift does not exceed rupees one lakh shall not be a foreign contribution within the meaning of sub-clause (i) of clause (h) of sub-section (1) of section (2).

Registration and Prior Permission

Q.11. How does a person obtain permission to accept Foreign Contribution?

Ans. There are two modes of obtaining permission to accept foreign contribution according to FCRA, 2010:

- I. Registration
- II. Prior Permission

Q.12. What are the eligibility criteria for grant of registration?

Ans. For grant of registration under FCRA, 2010, the association should:

I. Be registered under an existing statute like the Societies Registration Act, 1860 or the Indian Trusts Act, 1882 or section 25 of the Companies Act, 1956 (Now Section 8 of Companies Act, 2013) etc.;

II. Be in existence for at least three years and has undertaken reasonable activity in its chosen field for the benefit of the society for which the foreign contribution is proposed to be utilised. The applicant NGO/association will be free to choose its items of expenditure (excluding the administrative expenditure as defined in Rule 5 of FCRR, 2011) to become eligible for the minimum threshold of Rs. 15.00 lakh spent during the last three years. If the association wants inclusion of its capital investment in assets like land, building, other permanent structures, vehicles, equipment's etc., then the Chief Functionary shall have to give an undertaking that these assets shall be utilized only for the FCRA activities and they will not be diverted for any other purpose till FCRA registration of the NGO holds.

Q.13. What are the eligibility criteria for grant of prior permission?

Ans. An organization in formative stage is not eligible for certificate of registration. Such organization may apply for grant of prior permission under FCRA, 2010. Prior permission is granted for receipt of a specific amount from specific donor/donors for carrying out specific activities/projects. For this purpose, the association should meet following criteria:

I. be registered under an existing statute like the Societies Registration Act, 1860 or the Indian Trusts Act, 1882 or section 25 of the Companies Act, 1956 etc.;

II. submit a specific commitment letter from the donor indicating the amount of foreign contribution and the purpose for which it is proposed to be given; and

III. For Indian recipient organizations and foreign donor organizations having common members, FCRA Prior Permission shall be granted to the Indian recipient organizations subject to it satisfying the following:

- The Chief Functionary of the recipient Indian organization should not be a part of the donor organization.
- At least 75% of the office-bearers/ members of the Governing body of the Indian recipient organization should not be members/employees of the foreign donor organization.
- In case of foreign donor organization being a single person/individual that person should not be the Chief Functionary or office bearer of the recipient Indian organization.

- In case of a single foreign donor, at least 75% office bearers/members of the governing body of the recipient organization should not be the family members and close relatives of the donor.

Q.14. What are the conditions to be met for the grant of registration and prior permission?

In terms of Sec.12 (4) of FCRA, 2010, the following shall be the conditions for the grant of registration and prior permission:

I. The 'person' making an application for registration or grant of prior permission-

- is not fictitious or benami;
- has not been prosecuted or convicted for indulging in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another;
- has not been prosecuted or convicted for creating communal tension or disharmony in any specified district or any other part of the country;
- has not been found guilty of diversion or mis-utilisation of its funds;
- is not engaged or likely to engage in propagation of sedition or advocate violent methods to achieve its ends;
- is not likely to use the foreign contribution for personal gains or divert it for undesirable purposes;

- has not contravened any of the provisions of this Act;
- has not been prohibited from accepting foreign contribution;
- the person being an individual, such individual has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him.
- the person being other than an individual, any of its directors or office bearers has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him.

II. the acceptance of foreign contribution by the association/ person is not likely to affect prejudicially–

- the sovereignty and integrity of India;
- the security, strategic, scientific or economic interest of the State;
- the public interest;
- freedom or fairness of election to any Legislature;
- friendly relation with any foreign State;
- harmony between religious, racial, social, linguistic, regional groups, castes or communities.

III. the acceptance of foreign contribution–

- shall not lead to incitement of an offence;
- shall not endanger the life or physical safety of any person.

Q.15. Can a private limited company or a partnership firm get registration or prior permission under FCRA, 2010?

Yes, a private limited company too may seek prior permission/registration for receiving foreign funds in case they wish to do some work useful/beneficial to society.

Q.16. Whether an individual or a Hindu Undivided Family (HUF) can be given registration or prior permission to accept foreign contribution in terms of section 11 of FCRA, 2010?

Ans. Yes. The definition of the 'person' under section 2(1)(m) in the Foreign Contribution (Regulation) Act, 2010 includes any individual and a 'Hindu Undivided Family' among others. As such an Individual or an HUF is also eligible to apply for certificate of registration or prior permission to accept foreign contribution.

Q.17. Whether organisations under Central/State Governments are required to obtain registration or prior permission under FCRA, 2010 for accepting foreign contribution?

Ans. Yes. However, all organizations (not being a political party), constituted or established by or under a Central Act or a State Act or by any administrative or executive order of the Central Government or any State Government and wholly owned by the respective

Government and required to have their accounts compulsorily audited by the Comptroller and Auditor General of India (CAG) or any of the agencies of the CAG, are exempted from the operation of all the provisions of FCRA, 2010.

Executive Committee

Q.18 Whether foreigners can be appointed as Executive Committee members of an association seeking registration or prior permission?

Organizations having foreign nationals, other than of Indian origin, as members of their executive committees or governing bodies are generally NOT permitted to receive foreign contribution. However, foreigners may be allowed to be associated with such associations in an ex-officio capacity, if they are representing multilateral bodies, foreign contribution from whom is exempted from the purview of the Foreign Contribution (Regulation) Act, 2010, or in a purely honorary capacity depending upon the person's stature in his/her field of activity.

Relaxation may be considered on case to case basis by an authority higher than the competent authority, if any of the following grounds is met:

I. the foreigner is married to an Indian citizen;

II. the foreigner has been living and working in India for at least five years;

III. the foreigner has made available his/her specialized knowledge, especially in the medical and health related fields on a voluntary basis in India, in the past;

IV. the foreigner is a part of the Board of Trustees/Executive Committee in term so the provisions in an inter-governmental agreement;

V. the foreigner is part of the Board of Trustees/Executive Committee, in an ex-officio capacity representing a multilateral body which is exempted from the definition of foreign source.

Q.19. Whether Government servants, Judges and employees of a Government owned/controlled company/body can be on the executive committees/boards of an association?

Ans. Yes. The legal entity of a 'person' under FCRA, 2010 is distinct from an individual person. Therefore, individuals who cannot receive foreign contribution may happen to be on the executive committees/boards of such an association.

Q.20 Whether the registration certificate or prior permission granted under the repealed FCRA, 1976 shall remain valid when FCRA, 2010 has come into force?

Ans. Yes. An association granted prior permission or registration under the repealed FCRA, 1976 shall be deemed to have been registered or granted prior permission, as the case may be, under FCRA, 2010. Registration granted under FCRA, 1976 remained valid for a period of 5 years from the 1st May, 2011, i.e., up to the 30th April, 2016 & if it was renewed, then for a further period of five years.

Ans. No. Prior permission granted under FCRA, 1976 remains valid under FCRA, 2010 till receipt and full utilisation of the amount of FC for which the permission was granted.

(Source: FCRA Online Services)

Q.21. Whether prior permission granted under FCRA, 1976 would also remain valid for next 5 years from the 1st May, 2011, i.e., the date when FCRA, 2010 came into force?





Non-Banking Financial Institutions (NBFC)



VII. NON-BANKING FINANCIAL COMPANY (NBFC)

Housing Finance Company

Housing finance company” shall mean a company incorporated under the Companies Act, 2013 that fulfils the following conditions:

a. It is an NBFC whose financial assets, in the business of providing finance for housing, constitute at least 60% of its total assets (netted off by intangible assets).

b. Out of the total assets (netted off by intangible assets), not less than 50% should be by way of housing financing for individuals as stated at clauses (a) to (e) below.

“Housing Finance” shall mean financing, for purchase/ construction/ reconstruction/ renovation/ repairs of residential dwelling units, which includes:

a. Loans to individuals or group of individuals including co-operative societies for construction/ purchase of new dwelling units.

b. Loans to individuals or group of individuals for purchase of old dwelling units.

c. Loans to individuals or group of individuals for purchasing old/ new dwelling units by mortgaging existing dwelling units.

d. Loans to individuals for purchase of plots for construction of residential dwelling units provided a declaration is obtained from the borrower that he intends to construct a house on the plot within a period of three years from the date of availing of the loan.

e. Loans to individuals or group of individuals for renovation/ reconstruction of existing dwelling units.

- f. Lending to public agencies including state housing boards for construction of residential dwelling units.
- g. Loans to corporates/ Government agencies for employee housing.
- h. Loans for construction of educational, health, social, cultural or other institutions/ centres, which are part of housing projects and which are necessary for the development of settlements or townships (see note below).
- i. Loans for construction meant for improving the conditions in slum areas, for which credit may be extended directly to the slum-dwellers on the guarantee of the Central Government, or indirectly to them through the State Governments.
- j. Loans given for slum improvement schemes to be implemented by Slum Clearance Boards and other public agencies.
- k. Lending to builders for construction of residential dwelling units.

All other loans including those given for furnishing dwelling units, loans given against mortgage of property for any purpose other than buying/ construction of a new dwelling unit/s or renovation of the existing dwelling unit/s as mentioned above, will be treated as non-housing loans and will not be falling under the definition of "Housing Finance".

Guidelines on Liquidity Risk Management Framework

All non-deposit taking HFCs with asset size of ₹100 crore and above and all deposit taking HFCs (irrespective of asset size) shall pursue liquidity risk management, which inter alia should cover adherence to gap limits, making use of liquidity risk monitoring tools and adoption of stock approach to liquidity risk. It will be the responsibility of the Board of each HFC to ensure that the guidelines are adhered to. The internal controls required to be put in place by HFCs as per these guidelines shall be subject to supervisory review.

Guidelines on Liquidity Coverage Ratio (LCR):

HFCs shall maintain a liquidity buffer in terms of LCR, which will promote resilience of HFCs to potential liquidity disruptions by ensuring that they have sufficient High Quality Liquid Asset (HQLA) to survive any acute liquidity stress scenario lasting for 30 days. Guidelines on LCR will be applicable to HFCs as per the following timeline:

- i) All non-deposit taking HFCs with asset size of ₹10,000 crore & above, and all deposit taking HFCs irrespective of their asset size:

From	December 01, 2021	December 01, 2022	December 01, 2023	December 01, 2024	December 01, 2025
Minimum LCR	50%	60%	70%	85%	100%

ii) All non-deposit taking HFCs with asset size of ₹5,000 crore & above, but less than ₹10,000 crore with the timeline as:

From	December 01, 2021	December 01, 2022	December 01, 2023	December 01, 2024	December 01, 2025
Minimum LCR	30%	50%	60%	85%	100%

Exposure of HFCs to group companies engaged in real estate business:

In case of companies in a group engaged in real estate business, HFCs may undertake exposure either to the group company engaged in real estate business or lend to retail individual home buyers in the projects of such group companies. In case HFC prefers

to undertake exposure in group companies, such exposure by way of lending and investing, directly or indirectly, cannot be more than 15% of owned fund for a single entity in the group and 25% of owned fund for all such group entities. The HFC would in all such cases follow arm's length principles in letter and spirit.





Insolvency and Bankruptcy Code, 2016



VIII. CASE LAW

**ORDER OF HON'BLE NATIONAL COMPANY LAW APPELLATE
TRIBUNAL, PRINCIPAL BENCH, NEW DELHI
DATED 24TH NOVEMBER 2023
COMPANY APPEAL (AT) (INSOLVENCY) NO.481 OF 2023**

**IN THE MATTER OF
SANJAY D. KAKADE**

.....APPELLANT

VERSUS

.....RESPONDENTS

- 1. HDFC VENTURES TRUSTEE
COMPANY LTD.**
- 2. EDWARD MAURITIUS LTD.**
- 3. KAKADE ESTATE DEVELOPERS
PVT. LTD.**

Facts of the Case:

1. This Appeal by Mr. Sanjay D. Kakade, Suspended Director of the Corporate Debtor has been filed challenging the order dated 29.03.2023 passed by the Adjudicating

Authority (National Company Law Tribunal), Mumbai Bench-IV admitting Section 7 application filed by the Respondent – HDFC Ventures Trustee Company Ltd.

2. A Share Subscription and Shareholders Agreement was entered on 14.05.2008 between the Promoters, the Appellant Sanjay D. Kakade being one of them and IL&FS Trust Company Ltd. Promoters as 'First Part', IL&FS Trust Company Ltd. as 'Second Part', IIRF Holdings XIV Limited as 'Third Part', Edward Mauritius Limited as 'Fourth Part', HDFC Ventures Trustee Company Limited as 'Fifth Part' and Kakade Estate Developers Private Limited as 'Sixth Part'. A sum of Rs.72,86,65,720/- was subscribed towards equity shares (Rs.85,720/-) and compulsorily convertible preference shares (Rs.72,85,80,000/-).

3. On 11.07.2008, a Supplementary Agreement was entered into between the same persons under which additional sum of Rs.15 Crores was subscribed in respect of 15,000 preference shares.

4. The project could not be developed by the Promoters and they offered the Investors with proposal to develop and to provide exit to the Investors. The Binding Term Sheet was executed in the year 2015 between the Company, Promoters, IIRF Holdings XIV Ltd. and IL&FS Trust Company Limited. Under the Term Sheet an exit was to be provided to the Investors. The exit consideration was to carry an IRR of 17% from March 10th, 2015.

5. On arising dispute between the parties, reference was made to the Sole Arbitrator, Justice C. K. Thakkar (Retd.). Before the Arbitrator a Consent Term by the parties was filed. On basis of which Consent Terms arbitration proceedings were disposed of by Consent Award dated 19.01.2021. As per Consent Term, a sum of Rs.72,85,71,429/- was agreed to be paid to Respondent Nos. 1 and 2 on or before 25.08.2021 and a further sum of Rs.47,14,28,571/- was agreed to be paid to the Respondent Nos. 1 and 2 on or before expiry of 15 months from 25.11.2020. In terms of the Consent Terms, failure to pay one of the tranches, would render the amount of Rs.120 Crores being payable along with interest at 15% per annum calculated from 25.08.2021 till date of payment.

6. The amount as contemplated under the Consent Award were not paid.

7. On 16.06.2022, Section 7 application was filed by Respondent No.1 and 2 against the Corporate Debtor – Kakade Estate Developers Private Limited claiming total default of Rs.133,75,89,041/- being amount payable under the Consent Award amounting to Rs.120 Crores and interest accrued thereupon till 31.05.2022.

8. By impugned order dated 29.03.2023 the Adjudicating Authority has admitted

Section 7 application and has appointed Mr. Jayesh Natvarlal Sanghrajka as Interim Resolution Professional. Aggrieved by the order this Appeal was filed.

Appellant Contentions:

1. Respondent Nos. 1 and 2 who are 98.98% shareholders cannot be classified as Financial Creditors of the Corporate Debtor and claim of such shareholders against transfer of their own share cannot be classified as financial debt.

2. Consent Award was passed by the Arbitrator on Consent Terms signed between parties where the Corporate Debtor was liable to pay an exit consideration to Respondent No.2 and Consent Decree ipso facto does not constitute financial debt.

3. The underlying transaction is that the Respondent Investors will be paid money and in turn they will transfer shares which they own of the Corporate Debtor, to the Promoters or their nominees. The transaction is therefore one of consideration for exchange and sale/purchase of shares. Such a transaction does not constitute a financial debt under the IBC nor does it have a commercial effect of a borrowing, not it is disbursement for time value of money.

Respondent Contentions:

1. Refused the submissions of appellant and submits that on account of default to provide an exit, the Financial Creditor became entitled to an internal rate of return (IRR) to the extent of 15% per annum, compounded annually.

2. The underlying transaction has the commercial effect of a borrowing as per Section 5(8)(f) of the IBC as the Corporate Debtor raised funds under the transaction for its project, repayable upon a specified tenure.

Issue Involved: Whether raising of amount Via Share Subscription-Cum-Shareholders Agreement is a Commercial Borrowing and constitutes 'Financial Debt' Under IBC?

Hon'ble NCLAT held that:

1. The NCLAT placed reliance on the Supreme Court decision of Pioneer Urban Land and Infrastructure Limited and Anr. vs. Union of India and Ors.

2. The transactions between the parties including the Agreement, Supplementary Agreement and Binding Term Sheet, clearly indicate that there was a debt, due and payable, which debt was in the nature of 'financial debt'.

3. Commercial effect of borrowing can be evidenced via the Supplementary Share Subscription-Cum-Shareholders Agreement where it was noted that "the Company now requires further funding to the extent of Rs.50 to carry out objectives of the Business Plan, i.e., approval of township, and actual execution of the township as per the designs prepared by the Company architects". The use of the expression 'further funding' indicates that the transaction has the commercial effect of borrowing.

4. The appeal was dismissed.





GENERAL



IX. CORPORATE COMPLIANCE CALENDAR

S. No.	Due Date	Statute	Particulars of Form(s)/Return to be filed	Compliance
1.	01st October to 31st December, 2023	Companies Act, 2013	NA	Every Company to hold a minimum of 4 Board meetings in a calendar year subject to the gap between 2 Board Meetings not exceeding 120 days. It is recommended to hold at least one Board Meeting in every calendar quarter.
2.	At least 2 working days before the date of Board Meeting	SEBI (LODR) Regulations, 2015	NA	Prior intimation about the Meeting of the Board of Directors considering the following events to be sent to the concerned Stock Exchange at least 2 working days before the date of the Meeting <u>excluding the date of intimation and date of Meeting</u> :

				1. Proposal for buyback of securities; 2. Proposal for voluntary delisting; 3. Fund raising by way of FPO, rights issue, ADR/GDR/FCCB, QIP, debt issue, preferential issue etc. and for determination of issue price; 4. Declaration/recommendation of dividend, issue of convertible securities; 5. Proposal for declaration of bonus securities.
3.	At least 5 days before the date of Board Meeting	SEBI (LODR) Regulations, 2015	NA	Prior intimation about the Meeting of the Board of Directors considering the quarterly and year-to-date financial results to be sent to the concerned Stock Exchange at least 5 days before the date of the Meeting <u>excluding the date of intimation and date of Meeting.</u>

4.	Within 30 minutes of closure of the Board Meeting	SEBI (LODR) Regulations, 2015	NA	Listed entity to disclose to the concerned Stock Exchange, within 30 minutes of the closure of the meeting, held to consider the following: 1. Dividends/cash bonuses recommended or declared or the decision to pass any dividend and the date on which dividend shall be paid/dispatched; 2. Any cancellation of dividend with reasons thereof; 3. Decision on buyback of securities; 4. Decision with respect to fund raising proposed to be undertaken; 5. Increase in capital by issue of bonus shares through capitalization including the date on which such bonus shares shall be credited/dispatched; 6. Reissue of forfeited shares/securities, or issue of shares/ securities held in reserve for future issue or the creation in any form or manner of new shares/securities or any other rights, privileges or benefits to subscribe to; 7. Alterations of capital, including calls; 8. Financial results; 9. Decision on voluntary delisting
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5.	Within a period of 9 months from the closure of the year i.e. by 31st December each year	FCRA, 2010	Form FC-4	Filing of FCRA Annual Returns with the FCRA till 31st Dec, 2023.
6.	Till 31st December each year	FEMA	Form APR	Filing of Form APR (Annual Performance Report) till 31st Dec, 2023. APR is to be certified by statutory auditors of the Indian Party and submitted through the designated AD bank every year by 31st December.



X. CORPORATE NEWS

Completion of merger of L&T Finance Holdings with its subsidiaries

L&T Finance Holdings (LTFH) has completed the merger of subsidiaries, L&T Finance (LTF), L&T Infra Credit (LTICL), and L&T Mutual Fund Trustee, with itself.

The respective boards of the said companies had approved the merger proposal in January 2023 and the process was completed post requisite approvals from shareholders, creditors, and regulatory/ statutory authorities - Reserve Bank of India (RBI), National Company Law Tribunal (NCLT), Securities and Exchange Board of India (SEBI), and stock exchanges.

The key benefits of the merger include astute liability management, ability to provide enhanced return to shareholders, seamless compliance and adherence to RBI scale based regulations, and operational efficiency.

Tata Steel completed merger of S & T Mining Company with itself

The scheme of amalgamation of S & T Mining Company Ltd ('S&T Mining') into and with Tata Steel Ltd was approved and sanctioned by National Company Law Tribunal (NCLT) Kolkata vide order dated November 10, 2023.

The scheme of amalgamation has become operative and effective from December 1, 2023. In terms of the scheme of amalgamation, S&T Mining stands dissolved without being wound up, effective December 1, 2023.



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