# The Corporate Brief

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# Repeal Of Companies Act (Public Companies – Annual General Meetings) Regulations

-Divyank Dewan

During the COVID-19 pandemic, the Companies Act (Public Companies - Annual General Meetings) Regulations (the "Original Regulations") were promulgated in order to: (1) extend the period for holding annual general meetings and filing audited accounts; and (2) authorise the holding of remote or virtual general meetings by certain public companies.

**Annual General Meetings: Introduction**

An Annual General Meeting (AGM) is held to allow interaction between the company's management and shareholders. The Companies Act of 2013 requires that an annual general meeting be held to discuss the yearly results, auditor's appointment, and other matters.

**Companies Required to hold an AGM**

All companies except one person company (OPC) should hold an AGM after the end of each financial year. A company must hold its AGM within a period of six months from the end of the financial year.

**Procedure to hold an AGM**

The company must give its members a clear 21-day notice prior to actually calling the AGM.
The place, date, and day of the meeting, as well as the hour, should all be mentioned in the notice.

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**Quorum for an AGM**

In the case of a private company, the quorum for the AGM is two members present at the meeting. A quorum in the case of a public company is:-

•Five members present at the meeting if the number of members is within one thousand.
•Fifteen members present at the meeting if the number of members is more than one thousand but within five thousand.
•Thirty members present at the meeting if the number of members is more than five thousand.

If the quorum for the meeting is not present within half an hour of the scheduled time, the meeting will be rescheduled for the same day and time the following week.

**Special Procedure for the year 2020**

Companies were allowed to hold AGMs via Video Conferencing (VC) or Other Audio-Visual Means (OAVM) in the year 2020 on May 5th, due to extraordinary circumstances.
Due to the difficulty of sending out physical copies of the financial statements (including the Board's report, Auditor's report, or other documents), it was decided that they could be sent out via e-mail to members, trustees, and those entitled. It was also agreed that they could be sent notices via e-mail.

addresses registered with the company or depository participants. Before sending out notices with financial statements, the company must publish at least once in a vernacular newspaper in the district where its registered office is located and once in an English newspaper, preferably with electronic editions. Dividends were paid directly to bank accounts, and aside from ordinary business, only items of special business considered unavoidable by the Board could be transacted during the AGM. The quorum rules outlined in Section 103 of the Companies Act, 2013, will continue to apply to all members physically present at the meeting as well as those attending via VC or OAVM.

**Current Update**

The Original Regulations will be repealed by Legal Notice 41 of 2023. (the "Repeal Regulations"). Unfortunately, the Repeal Regulations are not entirely clear about the effective date of the repeal; however, assuming the effective date is April 21, 2023, the Original Regulations will remain in effect until April 20, 2023.

The Repeal Regulations also include a transitory provision that allows any "action, decision, or proceeding, taken or begun" prior to the effective date of the Repeal Regulations to continue to be governed by the Original Regulations. This essentially means that a decision to hold a remote meeting in terms of the Original Regulations which is taken on the day prior to the effective date of the Repeal Regulations will effectively allow companies to hold such a remote meeting after the Repeal Regulations come into force.

**Suggested Readings:**


1. https://www.mondaq.com/corporate-and-company-law/1288974/public-companies-annual-general-meetings-regulations-to-berepealed#:~:text=Notably%2C%20the%20Repealing%20Regulation%20will,until%20the%2020th%20April%202023.
2. https://www.indiafilings.com/learn/guide-to-annual-general-meeting/#:~:text=Annual%20General%20Meeting%20is%20a,hold%20an%20AGM%20every%20year.
3. https://camilleripreziosi.com/news/public-companies-general-meetings-repeal-of-companies-act-public-companies-annual-general-meetings-regulations/
4. https://cleartax.in/s/annual-general-meeting-companies-act-2013

# Implications of the Extension of 'Angel Tax' Provisions to Non-Residents

-Purava Rathi

**Introduction**

The Union Budget 2023, presented by Finance Minister Nirmala Sitharamanproposedan amendment via the Finance Bill 2023 to Section 56 (2) (vii-b) of the Income Tax, 1961. The amendment extends the applicability of the 'Angel Tax' on funding received by privately held, unlisted companies from 'non-residents'. This tax was previously levied only on the funding received from affluent 'residents'. The proposed amendment is set to adversely impact the financing of start-ups which has, as it is shown, a downward trend since 2022.

**Details of the Proposed Amendment**

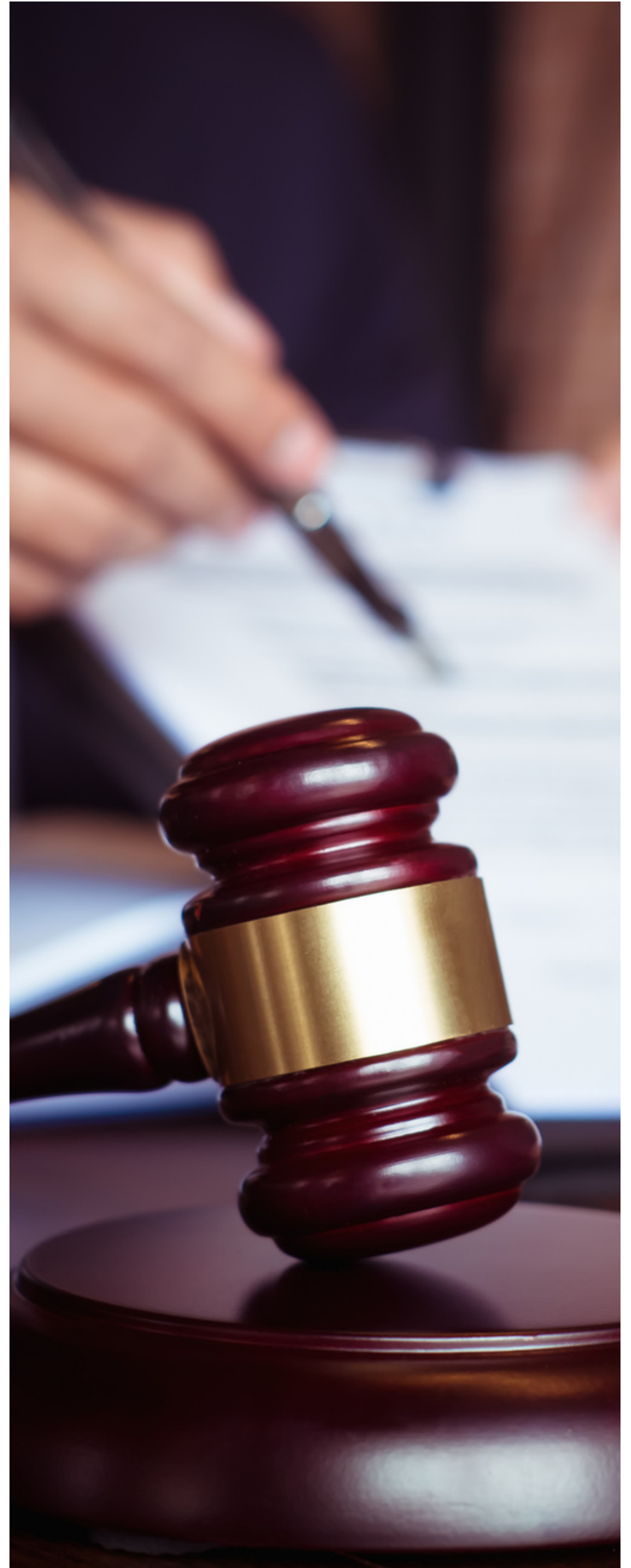
Angel investors generally invest in firms where they see growth prospects. A corollary of the same is that they usually opt for convertible debt or ownership equity, due to the uncertainty and volatility of the markets. This tax is imposed on the amount that startups receive on selling shares at a premium. When the shares of a company are sold at a higher share price than the fair market value, the government taxes the excess income accordingly under the head of 'income from other sources'. This provision was introduced in 2012 to mainly combat money laundering, corruption, and tax evasion.

The common practice was that of converting black money to white by investing in shell companies. This was certainly a welcome move. However, the imposition of the same on finances raised from non-residents might be detrimental to the growth of startups in India given that the Government is majorly focusing on FDI and ease of doing business in India.

In this context, it is also pertinent to discuss certain exemptions provided via the Exemption Notification of 2019. It stated that only "start-ups" recognised by the DPIIT and whose total paid-up share capital and share premium after issuance or intended issuance of shares, if any, does not exceed INR 25,00,00,000 are eligible for the exemption. This is limited by the requirement that start-ups must not have invested in or would invest in the class of assets that includes immovable properties, loans and advances, capital contributions to other entities, shares and securities, motor vehicles, or any other mode of transportation, jewellery, or any other asset class. Funds from non-resident investors shall not be included in computing the aforesaid threshold. However, it is expected that amendment to the exempted categories would also take place soon to align itself with the proposed amendment.

**Implications and Conclusion**

At a time when the startup industry is growing rapidly, with the greatest number of unicorns in India after the USA and China, this government initiative seeks to dampen that enthusiasm and growth prospects. This is because foreign investors are the major source of funding for start-ups. Moreover, an obvious outcome would be apprehension amongst foreign investors due to the increased risk of litigation about the subjective valuation of the company.For instance, the lower valuation benchmark established by share transfers may become the basis for questioning the higher premium received by the investee company.Further, with the ambit of the 'Angel tax' extended, startups would want to shift or establish their base in foreign countries where such tax restrictions are not applied. This would further impact employmentgeneration and the ease of doing business in the country. Therefore, it is hoped that the Government will reconsider this proposed amendment giventhe complex consequences that are to ensue.



**Suggested Readings:**


1. https://www.mondaq.com/india/corporate-and-company-law/1282964/applicability-of-angel-tax-on-investments-by-non-residents-to-impact-indias-fdi-dreams
2. https://www.indiatoday.in/business/story/budget-2023-extension-of-angel-tax-provisions-non-residents-implications-2334152-2023-02-13

# Reforms Suggested by SEBI's Consultation Papers on Alternative Investment Funds

-Shriya Garg

Alternative Investment Funds (AIFs) have emerged as an important asset class in India's financial landscape. They have been gaining popularity due to their ability to generate high returns and provide diversification to investors' portfolios. AIFs are essentially funds that invest in assets other than traditional investments such as stocks, bonds, and cash. They can invest in various asset classes, including private equity, real estate, hedge funds, and distressed assets.

The importance of AIFs in today's paradigm in India cannot be overstated. With a growing economy, a thriving startup ecosystem, and a large population of high net worth individuals, the demand for alternative investment options has been on the rise. AIFs have emerged as a popular choice for investors looking to diversify their portfolios and generate higher returns.

These funds have also played a crucial role in India's startup ecosystem. They have provided capital to early-stage startups that are not yet ready for public funding or traditional bank loans.

This has helped these startups grow and create jobs, contributing to India's overall economic development. The Securities and Exchange Board of India (SEBI) has issued five consultation papers to review and suggest changes in regulatory norms for AIFs, and has invited comments from the public on February 03, 2023.

Here are the key changes suggested by SEBI in these consultation papers:

**1. Replacing the five years' experience criteria with certification requirement**: SEBI proposed replacing the five years' experience criteria for key investment team members with a certification requirement. AIFs would be required to ensure that their key investment team members have the necessary certification and training in the relevant areas of finance, such as securities markets, investment analysis, and risk management.

**2. Investor consent for buying/ selling investments from/ to associates of AIFs and related schemes**: SEBI proposed that AIFs should obtain investor consent before buying or selling investments from or to associates of the AIF or related schemes. This is to ensure that investors are aware of any potential conflicts of interest and have the opportunity to opt-out of such transactions if they wish.

3. Dematerialisation of units of AIFs: SEBI proposed that units of AIFs should be dematerialized to improve transparency and reduce fraud. This would require AIFs to register with a depository and issue units in a dematerialized form. Investors would also be able to trade these units on stock exchanges.

**4. Option to set up a liquidation scheme for unliquidated assets**: SEBI proposed that AIFs should have the option to set up a liquidation scheme for unliquidated assets. This would allow AIFs to return capital to investors in a timely manner, rather than waiting for the assets to be sold. The liquidation scheme would have to be approved by investors and SEBI before being implemented.

The proposed changes are aimed at increasing transparency, investor protection, and promoting the growth of the AIF industry in India. It is worth noting that these changes are not yet final and are subject to further discussion and review.

**Read more at:**
https://corporate.cyrilamarchandblogs.com/2023/02/sebi-unveils-next-generation-reforms-for-aifs/

# CCI Stays Penalty on UBL and other Cartelised Beer Companies

-Vikram Jain

The Supreme Court of India has put a hold on the penalty of over Rs. 800 crores imposed on various beer companies for engaging in cartelization. The Competition Commission of India (CCI) had levied a fine on United Breweries Limited, Carlsberg India Private Limited, and Anheuser Busch InBev SA/NV for colluding in fixing beer prices in India. UBI had received a penalty amount close to 751 Crores. [1]

The beer companies had appealed the decision before the National Company Law Appellate Tribunal (NCLAT), which had upheld the CCI's ruling. However, the companies continued to challenge the order and approached the Supreme Court.

During the hearing, the beer companies argued that the CCI had not given them a proper opportunity to defend themselves and that the penalty imposed was excessive. They also argued that the CCI had wrongly calculated the penalty based on the total revenue earned by the companies in India.

The Supreme Court, while staying the penalty, directed the CCI to re-examine the issue and consider the companies' objections.

The Court also clarified that the stay would not prevent the CCI from conducting further investigations into the matter.

Cartelization is an antitrust violation where competitors in a market collude to manipulate prices, output, or market share. Such conduct harms competition and consumers by reducing choice and driving up prices.

The Competition Act, 2002, empowers the CCI to investigate and penalize cartelization and other anticompetitive conduct. The act provides for penalties of up to 10% of the company's average turnover for the preceding three financial years.

This case highlights the importance of fair competition in markets and the role of antitrust regulators in maintaining it. Cartelization harms the economy and consumers, and strict enforcement is necessary to deter such conduct. However, companies also have the right to a fair trial and due process, and penalties should be proportionate to the gravity of the offense.

In conclusion, the Supreme Court's stay on the penalty imposed on beer companies for cartelization highlights the need for a balance between competition enforcement and due process. The CCI should re-examine the issue and consider the companies' objections while ensuring that it continues to promote fair competition in India's markets.

**Suggestive reading:**

1.https://legal.economictimes.indiatimes.com/news/industry/sc-stays-over-rs-800-crore-penalty-imposed-on-beer-companies-for-cartelisation/98031711

2.https://trilegal.com/news-insights/deal-supreme-court-stays-nclat-order-affirming-penalty-of-inr-751-83-crores-on-heinekens-subsidiary-united-breweries-limited-in-the-alleged-beer-cartel-case/

3.https://bwlegalworld.businessworld.in/article/Supreme-Court-Stays-NCLAT-Order-Affirming-Penalty-Of-INR-751-83-Crores-On-Heineken-s-Subsidiary-United-Breweries-In-Alleged-Beer-Cartel-Case/17-02-2023-466030/

[1]https://www.lexology.com/library/detail.aspx?g=4d8d394e-3213-47d9-9924-7d2feb706ab6

# A road to the Competition Amendment bill 2023: Modifications to the Previous Bill.

-Vidushi Jaiswal

The Competition (Amendment) Bill, 2022 (the Bill), which was introduced in the Indian Parliament in August 2022, was amended on February 8, 2023 by the Ministry of Corporate Affairs, Government of India (MCA), to make gradual improvements to the Competition Act, 2002. (Competition Act). The Bill sought to bring substantial changes to the substantive and procedural aspects of the existing competition law regime. The changes considerably altered the preceding image of the Competition Act as the static framework which had gaps that necessarily needed to be overcome.

**Changes introduced by the Competition (Amendment) Bill, 2023**

Some of the changes introduced by the 2023 Bill are merger control, merger review timeline, material influence as the standard of control, more flexibility to the open market purchases, new settlement and commitment mechanism, introduction of a limitation period, specific law to include intermediaries that act as a conduit to sustain cartels, leniency and appointment and powers of the Director General(DG).

The government has broad-reaching revisions in mind for the Competition Act. These changes encapsulate the following features:
Merger control through introduction of deal value threshold was one of the most significant changes introduced by this bill. Deal value thresholds involve those transactions to be reported to the CCI which has a transaction value exceeding INR 20 billions and the enterprise which is the party to the transaction has substantial business operations in India. There is no definition of "significant business operations in India" in the Bill and the CCI is anticipated to provide clarification on the meaning of this phrase. The merger review timeline was shortened to that of 20 day period from 30 day calendar period. Material influence as the standard of control is now embedded in the Bill.

As far as settlement and commitment mechanism is concerned, between the start of an inquiry and the Office of the DG issuing an investigative report, parties under investigation might make commitments. Settlements would be taken into consideration between the publication of the DG's report and the CCI's final ruling.

In contrast to the current situation, where the appointment to the DG's office was made by the Central Government coupled with an expansion of his powers, the Bill gives the CCI the authority to appoint the DG.

**New changes introduced by the 2023 Bill**

Additional changes that were brought about through the 2023 Bill include that in the global turnover, the cartel prosecution, settlement cases, deal value threshold, procedural timeline and limiting the powers of the DG.

The 2023 Bill suggests changing how the penalty is calculated from "relevant turnover" to "global turnover derived from all the products and services" by the infringing parties. Another change was to include a mens rea component in cartel prosecution. Given the severe financial penalties for cartels set forth in the Competition Act, it is crucial that the proper standard of proof be followed in these situations, preventing the "intention to participate" in a cartel from being improperly equated with merely knowing about a cartel (with or without knowledge of its legality) or failing to file a leniency application.

According to the Committee's recommendations, the 2023 Bill has made it clear that the target enterprise will be the relevant enterprise for determining whether a company has "significant business operations in India".

The 2023 Bill increases the schedule for the CCI's development of its preliminary view from 20 to 30 days, but does not propose any changes to the 2022 Bill's proposed reduction in the overall timeline for the CCI's formation of the final view. The 2023 Bill has restricted the DG's authority to investigate, among other things, just the in-house legal counsel employed by the enterprise under inquiry.

**Conclusion**

Although the 2023 Bill has addressed industry concerns with the 2022 Bill (such as those related to the DVT), its introduction of provisions regarding computation of penalty on global turnover and mens rea in cartel cases has caught the legal community as well as the business community by surprise. The new adjustments that are being suggested will have substantial effects, and the break will give the Parliament a chance to learn about the opinions and concerns of the stakeholders before enacting the further revisions into law.

**Suggestive Readings:**


1. Competition Amendment Bill, 2023: More Than Just A Facelift Of The 2022 Bill - Cartels, Monopolies - India (mondaq.com).
2. Standing Committee Report Recommends Sweeping Changes to the Indian Competition_0.pdf (khaitanco.com).

# Proposed Amendments To The Insolvency And Bankruptcy Code- An Analysis From The Perspective Of The Real Estate Sector

-Divyansh Marolia

The recently proposed amendment to the Insolvency and the Bankruptcy Code(hereinafter the “IBC”) includes a proposal to amend certain provisions in order to ensure better procedure of the Corporate Insolvency Resolution Process in cases concerning Real Estate players. The said proposal is made in light of issues faced by reals estate players in the resolution process.

**Problems faced by the real estate players**

There are two major issues faced in the resolution processes concerning players in the real estate sector. Firstly, the interests of the “allottee” do not align with that of the resolution process, the allottee majorly focuses on the ownership of the land/unit; whereas, the resolution process majorly intends to the repayment of debt. Secondly, the Committee of Creditors (hereinafter the “CoC”) in the resolution process usually comprises the allottees, who often have little or no knowledge with regard to finances and the feasibility of resolution plans.

**Recourses taken by various courts**

The courts have often taken recourse to different strategies to deal with peculiar issues in the sector. Two major strategies applied by the courts are described below-

**Reverse CIRP-** It is a process that is led by the promoter, and in order to pay the past-due fees and ensure that project development continues, the promoter must come to an agreement with all of the stakeholders. It has been applied by courts in matters such asFlat Buyers Association Winter Hills-77, Gurgaon v. Umang Realtech Private Ltd through IRP &Ors.

**Project-wise CIRP-** Under the project-wise CIRP, for the purpose of balancing the creditors, including allottees, financial institutions, and operational creditors of that specific project, the company's asset for the concerned project must be maximised. Such techniques have been applied in various cases, for instance, Whispering Tower Flat Owner Welfare Association v. Abhay Narayan Manudhane.

**Proposed amendment**

In order to rectify the said issues faced in the real estate sector, following major amendments have been proposed to the IBC–

- The adjudicating authority may, in its discretion, accept the case but limit the application of the CIRP provisions to the defaulted real estate projects when a corporate debtor who is the promoter of a real estate project submits an application to begin the CIRP and one or more of its real estate projects are impacted by the default.

So, such efforts need to be recognised as distinct from the larger body for the particular purpose of resolution.

- An amendment to the Section 28 of the code may be made in order to allow the Resolution Professional to transfer title and possession of a plot, apartment, or building to the allottees, given that the same is in consonance with the consent of the CoC.
- With the appropriate adjustments, the provisions of the Code that apply to the CIRP of a corporate person should be made applicable to the CIRP of real estate projects.

**Analysis of the proposal**

The said proposals have been welcomed by different stakeholders; however, two major concerns have been raised by certain practitioners and academicians. Firstly, that said proposals only aim at giving effect to the project0wise CIRP, and are silent on the reverse-CIRP. Secondly, it has been opined that the said proposal lacks clarity in certain aspects, for instance, the bifurcation of creditors has not been specified.

**Read more:**

1. https://corporate.cyrilamarchandblogs.com/2023/03/proposed-amendments-to-the-insolvency-and-bankruptcy-code-a-real-solution-for-real-estate-insolvencies/
2. https://www.barandbench.com/columns/proposed-amendments-to-the-ibc-need-for-a-closer-look

# IRDAI (Registration Of Indian Insurance Companies) Regulations, 2022: Background

-Kunal Dave

The Insurance Regulatory and Development Authority of India ("IRDAI"), vide its notification dated December 5, 2022, has notified the IRDAI (Registration of Indian Insurance Companies) Regulations, 2022 ("Registration Regulations"). The Registration Regulations repeal the IRDAI (Registration of Indian Insurance Companies) Regulations, 2000 and the IRDAI (Transfer of Equity Shares of Insurance Companies) Regulations, 2015, to promote the insurance sector's growth by simplifying the process of registration of Indian insurance companies and to promote ease of doing business. The Registration Regulations have introduced several reforms in the existing framework for the registration and administration of Indian insurance companies, keeping in mind the recent increase in the permissible foreign direct investment limit in the insurance sector in India.

**Proposed Amendments**

The regulations will remain in force for a period of three years from 8 December 2022 unless reviewed or repealed earlier. A summary of certain key changes introduced in the Registration Regulations are as follows:-

- The Registration Regulations have scaled down the disqualification criteria for applicants (vis-à-vis the draft regulations) and have introduced a fit and proper criteria for promoters.
- The Registration Regulations have increased the minimum paid-up equity capital requirement for life insurance, general insurance and health insurance companies from Rs. 100 crore to Rs. 200 crore.
- The Registration Regulations have allowed private equity funds to act as promoters of Indian insurance companies under certain conditions such as: (i) having a minimum lock-in period of five years; (ii) having a maximum shareholding limit of 49%; (iii) having at least one-third independent directors on the board; and (iv) complying with certain disclosure requirements.
- The draft regulations provided certain stipulations which were required to be fulfilled by an applicant promoted by a Special Purpose Vehicle (SPV) or a non-operative financial holding company. These include, among other things, conditions relating to restrictions on the issuance of convertible instruments, infusion of capital, and prior approval of the IRDAI for the transfer of shares.
- The Registration Regulations have permitted non-operative financial holding companies (NOFHCs) to act as promoters of Indian insurance companies subject to certain conditions such as: (i) having a minimum net worth of Rs. 500 crore; (ii) having at least 51% shareholding in each insurance company promoted by it; and (iii) complying with certain governance norms.

- The Registration Regulations lay down the caps for "investment in the capacity of investor" in an insurance company to 25% in case of a single investor and 50% for all the investors, collectively. However, this restriction does not apply to shares listed on stock exchange(s) in India.

**Implications of the Bill**

The impact of these regulations on private equity participants can be seen from different perspectives. Some possible impacts are:

- Upon the bill being implemented, it may increase the attractiveness of investing in Indian insurance companies as promoters, as they provide more flexibility and clarity on various aspects such as shareholding limit, lock-in period, governance norms and disclosure requirements.
- They may expand the pool of potential private equity investors, as they include investment funds registered with IFSCA and foreign regulators under the definition of private equity fund.
- ·The number of new insurance companies being set up by private equity funds may be limited, as they increase the minimum paid-up equity capital requirement for insurance
- companies from Rs. 100 crore to Rs. 200 crore.

**Impact on Private Equity Partners**

These regulations are considered a step up for private equity participants because they:

- Allow private equity funds to act as promoters of Indian insurance companies under certain conditions, which was not explicitly permitted before.
- Remove the requirement of investing through a special purpose vehicle (SPV) for private equity funds acting as promoters, which was seen as a tax and administrative burden.
- Expand the definition of private equity fund to include investment funds registered with the International Financial Services Centres Authority (IFSCA) and those registered with foreign regulators.

These changes are expected to encourage more participation from private equity players in the insurance sector, which will provide access to much-needed capital for both new and existing insurance companies.

The Registration Regulations have introduced multiple changes to the insurance regulatory framework governing applicant entities. Some of these changes may have wide ranging impacts in terms of structuring of investments in insurance companies which may in turn also impact the quantum of investments that the insurance sector may attract in the future.

**Read more:**

- https://corporate.cyrilamarchandblogs.com/2023/02/irdai-registration-of-indian-insurance-companies-regulations-2022-a-step-up-for-private-equity-participants/

- https://www.mondaq.com/india/insurance-laws-and-products/1262940/irdai-registration-of-indian-insurance-companies-regulations-2022-a-revamp-of-the-old-regime

- https://www.jsalaw.com/newsletters-and-updates/new-regulations-for-registration-of-indian-insurance-companies/

# Advance Collected from Allottees Towards Payment of Maintenance Charges or Taxes is Operational Debt: NCLT Mumbai

-Udhav Mittal

**Background**

Marathon Nextgen Realty Limited ("Corporate Debtor") is a real estate development company that owns the 'Marathon Innova' commercial building project. Innova Premises Co-operative Society Limited (the "Applicant Society/Financial Creditor") is a registered Co-operative Housing Society with 100 members who live in commercial flats in the Marathon Innova Project.The Applicant Society maintains the common space of the office flats in Marathon Innova. In accordance with this, the Parties negotiated a Premises Ownership Agreement. The Applicant Society claimed that, in 2016-17, the Corporate Debtor obtained surplus sums from Members for Marathon Innova building maintenance. The funds were collected in the form of advances made by allottees upon occupation of said flats toward maintenance charges/taxes recoverable from such flat owners. The amount was paid for the period after the flats' occupation as well as the period of development of the apartments.

The Corporate Debtor did not release the alleged surplus money. However, the Corporate Debtor delivered the commercial flats to the allottees without a hitch.

As a result, the Applicant Society filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), seeking to initiate a Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor for a default of Rs.1,55,31,417/-.

**The question-**

Whether payment towards maintenance charges or taxes of the real estate project, is akin to the money paid for availing services?

**What the NCLT has to say-**

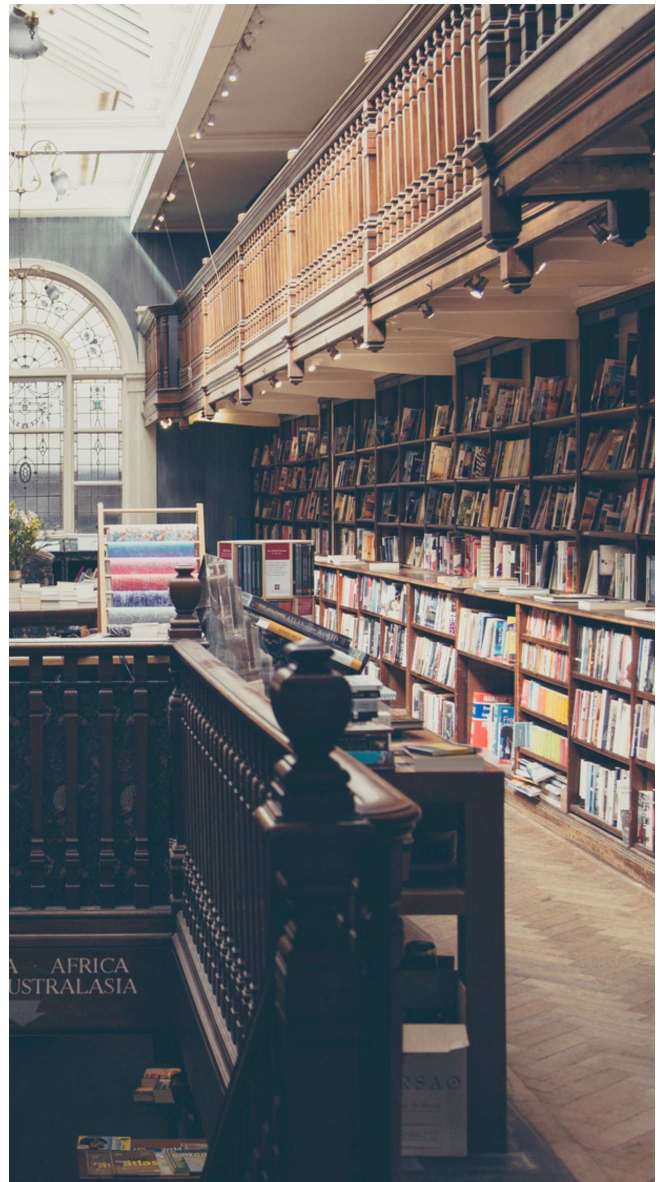
The Court determined that money was received for the payment of maintenance/taxes and that there was no delay in giving over the units booked by members of the Applicant Society. The sum in question is comparable to money paid in advance to a service provider for availing services and defraying expenditures incurred by such service providers in rendering agreed-upon services.

Any debt emerging from the delivery of products or services, including any advance paid towards the supply of such goods or services, is classified as operational debt. In this case, the Applicant has filed this Application claiming to be a Financial Creditor

under section 5 (8) (f) of the Code, even though the amount in question is in the nature of an Operational Debt recoverable from the Corporate Debtor, even if the debit notes towards common amenities claimed by the Corporate Debtor for the period following the handover are not considered. According to the Court, any debt arising from the delivery of products or services, including advances towards the same, falls within the category of Operational Debt. The Applicant Society, on the other hand, submitted the Section 7 application as a Financial Creditor under Section 5(8) of the IBC.

Considering the debt in dispute is operational in nature, the Applicant Society cannot be considered a Financial Creditor. As a result, the Section 7 application cannot be maintained. The application was denied by the Bench.

**Read more:**
https://www.livelaw.in/news-updates/advance-collected-from-allottes-towards-payment-of-maintenance-charges-or-taxes-is-operational-debt-nclt-mumbai-222585



# Reopening the Assessment cannot be justified based on the disclosure of income by another Director in a different manner: Bombay High Court

-Pushpendra Dixit

In the case of Deepak Marda v The Income Tax Officer & Ors, a division bench (comprising of Hon'ble Justice Dhiraj Singh Thakur and Hon'ble Justice Kamal Khata) held that merely a different disclosure of income by one of the directors of the company cannot be a ground to reopen its assessment.

**Background**

- The petitioner was the director of Cinepolis India Pvt. Ltd., at Gurgaon. In 2007, the petitioner established Cinepolis India in partnership with the Cinepolis Group and purchased a portion of the stock and ownership in the company.
- The petitioner transferred the equity shares and rights in Cinepolis India during the financial year (F.Y.) 2013–2014.
- The proceeds from the sale of equity shares in Cinepolis India were stated in the petitioner's income tax return for the fiscal year 2014–15 under the title "Capital Gains." Furthermore, under the heading "Cost of Improvement," the petitioner sought a deduction for legal costs, and the return was properly processed in accordance with Section 143. (1).
- On July 11th, 2016, the petitioner received a notice under Section 142(1) of the Income Tax Act, 1961 for review of the transaction.
- The petitioner submitted the required information. The Assessment Officer (AO) passed an order accepting the total income.
- The petitioner was issued a reassessment notice to reopen the assessment in 2021 u/s. 148 of the Act.

**What the petitioners had to say**

1. The petitioner contended that the reopening of the assessment vide impugned notice is made after four years without demonstration of any failure on the part of the petitioner where he has failed to disclose any material facts.
2. The petitioner also contended that the notice is also vitiated as per s. 147(1) of the Act which talks about grounds on which notice can be issued by AO, i.e., the assessee failed to disclose, truly and fully, any material facts necessary for the assessment is not established.
3. The petitioner also submitted that the reopening was initiated solely based on information received from the ACIT, Gurgaon without application of mind.

**What the respondents had to say**

1. The respondent supported the impugned order and argued that the expression "reason to believe" cannot be read to mean that the

AO should have finally ascertained the fact by evidence or conclusion.

2. The petitioner failed to provide the first agreement, dated October 6, 2007, and it came to the notice of the authorities during the proceedings in the case of Shri Milan Saini, another director who also received a similar payment from the same company.

**The High Court's judgment**

1. The court held that there was no escapement of revenue since the AO failed to specify in the order on basis of which tangible material the escapement of income can be established. The AO also failed to confirm the material fact that the assessee had failed to disclose accurately and completely.
2. The Court further stated that the mere fact that another director of the same company disclosed the income received in a different way cannot serve as a basis for reopening and that doing so would clearly constitute a change of opinion that is not only based on conjectures and assumptions but also a case of blindly relying on information and borrowed satisfaction, both of which are not permitted grounds for reopening an assessment.

**Read more:**

1.https://www.livelaw.in/news-updates/assessment-reopened-another-director-disclosure-income-differently-received-bombay-high-court-222654

2.https://taxguru.in/income-tax/reopening-reasoning-another-director-disclosed-income-differently-unsustainable.html