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Confidential IPO Filings: Why They Emerged, How They Were Designed, and What Was Implemented

Introduction:

As more Indian companies preparing for an Initial Public Offering (IPO) choose the confidential pre-filing route, curiosity around this approach is growing. The most obvious question is - if a company is going public, why keep its IPO filings confidential?

To answer this, we will explore the origins of confidential IPO filings, the need that led to their introduction, and how they have been implemented worldwide. Finally, we will examine how this framework is shaping the Indian primary market.

Origin of the Confidential Filing Route:

The confidential filing of the IPO documents with the regulator was originated in United States in 2012 with the enactment of the Jumpstart Our Business Startups (JOBS) Act[i]. This legislation allowed Emerging Growth Companies (EGCs), defined as firms with less than $1 billion in revenue, to submit draft registration statements to the Securities and Exchange Commission (SEC) for non-public review[ii]. Later this was taken up by UK, Canada, Hong Kong Etc.

Need of Confidential filing:

In May 2022, the Securities and Exchange Board of India (SEBI) proposed the introduction of a pre-filing mechanism for IPOs in its consultation paper. [iii] This was later approved in SEBI's board meeting in November 2022[iv]. Both documents highlighted the need for a confidential pre-filing route, emphasizing key reasons behind its introduction. The traditional IPO process presents challenges that necessitated an alternative approach like the confidential pre-filing route.

The reasons are as follows:

a. **Protecting Sensitive Business Information:**
When a company decides to go public, it must file a Draft Red Herring Prospectus (DRHP) that discloses sensitive business information ranging from financials and strategies to key risks and operational insights. In the traditional IPO route, this document enters the public domain well before the IPO plans are finalized. This prolonged public exposure can leave companies vulnerable to competitive exploitation, especially if the IPO is eventually shelved. Recognizing this concern, SEBI, in its November 2022 Board Meeting Note, revealed that between 2018 and 2021, out of 129 companies that filed offer documents, 57 ultimately did not proceed with their IPOs. This significant drop-off was one of the key reasons behind SEBI's introduction of the confidential pre-filing route an alternative that balances regulatory scrutiny with strategic discretion.

b. **Managing Market Uncertainty:**
Even after SEBI's approval, companies sometimes delay their IPOs due to market fluctuations. By the time they decide to relaunch, earlier investor feedback may no longer be relevant, making it harder to plan. The confidential IPO route allows companies to assess market conditions and move forward when the timing is right, ensuring a better chance of success.

c. **Allowing Flexibility in IPO Planning:**
Once a company files the Red Herring Prospectus (RHP), companies typically launch the IPO within 2-5 days, leaving little time to evaluate market conditions, investor sentiment, and regulatory feedback. The confidential pre-filing route offers greater flexibility, allowing companies to refine their plans and proceed at the right time.

The pre-filing route solves these issues by allowing companies to engage privately with SEBI and institutional investors before going public. This helps them time their IPOs better, protect sensitive information, and make well-informed decisions.

Process Adopted by SEBI for confidential pre-filing route:

Chapter IIA of SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2018 (ICDR Regulations) govern the IPO by way of pre-filing of the offer document.

We will compare the traditional route of the IPO and Confidential Route to understand the process better (Table[v]):

Activity	Existing Process	Pre-Filing Process
Filing of Offer Documents	Filing of DRHP with SEBI (document available in public domain).	Pre-filing of DRHP with SEBI (document **not available** in public domain).
Receipt of SEBI Observations	SEBI provides observations.	SEBI provides observations.
Updated Draft Red Herring Prospectus (UDRHP)	Filing of UDRHP with SEBI (mandatorily incorporating SEBI's observations).	Issuer, if it so desires based on market conditions and its own financial requirements, may decide to pursue undertaking IPO. If so, then next step is filing of Updated Draft Red Herring Prospectus-I (UDRHP-I) with SEBI (incorporating SEBI's observations). UDRHP-1 is **available in public domain** for public comment.

Activity	Existing Process	Pre-Filing Process
Public Feedback Incorporation	Not Applicable	Filing of Updated Draft Red Herring Prospectus-II (UDRHP-II) with SEBI (incorporating public comments), Document **not available** in public domain.
Final RHP Filing	Filing of RHP with RoC and SEBI.	Filing of RHP with RoC and SEBI.
Issue Process	IPO opens and closes.	IPO opens and closes.
Filing of Prospectus	Filing of Prospectus with SEBI.	Filing of Prospectus with SEBI.
Publicity & Marketing	Permitted from DRHP filing. Public communication before DRHP must align with past issuer practices.	Publicity and marketing not permitted from filing of the DRHP. Limited marketing permitted (Only for Testing the waters i.e., limited purpose marketing of the intended issue to only QIBs during the Prefiling stage). Public communication / marketing from date of board meeting in which the IPO is approved till filing of updated draft offer document (UDRHP-I) shall be consistent with past practices of issuers
Exemptions under ICDR after DRHP filing	N/A	(1) Restriction on issuing new shares/convertibles. (2) Flexibility in changes to Schedule XVI matters (e.g., directors, promoters, objects of the issue) without refiling. Till filing of UDRHP-1.
Offer For Sale (OFS) Compliance	Minimum one-year holding before issue requirement for equity shares in OFS. This is to be tested at the stage of filing of DRHP.	Compliance with additional conditions for OFS related to minimum period of one year of holding of equity shares proposed to be offered at OFS and compliance with conditions pertaining to securities which are ineligible to be counted towards minimum promoters' contribution to be tested at the stage of UDRHP-I.

Activity	Existing Process	Pre-Filing Process
Validity of SEBI Observation	Issue must open within **12 months** of SEBI observation.	Issue must open within **18 months** of SEBI observation, subject to UDRHP-I filing within 16 months.
Applicability of Schedule XVI i.e. All change permissible under Schedule XVI such as change in issue size (fresh issue and/ or offer for sale), change in promoter/ directors, objects, without the requirement of re-filing	Applicable from DRHP filing. Fresh issue size can change up to 20% after SEBI's observations.	Applicable from the date of issuance of SEBI Observations on pre-filed document. Change (increase or decrease) in fresh issue size after issuance of SEBI's observation proposed to be permitted to the extent of 50% as against 20% in existing mechanism.

Why Companies May Consider the Confidential Pre-Filing Route for IPOs:

Going public is a major milestone, but the traditional IPO process comes with challenges such as tight timelines, market volatility, and the risk of exposing sensitive business information too soon. The confidential pre-filing route gives companies more control over their IPO journey. Here's why companies may consider it:

1. Pick the Right Market Timing:

In the traditional IPO process, once a company gets SEBI's approval, it has just 12 months to launch the IPO. If market conditions turn unfavourable, companies are stuck with a tough choice of going ahead anyway or scrap the plan.

With confidential pre-filing, companies get 18 months instead of 12, giving them extra breathing room. They can wait for the right market conditions and investor sentiment before going public.

2. Review and Improve Without Public Scrutiny:

The confidential pre-filing route lets companies share their draft offer documents privately with SEBI, away from competitors and market speculators. This gives them the space to fine-tune disclosures, address regulatory feedback, and plan their IPO confidently, without the pressure of public exposure or giving away sensitive business plans too early.

3. More Flexibility in IPO Structure:

Markets change, and so do business needs. The confidential route offers: Up to 50% change in fresh issue size after SEBI's observations (vs. only 20% in the traditional route)[vi]. Freedom to make key business changes (like appointing new directors or modifying the use of IPO proceeds) without refiling the offer document.

This makes IPO planning much more adaptable.

4. Test Investor Interest Without Commitments:

Before committing to a full IPO, companies can privately gauge investor interest through Qualified Institutional Buyers (QIBs). This "Testing the Waters"[vii] approach helps them understand demand and pricing, without the pressure of public scrutiny.

As more companies explore this route, it could reshape how IPOs are planned in India. By balancing transparency with strategic flexibility, the confidential pre-filing option helps businesses go public on their own terms. For companies aiming for a smooth listing with minimal disruptions, this could be the future of IPOs.

Companies that opted the confidential pre-filing route for IPO:

Tata Capital limited, Swiggy limited, Vishal Mega Mart Limited, Physics Wallah Limited, Tata Play Limited, Oravel Stays Limited (OYO)

Conclusion:

The confidential pre-filing route offers companies a strategic advantage in the IPO process by allowing them to engage with SEBI and institutional investors without immediately making their plans public. This reduces competitive risks, provides flexibility in timing, and ensures a more efficient IPO execution. As Indian markets evolve, this approach is likely to gain traction, enabling companies to go public with greater confidence and control. Ultimately, it strikes a balance between regulatory compliance and business strategy, making IPOs more adaptable to market conditions.

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[i] https://mywallst.com/blog/what-does-a-confidential-ipo-filing-mean/
[ii] https://www.treasuryandrisk.com/2017/06/30/sec-opens-confidential-ipo-filing-to-all-companies/?slreturn=2025032525721
[iii] https://www.sebi.gov.in/reports-and-statistics/reports/may-2022/consultation-paper-on-pre-filing-of-offer-document-in-case-of-initial-public-offerings_58875.html
[iv] https://www.sebi.gov.in/sebi_data/meetingfiles/nov-2022/1667447898345_1.pdf
[v] https://www.sebi.gov.in/sebi_data/meetingfiles/nov-2022/1667447898345_1.pdf
[vi] https://www.sebi.gov.in/sebi_data/meetingfiles/nov-2022/1667447898345_1.pdf
[vii] https://www.sebi.gov.in/sebi_data/meetingfiles/nov-2022/1667447898345_1.pdf

Immediate SEBI LODR Compliance for High Value Debt Entities

Securities and Exchange Board of India ('SEBI') vide its amendments notification dated March 27, 2025, amended Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (amendment) Regulations, 2025 [LODR amendment']. LODR amendment is effective immediately for High Value Debt Listed Entity ['HVDLE'] (i.e. entities only having their principal outstanding non-convertible debt securities of Rs. 1000 crore or more as on March 31).

HVDLE will have to ensure compliance with provisions of Chapter IV and Chapter VA of SEBI LODR immediately. HVLDE will have to frame policies, change composition of board of directors, committees of board, compliances relating to subsidiary etc. immediately.

Below is the list of policies that need to be framed and compliances that needs to be done by HVDLE on immediate basis:

A. Policies that need to be framed with approval of board of directors

Regulation	Particulars
62J	As per reg. 62J of LODR, HVDLE will have to frame whistle blower policy for directors and employees to report genuine concerns.
62K(1)	HVDLE shall formulate a policy on materiality of related party transactions and this policy shall be reviewed by board of directors every three years.
62K(3) – material modification	Audit committee shall define "material modification" and disclose it as part of policy on materiality of related party transaction.
62K(4)(a) – criteria for omnibus approval	Audit committee shall lay down criteria for granting omnibus approval by audit committee.
62O(3) – code of conduct	code of conduct for board of directors and senior management

B. Immediate Compliances that need to be done by HVDLE.

Reg. no. of LODR	Compliance that needs to be ensured
Reg. 62O (1) - Max. no. of membership and chairmanship of audit committee and stakeholder relationship committee.	Director shall not be a member in more than 10 committees or act as chairperson of more than 5 committees. Audit committee and stakeholder relationship committee are to be counted for the purpose of ascertaining this limit. To determine 10 committee membership and 5 committee chairmanship, HVDLE and public limited companies are to be counted by HVDLE.

Reg. 62O (3) - Compliance with code of conduct	Board of directors and senior management shall affirm compliance with code of conduct. This affirmation needs to be done on an annual basis.
Reg. 62O (4) – Disclosure of material financial relationship	Senior Management to disclose material financial and commercial transaction where they have personal interest and that have conflict of interest with HVDLE at large.
62N(11) – D&O Insurance	HVDLE will have to take directors and officers insurance for independent directors
62M(1) and (2) – secretarial auditor	HVDLE will have to submit secretarial audit report for FY 24-25 along with annual report dispatched to shareholders for FY24-25. Secretarial audit report of material subsidiary also needs to be given along with secretarial audit report of HVDLE. HVDLE needs to appoint secretarial auditor for undertaking secretarial audit at the upcoming board meeting of the entity. HVDLE will also have to submit annual secretarial compliance report for FY 24-25 by May 31, 2025 (i.e. within 60 days from end of March 31).
62L (1)	HVDLE is required to appoint an Independent Director on the Board of its unlisted material subsidiary, located in India or abroad.
62L (2)	Financial statements and in particular the investments of unlisted material subsidiary have to be reviewed by the audit committee of the HVDLE
62L (3)	The minutes of the Board meetings of the unlisted material subsidiary to be placed before the Board of Directors of HVDLE.
62L (4)	The unlisted material subsidiary shall inform the Board of Directors of HVDLE about any significant transactions or arrangements
Obligations under Chapter III of SEBI LODR	
Reg. 6	HVDLE will have to ensure that position of compliance officer shall be 'one level below the board of director'.
Reg. 5	HVDLE shall seek all information that is relevant and necessary for listed entity to ensure compliance with applicable laws from key managerial personnel, directors, promoters, promoter group or any other person dealing with the listed entity.

Compliance with respect to no. of directorships

62 E	Directors of the HVDLE can hold positions of director or independent director in maximum seven listed entities including HVDLE. To comply with this there is a limit of six months from March 27, 2025. Managing Director or Whole Time Director can hold position of independent director in maximum three listed entities including HVDLE. These conditions are not applicable to the ex-officio positions or positions level due to deputation.

Conclusion

High-value debt listed entities must prioritize timely compliance. Some of these compliances need to be addressed at the upcoming board meeting in order to ensure adherence to regulatory obligations.

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SEBI amends UPSI Definition: Can Companies Still Defend against UPSI Claims?

Background:

Securities and Exchange Board of India (Prohibition of Insider Trading), regulations, 2015 ['PIT'] vide its amendment notification dated March 12, 2025, amended the definition of 'Unpublished Price Sensitive Information' as per reg. 2(1)(n) of PIT ['UPSI'].

Post this amendment events that are ordinarily considered as UPSI have increased from five events to sixteen events. Question that arises is whether all these events stated in the definition of UPSI would be considered as UPSI by default or a listed entity can still defend stating that that the event(s) provided in the definition of UPSI is not UPSI?

Introduction:

In this regard, the observations from the report of the High-Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992 under the chairmanship of Justice Sodhi on UPSI, is noteworthy. The Committee observed as follows: "*The Committee also felt that some illustrative examples of what would ordinarily constitute UPSI should be set out to clearly understand the concept. It is important to ensure that regardless of whether the information in question is price sensitive, no piece of information should mandatorily be regarded as UPSI. Towards this end, examples of events and developments information about which would ordinarily be regarded as UPSI, are listed – such as financial results, dividends, mergers and acquisitions, changes in capital structure etc.*"

The Chief Executive Officer, Managing Director or such other analogous person of a listed company, intermediary or fiduciary shall put in place adequate and effective system of internal controls to ensure compliance with the requirements given in these regulations to prevent insider trading. Internal controls shall inter-alia include identification of UPSI[i]. Hence it means obligation is on the CEO or MD or analogous person to put in place adequate and effective systems for identification of UPSI.

So it means even if the list of events ordinarily considered as UPSI has increased from five to sixteen, still listed companies can defend whether a particular event specified in the definition of UPSI is not necessarily a price sensitive information for their company.

Precedents in identification of UPSI:

SEBI in its adjudication order dt: June 8, 2021, in the matter of Mr. Kunal Kashyap and Allegro Capital Pvt Ltd in the matter of Biocon Ltd has stated that, "*…the illustrations (as provided under the definition of UPSI) are not mandatorily UPSI, if proven otherwise*…."

Further Hon'ble SAT in the matter of Anil Harish Vs. SEBI (date of Order-June 22, 2011) has held that whether an information is price sensitive information or not will depend on the facts and circumstances of each case. Also, Hon 'able Supreme Court in SEBI vs. Abhijit Rajan (Civil Appeal No.563 of 2020, Decision dated September 19, 2022) has held that, *"That the price sensitivity of an information has a correlation directly to the materiality of the impact that it can have on the price of the securities of the company. An information may materially affect the price of the security of a company either positively or negatively. The impact may be beneficial or adverse. The information should have the potential either to catapult the price of the securities of the company to a higher level or to make it plunge. The effect can be bullish or bearish. But the effect should be material and not completely insignificant"*

Conclusion:

Hence it can be seen that whenever any information or event is added in the definition of UPSI it does not necessarily mean that it would be mandatorily considered as deemed UPSI under PIT. As seen in above cases Hon'able Supreme Court, SAT, and SEBI has held that for any information or event to be UPSI it should be based on facts and circumstances of each case. Further the list of UPSI provided therein is just an illustrative list of UPSI and if proven otherwise then it may not be considered as UPSI.

Hence it can be inferred that the expanded list of UPSI as provided by SEBI in the amended definition of UPSI would still not be considered as UPSI if proven that it was not UPSI.

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[i] Regulation 9A(1) read with 9A(2) of PIT

Bonus Shares in No-Go Zones?
DPIIT Clears Air on FDI-Restricted Sectors

Overview:

On April 7, 2025, the Department for Promotion of Industry and Internal Trade (DPIIT) issued a clarification by Press Note 2, providing much-needed guidance on the issuance of bonus shares by Indian companies operating in sectors where Foreign Direct Investment (FDI) is prohibited. The press note clarifies ambiguity on permission to Indian Companies engaged in sectors prohibited for FDI to issue bonus shares to their existing non-resident shareholders, subject to certain conditions, including adherence to sectoral caps and maintaining the existing shareholding pattern.

Background:

Under the Consolidated FDI Policy Circular of 2020 (effective from October 15, 2020), Indian companies were permitted to issue bonus shares to non-resident shareholders, provided such issuance complied with applicable sectoral caps. However, the policy lacked explicit clarity on whether this applies to companies operating in sectors where FDI is completely prohibited.

To address this gap, DPIIT has inserted the following clarification under Paragraph 1 of Annexure 3 of the FDI Policy:

"An Indian Company engaged in sector/activity prohibited for FDI is permitted to issue bonus shares to its pre-existing non-resident shareholders, provided that the shareholding pattern of the pre-existing non-resident shareholders does not change pursuant to the issue of bonus shares."

Implications of the Clarification:

The revised policy explicitly permits Indian companies in FDI-prohibited sectors to issue bonus shares to their existing non-resident shareholders—on the condition that the shareholding pattern remains unchanged post-issuance.

FDI is currently prohibited in following sectors such as:

- Lottery business, Gambling and betting (including franchise, trademark, brand licensing, or management contracts for the same or casinos)
- Chit funds and Nidhi companies
- Trading in transferable development rights (TDRs)
- Real estate business and construction of farmhouses
- Manufacturing of tobacco products (e.g., cigarettes, cigars)
- Atomic energy and railway operations (non-open to private sector investment)

Companies in these sectors are not allowed to issue fresh equity shares to non-residents. The new clarification does not override this restriction. Instead, it applies specifically to bonus issuances to existing non-resident shareholders—typically those who invested prior to the enforcement of the Foreign Exchange Management Act (FEMA), 1999, under Foreign Exchange Regulation Act, 1973 (FERA).

Eligibility for Bonus Issue:

Only Indian companies in prohibited sectors with grandfathered foreign shareholding—i.e., investments made in compliance with FERA (prior to FEMA, 1999) shall be allowed issuing bonus shares to existing shareholders pursuant to this clarification. These companies must also ensure that the bonus share issuance does not alter the percentage of ownership held by non-resident shareholders.

This clarification is particularly relevant for legacy companies which operate in sectors in which FDI is now strictly prohibited. Such Companies had received foreign investment before these prohibitions came into force. Until now, the lack of clarity in FDI policy had constrained their ability to undertake routine corporate actions like bonus issue.

Conclusion:

The DPIIT's clarification is a welcome and pragmatic step toward addressing regulatory ambiguity for legacy companies operating in sectors closed to FDI. By enabling such Companies to issue bonus shares to pre-existing foreign investors without altering the shareholding structure, the clarification enhances regulatory certainty and supports efficient corporate functioning.

Importantly, this clarification applies exclusively to bonus issue, as these do not involve fresh capital infusion. However, issue of rights shares or any instrument that entails additional foreign investment remains prohibited in these sectors under the existing FDI policy.

This move is expected to boost investor confidence, especially in companies with long-standing foreign shareholders, while safeguarding the integrity of India's FDI policy framework.

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RBI Makes Online Filing of Applications through PRAVAAH mandatory from May 1, 2025

In a significant move towards digitization and efficiency, the Reserve Bank of India (RBI) has announced that, effective May 1, 2025, all applications for regulatory authorizations, licenses, and approvals must be submitted mandatorily through the PRAVAAH portal.

Background:

The **PRAVAAH** (Platform for Regulatory Application, VAlidation and AutHorisation) portal was launched by the RBI in May 2024 as part of its commitment to enhance transparency, improve service delivery, and digitize internal workflows involved in the regulatory approval process. Initially launched with 60 application forms, the portal has since expanded to 108 forms across various regulatory and supervisory departments.

Key Features of the PRAVAAH Portal:

Online Application Submission: Applicants can submit their requests directly through the portal.
Real-Time Tracking: Status updates allow applicants to monitor the progress of their applications.
Communication and Query Handling: The portal facilitates prompt responses to clarifications and queries raised by the RBI.
Time-Bound Decision Making: Ensures quicker resolution and greater transparency.

Mandatory Usage Notification:

As per the press release dated April 11, 2025, the RBI has advised all applicants—including Regulated Entities (REs)—to use the PRAVAAH portal for submitting all applications related to regulatory approvals. For cases where a specific application form is not yet available, a general-purpose form is provided on the portal.

Over 3,000 applications/requests have already been processed through PRAVAAH since its launch, reflecting growing adoption across the ecosystem.[i]

Exceptions and Support:

Recognizing possible challenges, the RBI has made provisions for exceptional cases. If members of the public are unable to access or use the PRAVAAH system, they may continue to submit their applications directly to the Reserve Bank.

Applications by the Foreign Exchange Department (FED) on PRAVAAH:

The Reserve Bank of India, in its press release, has provided a detailed list of departments and corresponding purposes for which application forms will be available on the PRAVAAH portal. Further, the following categories of applications processed by the

Foreign Exchange Department (FED) must be submitted exclusively through the PRAVAAH portal from 1st May, 2025:

Sr. No.	Purpose	Applicant
1	Addendum to already filed compounding application	Applicant to RBI
2	Approval for miscellaneous current account/import of services remittances to be granted by External Payment Division, FED, CO	AD Bank to RBI
3	Approval for remittance beyond prescribed limit under para 2.i of Schedule III of Foreign Exchange Management - Current Account Transactions Rules, 2000 dated May 03, 2000	AD Bank to RBI
4	Remittance in excess of LRS limit (para A.7 of LRS Master Direction)	AD Bank to RBI
5	Acquisition or Sale of Immovable Property	Applicant to RBI
6	Bank Guarantees beyond AD Bank limits	AD Bank to RBI
7	Opening of Special Rupee Vostro Account	AD Bank to RBI
8	Borrowing and lending under FEMA	AD Bank to RBI
9	Clarifications on regulations/directions from FED, CO	AD Bank to RBI
10	Compounding application hearing confirmation	Applicant to RBI
11	EDPMS-IDPMS references to Trade Division, FED	AD Bank to RBI
12	Foreign Investment in Non-Debt Instruments	AD Bank to RBI
13	General correspondence on Overseas Investment (including prior approval)	AD Bank to RBI
14	Regulatory Approvals under FEMA (5R and 10R)	AD Bank to RBI
15	General References to Trade Division, FED	AD Bank to RBI
16	Queries related to APRD, FED	AD Bank to RBI
17	Guarantees under FEMA	AD Bank to RBI
18	Regulatory Approvals for Liaison/Branch/Project Offices in India	AD Bank to RBI

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[i]Source: RBI Press release dated 11 April, 2025 and May 28, 2024

Summary- In the matter of EPC Constructions India Limited - Appellant vs Matix Fertilisers and Chemicals Limited – Respondent at National Company Law Appellate Tribunal – New Delhi- dated 9 April 2025

Facts of the case

- EPC Constructions India Limited - the Appellant executed an EPC contract with Matix Fertilisers and Chemicals - Respondent/Corporate Debtor (CD) for setting up a fertilizer complex on 11 December 2009.
- A resolution dated 30 July 2015 was passed by the appellant giving consent to make investment up to Rs. 400 Crores into 8% Cumulative Redeemable Preference Shares (CRPS) of Rs.10/- each of CD in one or more tranches.
- CD in consequence allotted 25,00,00,000 8% CRP Shares of Rs.10/- each to appellant and Essar Projects (India) Limited (earlier name of the Appellant) in terms and conditions mentioned therein. The CRPS were renewable within three years.
- National Company Law Tribunal (NCLT) initiated Corporate Insolvency Resolution Process (CIRP) against the appellant by order dated 20 April 2018. The appellant issued a letter on 28 August 2018 to the CD asking for redemption of CRPS including dividend, aggregating to Rs.310 Crore.
- The CD sent a reply dated 24 August 2018 informing that liability towards redemption of CRPS along with cumulative dividend, aggregating to Rs.310 Crores had been adjusted against the claim which CD had against the appellant.
- CD submitted a claim in the CIRP of Appellant of Rs.377.87 Crores, information of which was also sent on 5 June 2018 for adjustment of total liability of CRPS against the aforesaid claim.
- The Resolution Professional of the appellant also wrote a letter on 27 October 2018 to the CD claiming the debt which included amount of Rs.250 Crores towards investment in CRPS with dividend of Rs.60 Crores totalling to Rs.310 Crores.
- The Liquidator of the appellant moved an application before the NCLT seeking leave under Section 33 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) for taking proceeding for recovery of the debt of the appellant.
- Consequently, an application u/s 7 of the IBC was filed by the Liquidator of the Appellant on 25 April 2022 against the CD claiming default amount of Rs.250 Crores + Rs.60 Crores totalling to Rs.310 Crores.
- NCLT rejected the application and observed that:
    - The CRPS were not due and payable, hence, no default could be established.
    - That CRPS were not a financial debt under IBC unless and until they become due for redemption.
    - In the absence of any debt due to the appellant and non-existence of default on part of respondent, the application filed u/s 7 of the IBC was held to be not maintainable.
- An appeal was filed with National Company Law Appellate Tribunal (NCLAT) challenging the above order of the NCLT.

Arguments of the Appellant:

- The CRPS were allotted by the respondent in lieu of the existing debt which was owed to the appellant. The respondent had acknowledged the liability to the extent of Rs.310 Crores and sought to adjust this amount against the outstanding dues payable to the respondent.
- The transaction under which the CRPS were allotted was a commercial transaction and was considered as financial debt having a commercial effect of borrowing, The NCLT committed error in rejecting the application filed by the appellant u/s 7 of IBC.
- It was submitted that the conversion of the outstanding amount into subordinated debt was undertaken at the request of the respondent. The CD had expressly communicated to the appellant that it had raised equity funds, which would be specifically earmarked for the repayment of the appellant's subordinated debt.
- The nature of the transaction serves as the basis for determining the classification of the debt. In the present case, it is evident that the transaction involved financial debt, as demonstrated by the allotment of CRPS. These shares carried an 8% dividend obligation and were redeemable, indicating a debt-like feature. The time value of money was also clearly reflected in the transaction. Under the IBC, this transaction fully meets the criteria for the commercial effect of borrowing, thereby qualifying as financial debt.
- In the Audited Financial Statement for the financial year 2016-17 of the CD - CRPS were shown as its liability which proves that respondent owed a financial debt.
- The appellant, after three years from the issuance of CRPS, was entitled to redeem them. Having written to the respondent requesting payment of the redemption amount along with the applicable dividend, the respondent incurred a financial debt. Therefore, the NCLT erred in rejecting the Section 7 application.

Arguments of the Respondent:

- The appellant submitted that CRPS is a capital and is not a financial debt owed by the CD to the appellant. The outstanding amount which was payable to the appellant under the contract by the CD having been converted into CRPS the debt extinguished. After debt is converted into shares, debt or liability losses the character of debt.
- Further, that terms 'preferential share' and 'investment' have been defined under the Companies Act, 2013 (Act), hence, relevant provision of the Act, have to be looked into to find the nature of debt and claim under the CRPS.
- The CRPS can only be redeemed as per Section 55 of the Act - out of the profit of the Company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption.
- The CD did not earn any profit in the relevant year so as to preferential shares could have been redeemed nor any amount was available towards fresh issue of shares for redeeming the preferential shares. No payment could have been made in the preferential shares as no amount was due nor any default could said have been committed.

- The appellant filed a petition u/s 7 of the IBC based on CRPS worth Rs.250 crores. The nature of debt has to be found out from the transaction which culminated in 25 Crore CRPS. The CRPS is not a financial debt. The legislature is fully conversant of the law which it enacts. The legislature was well aware with the concept of preferential shares, debentures and in Section 5(8)(c) expression 'debentures' has been used but there is no mention of preferential shares. The legislature was fully aware that a preferential shareholder is not a financial creditor.
- Written contract between the parties must be interpreted on its terms alone and any other evidence to interpret the same, must be excluded. There is no obligation to redeem preference shares when the company has not made any profit, and dividend has not been declared. IBC is a complete code; hence, the financial debt has to be proved as per the provisions of the IBC.

HELD:

- Section 2(37) of the IBC, 2016 provided that words and expressions used but not defined in IBC but defined in other statutes including the Act shall have meaning respectively assigned to them in those acts. Certain provisions of the Act, which are relevant to find out the nature of the preferential shares allotted to the Appellant needs to be noticed. The Act defines 'shares' as well as 'debentures' in Section 2(84) and 2(30) of the Act.
- Section 43 of the Act deals with 'Kinds of Share Capital'. Share Capital are equity share capital or preference share capital. Section 55 on which reliance has been placed by learned counsel for the respondent deals with 'Issue and Redemption of Preferential Shares'. The proviso to the Section 55 provides that no such shares shall be redeemed except out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption.
- In the present case, the respondent consistently argues that after the allotment of CRPS to the appellant, the respondent company neither declared any dividend nor earned enough profit to redeem the preference shares. If the CRPS allotted to the appellant could not be redeemed, no debt would have become due. The NCLT concluded that since the preference shares were not redeemable and the company had neither earned profit nor issued fresh shares to facilitate such redemption, there was no default on the part of the respondent. Therefore, the NCLAT fully concurs with the NCLT's finding that no default existed on the respondent's part, and thus, the Section 7 application could not be admitted.
- Placing reliance of the judgment passed by the Hon'ble Supreme Court *in Global Credit Capital Ltd. and Anr. v. Sach Marketing Private Limited and An*r., *NCLAT observed held that for determining the nature of debt, the real nature of transaction has to be looked into.*
- In the present case, although CRPS were allotted to the appellant, there was no Share Subscription and Shareholders Agreement between the parties, nor were the CRPS subject to any conditions that would categorize the transaction as a financial debt.
- The NCLAT was of the view that preferential shares being part of the preferential share capital of the Company should not transfer any debt to initiate any Section 7 proceeding.

- Further, the Company having not earned any profit nor any dividend having been declared, no redemption was permissible by the statutory provision, hence, no debt was due on basis of which Section 7 application could be filed by the appellant. There was also no material that any proceeds of a fresh issue of shares made for the purpose of such redemption was available.
- The NCLAT, thus, fully endorses the finding of the Adjudicating Authority that there did not exist any default. It, thus, does not find any merit in this appeal. Appeal was dismissed.

This summary is written by **Ms. Aarti Ahuja Jewani – Partner -artiahuja@mmjc.in** and **Ms. Esha Tandon – Deputy Manager – eshatandon@mmjc.in**

NEWS UPDATES CIRCULAR AND FAQ FOR THE MONTH OF APRIL & MAY 2025

Sr. No.	News Updates	Link
	TOPIC	
1	**SEBI**	SEBI working on common advertisement code of all market intermediaries in ease of business push https://www.moneycontrol.com/news/business/markets/sebi-working-on-common-advertisement-code-of-all-market-intermediaries-in-ease-of-business-push-13007229.html
2	**Startups**	Start ups, backers under I-T lens for potential fund round tripping https://economictimes.indiatimes.com/tech/startups/startup-backers-told-to-share-investment-information/articleshow/120561912.cms?from=mdr
3	**Rights Issue**	Rights Issue through ASBA https://www.moneycontrol.com/news/business/markets/rights-issues-through-asba-facility-from-today-12999367.html
4	**Joint Ventures**	Tech-for-stake: 10% cap likely for Chinese firms in electronics JVs https://economictimes.indiatimes.com/industry/cons-products/electronics/tech-for-stake-10-cap-likely-for-chinese-firms-in-electronics-jvs/articleshow/120463173.cms?from=mdr
5.	**MCA and SEBI**	MCA, SEBI plan investor camps for faster transfer of unclaimed shares, dividends https://economictimes.indiatimes.com/markets/stocks/news/mca-sebi-plan-investor-camps-for-faster-transfer-of-unclaimed-shares-dividends/articleshow/120422202.cms?from=mdr

	Circular	Particulars
1.	**Disclosures in the offer document as per the requirement of SEBI NCS regulation, 2021**	The Company's proposing to issue non-convertible debt securities are required to make disclosures in the offer document as per the requirement of Schedule I of SEBI NCS Regulation, 2021. BSE highlights that the issuers are requested to ensure that all the disclosures as per the regulatory requirement are included in the offer document itself and no reference of a separate document is given for the same. It is noted that in few of the issues, the issuers have given reference to a separate document with respect to few of the Schedule I disclosures (such as covenants including the accelerated payment covenants given by way of side letters). SEBI and BSE have asked to avoid this https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20250417-8
2.	**Frequently Asked Questions (FAQs)**	SEBI: FAQ's for LODR Regulations https://www.sebi.gov.in/sebi_data/faqfiles/apr-2025/1745399101865.pdf