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January - March 2018

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1. Foreign Direct Investment – Notifications by DIPP and RBI

1.1. DISCONTINUANCE OF LETTERS OF UNDERTAKING ("LOUs") AND LETTERS OF COMFORT ("LOCs") FOR TRADE CREDITS

The RBI vide its circular dated March 13, 2018 has discontinued the practice of issuance of LoUs/ LoCs by AD Category –I banks, for trade credits, for imports into India, with immediate effect. Letters of Credit and Bank Guarantees for trade credits for imports into India may continue to be issued subject to compliance with the provisions contained in Department of Banking Regulation Master Circular dated July 1, 2015 on "Guarantees and Co-acceptances", as amended from time to time.

Full text of the circular is available at https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11227&Mode=0.

1.2. REVISIONS TO THE MASTER DIRECTIONS – REPORTING UNDER FEMA, 1999

The RBI has modified the 'Master Directions - Reporting under FEMA, 1999' to revise the draft of the undertaking to be filed along with the application for compounding of contraventions. Each person filing an application for compounding of contravention shall have to submit the prescribed undertaking in the revised form.

Full text of the notification is available at: https://rbidocs.rbi.org.in/rdocs/notification/PDFs/13MDRD77DCF42C4E64B6C9A83C24EF5D4E188.PDF

1.3. MASTER DIRECTIONS - FOREIGN INVESTMENT IN INDIA NOTIFIED

The RBI has notified the 'Master Directions - Foreign Investment in India' on January 04, 2018. These master directions lay down the modalities as to how foreign exchange business has to be conducted in order to implement the Foreign Exchange Management (Transfer or Issue of a Security by a Person Resident Outside India) Regulations, 2017.

Full text of the notification is available at: https://rbi.org.in/scripts/BS_ViewMasDirections.aspx?id=11200

1.4. UPDATE ON THE MASTER DIRECTIONS – FOREIGN INVESTMENT IN INDIA

The RBI has updated the 'Master Directions - Foreign Investment in India' on January 12, 2018, to clarify that 'capital instruments', and not merely 'shares' of an Indian borrowing company, may be transferred for securing credit facilities.

The Foreign Exchange Management (Transfer or Issue of a Security by a Person Resident Outside India) Regulations, 2017 permitted pledge of only 'shares' of an Indian borrowing company/its associate resident companies for the purpose of securing external commercial borrowings. However, pledge of 'capital instruments' has now been permitted.

Full text of the Notification is available at: https://rbi.org.in/scripts/BS_ViewMasDirections.aspx?id=11200

1.5. AMENDMENT TO THE FDI POLICY, 2017

On January 23, 2018, the DIPP released the 2018 Press Note, incorporating the Cabinet's review dated January 10, 2018, of the extant FDI Policy. The key changes are as follows:

a) **Single-brand retail trading:** 100% FDI under automatic route, is now permitted in this sector. Further, the sourcing norms have been relaxed.

b) **Civil aviation:** Foreign airlines are now permitted to invested up to 49% under approval route in Air India, subject to certain conditions.

c) **Construction development:** It has been clarified that real-estate broking service does not amount to real estate business, and therefore, the same is eligible for 100% FDI under the automatic route.

d) **Power exchanges:** FIIs/FPIs are now permitted to invest in power exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010, through the primary market as well.

e) Issue of shares against non-cash considerations like pre-incorporation expenses, import of machinery etc. is now permitted under automatic route in case of sectors under automatic route.

f) Foreign investment into an Indian company, engaged only in the activity of investing in the capital of other Indian company/ies/ LLP and in the Core Investing Companies, will now be governed by the policy applicable to the sector 'Other Financial Services'.

g) DIPP is now the competent authority for examining FDI proposals under automatic route, from countries of concern.

h) The definition of 'medical devices' under the FDI Policy will be amended.

i) Wherever the foreign investor wishes to specify a particular auditor/audit firm (where such auditor/audit firm has an international network) for the Indian investee company, then the audit of such investee companies should be carried out as a joint audit, wherein one of the auditors should not be part of the same network.

The Press Release is available at: http://dipp.nic.in/sites/default/files/pn1_2018.pdf

2. Securities Law

2.1. CIRCULAR ON PARTICIPATION BY STRATEGIC INVESTORS IN InvITs AND REITs

INTRODUCTION

The SEBI released a circular (the "Circular") on January 18, 2018, outlining the operational modalities for participation by strategic investors in Infrastructure Investment Trusts ("**InvITs**") and Real Estate Investment Trusts ("**REITs**") under the SEBI (Infrastructure Investment Trusts) Regulations, 2014 (the "**InvIT Regulations**") and the SEBI (Real Estate Investment Trusts) Regulations, 2014 ("**REIT Regulations**") respectively.

The InvIT Regulations and REIT Regulations (as amended pursuant to a SEBI notification dated December 15, 2017), both define "strategic investors" on similar lines to include infrastructure finance companies registered with the RBI as Non-Banking Financial Companies ("**NBFCs**"), scheduled commercial banks, international multilateral financial institutions, systemically important NBFCs registered with the RBI and foreign portfolio investors.

Strategic investors were recently allowed to subscribe to debt funds issued by REITs and InvITs. However, they were not allowed to subscribe to public offerings. The Circular has now opened up a new form of investment by allowing strategic investors to subscribe to REITs and InvITs units, up to a maximum of 25 per cent (twenty five per cent) (and a minimum of 5% (five per cent) of the total offer size.

Strategic investors therefore may invest through the additional subscription route, providing further impetus for REITs and InvITs.

Generally, strategic investors are allowed to invest in InvITs and REITs, subject to the terms of Chapter VI of the InvIT Regulations and REIT Regulations respectively.

Mandatory disclosures in offer documents for the issue of InvIT and REIT units requires the disclosure of 'commitments received from strategic investors, if any'. However, no other specific provisions or conditions governing investments by strategic investors, were provided earlier.
The Circular, however, introduces further conditions, which must be adhered to.

EFFECTS OF THE CIRCULAR

The Circular requires InvITs and REITs inviting subscriptions from strategic investors, to mandatorily enter into a binding unit subscription agreement with them. Such subscription agreement and the offer document (draft or final) should mandatorily include details such as the name of each strategic investor, the number of units proposed to be subscribed by it or the investment amount, the proposed subscription price per unit and other details related to the subscription.

In particular, note that the price at which a strategic investor has agreed to buy units should not be less than the issue price determined in the public issue. Further, the entire subscription price must be deposited into a special escrow account, prior to opening of the public issue.

Now, strategic investors may, either jointly or severally, invest up to 25% (twenty-five percent) and a minimum of 5% (five percent) of the total offer size of such InvIT or REIT, as the case may be.

The Circular has also introduced a lock-in for the units subscribed by strategic investors, pursuant to the terms of the unit subscription agreement, which is a period of 180 (one hundred and eighty) days from the date of listing in the public issue.

In the event that the issue price to the public is higher, then strategic investors will be required to top up their subscriptions within two days to match the issue price. However, if the price is lower, then there is no obligation to refund the difference to strategic investors.
The Circular also provides that the subscription by the strategic investor cannot be terminated unless the issue fails to collect the minimum subscription.

Full text of the circular is available at: https://www.sebi.gov.in/legal/circulars/jan-2018/participation-by-strategic-investor-s-in-invits

2.2. **CIRCULAR ON COMPENSATION TO RETAIL INDIVIDUAL INVESTORS IN AN IPO**

SEBI issued a circular dated February 15, 2018 pertaining to compensation to retail individual investors in an IPO.

A uniform policy has been promulgated for calculation of minimum compensation payable, where the applicants in an IPO have failed to get allotment of specified securities and the opportunity loss suffered.
With this change, a uniform policy has now been prescribed for calculation of minimum compensation payable along with the formula for the same. Grievance redressal has also been made time-bound further protecting the interests of retail individual investors.

The full circular is available at: https://www.sebi.gov.in/legal/circulars/feb-2018/compensation-to-retail-individual-investor

3. Company Law

3.1. COMPANIES (FILING OF DOCUMENTS AND FORMS IN EXTENSIBLE BUSINESS REPORTING LANGUAGE) AMENDMENT RULES, 2018

NEW FRAMEWORK

The Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Amendment Rules, 2018 ("**Amendment Rules**") were notified on March 8, 2018 in the Gazette of India.

The Amendment Rules specify that the companies that have filed their financial statements under the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015 ("**2015 Rules**"), and Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011 ("**2011 Rules**"), will be required to continue filing their financial statements and other documents even though they may not fall within those classes of companies in the succeeding years.

PREVIOUS FRAMEWORK

The 2015 Rules mandate that listed companies, companies with a paid-up capital of INR 5 crores or above, companies with a turnover of INR 500 crores and other companies covered under the 2011 Rules are required to file their financial statements and other documents with the Registrar of Companies in e-Form AOC-4 XBRL.

REASONS FOR THE CHANGE

The Amendment Rules provide clarity regarding whether companies that previously fell within the categories of companies mentioned in the 2011 Rules and 2015 Rules would still be required to file the forms in the prescribed format in the succeeding years if they do not continue to fall within the categories of companies that have been prescribed.

Full text of the Amendment Rules is available at http://www.mca.gov.in/Ministry/pdf/CompaniesXBRL0803rule_15032018.pdf.

3.2. AMENDMENT TO THE EXEMPTIONS TO GOVERNMENT COMPANIES

The Central Government vide its notification dated February 23, 2018 has amended the exemptions to Government Companies which were published on June 5, 2015, in relation to entry no. 8, i.e. Chapter IX: Section 129.

Full text of the notification is available at http://www.mca.gov.in/Ministry/pdf/notificationSegment2302_26022018.pdf

3.3. AMENDMENT TO THE COMPANIES (ACCOUNTS) RULES, 2014

The Central Government vide its notification dated February 27, 2018 has through the Companies (Accounts) Amendment Rules, 2018 amended Rule 10 of the Companies (Accounts) Rules, 2014.

Full text of the notification is available at http://www.mca.gov.in/Ministry/pdf/CompaniesAccountsAmmendmentRule_01032018.pdf

3.4. MCA NOTIFIES SUB SECTIONS (3) AND (11) OF SECTION 132 OF THE COMPANIES ACT, 2013

NEW FRAMEWORK

The MCA has, vide notification dated March 21, 2018 notified sub sections (3) and (11) of Section 132 of the Companies Act, 2013 relating to manner of appointment and other terms and conditions of service of chairperson and members as well as secretary and other

employees of the National Financial Reporting Authority.

Simultaneously, the MCA has also notified the National Financial Reporting Authority (Manner of Appointment and other Terms and Conditions of service of chairperson and members Rules, 2018 ("**Rules**") relating to manner of appointment and other terms and conditions of service of chairperson and members.

PREVIOUS FRAMEWORK

Under Section 210 A of the Companies Act, 1956 an advisory committee called 'National Advisory Committee on Accounting Standards ('**NACAS**') had been constituted to advise on the formulation and laying down of accounting standards and auditing policies.

IMPACT

The NACAS will be replaced by the National Financial Reporting Authority.

The notification can be accessed at: http://mca.gov.in/Ministry/pdf/commencementNotification2103_21032018.pdf

4. Intellectual Property Rights

4.1. CROCS INC. USA v. LIBERTY SHOES LTD. & OTHERS

INTRODUCTION

The High Court of Delhi (the "**Court**") recently dismissed applications for interim injunctions filed by Crocs Inc. USA (the "**Plaintiff**"), against various Indian shoe traders, viz., M/s Liberty Shoes Ltd., M/s Relaxo Footwear Ltd., M/s Bioworld Merchandising India Ltd., M/s Bata India Ltd & Ors., M/s Action Shoes Pvt. Ltd. & Ors., M/s Aqualite India Limited & Anr. and M/s Kidz Palace & Ors. (the "**Defendants**"), in different suits of design infringement filed by the Plaintiff against the Defendants in various lower courts in Delhi. All the suits and applications were transferred to and taken up together by the Court and this common judgment was passed thereby.

BACKGROUND

The Plaintiff, a famous footwear brand based out of the USA, had sought for restraint against the Defendants from manufacturing, marketing, supplying, selling etc., of footwear that was a replica of the registered design of clog-type slipper/shoes sold by the Plaintiff. The Plaintiff had registration of the said design from 2004.

The Defendants while contesting the claims alleged that the subject design registration of the Plaintiff was not valid and there was hence no infringement. It was argued by the Defendants that the Plaintiff's registered design when registered in 2004, was not a new or original design as a similar design was already in existence when the Plaintiff sought for the registrations. The Defendants also produced evidence showing prior publication of the design in question by the Plaintiff on its own website. The design was hence alleged to be in public domain, pursuant to which, the Defendants claimed that the registrations of the Plaintiff were liable to be cancelled.

FINDINGS OF THE COURT

At the outset, the Court analysed whether the registered design of the footwear of the Plaintiff were published prior to registration. Based on the evidence by the Defendants, the Court held that there was prior publication of the design prior to the registration being granted in favour of the Plaintiff. There was another party whose footwear's design was prior. It was also noted that the Plaintiff itself had published the design in question prior to its registration. On the question whether the

design which had been registered by the Plaintiff with respect to the footwear were new or original, the Court held that the change in it was not sufficient to distinguish the new product from the existing one and could not hence be considered novel or original.

The Court laid down that the Plaintiff's registered design was invalid and liable to be cancelled. Hence, the Court dismissed interim injunctions filed by the Plaintiff and imposed costs, including costs of two lakhs per Defendants towards the losses incurred by them due to the litigation.

Full text of the judgment is available at https://spicyip.com/wp-content/uploads/2018/02/Crocs-vs.-Bata-Judgment.pdf

4.2. **CHRISTIAN LOUBOUTIN SAS v. MR. PAWAN KUMAR & ORS**

The High Court of Delhi (the "**Court**") recently held that the red-lacquered soles featured on the Christian Louboutin's high-end stiletto footwear were a well-known trademark.

BACKGROUND

The present trademark infringement and passing off suit was initiated by Christian Louboutin SAS (the "**Plaintiff**"), a famous footwear brand based out of France, seeking a declaration from the court that their 'RED SOLE' trademarks are well-known along with seeking permanent injunction against two different firms (the "**Defendants**") selling shoes with red soles in Delhi, damages, rendering of accounts and delivery up of infringing goods. The Plaintiff claimed to be well-known globally for its shoes with its iconic red coloured outsoles, coloured in a specific tone of colour red (pantone no. 18.1663TP). The Plaintiff also claimed that the said sole has over the time become distinctive to them and has been recognized by many Trade Mark offices around the globe.

The Defendants were involved in the business of selling women's shoes and accessories. The Plaintiff, through an extensive market survey learnt of the Defendants' use of the Plaintiff's 'RED SOLE' trademark and hired investigators to ascertain the extent of infringing products sold by the Defendants. In the suit, the Plaintiff submitted sufficient evidence in order to establish well-known status of their RED SOLE trademarks and also showing infringement of their trademarks by the Defendants.

FINDINGS

Upon looking into the evidence submitted by the Plaintiff, the Court held that the Defendants were in fact, infringing on the rights of the Plaintiff. Based on the information about the Defendants' products available in public domain and also obtained with the help of the Plaintiff's investigators, the Court calculated and awarded damages and legal fees to the tune of around INR 8.5 lakhs *in toto* to the Plaintiff, which was distributed between the two Defendants.

However, the challenge before the court was to determine whether the 'RED SOLE' trademark of the Plaintiff is, in fact well-known trademarks. In order to determine the Plaintiff's RED SOLE trademarks as well-known, the Court considered the following:

- The plaintiff was a well-known luxury brand with presence in over 60 countries including India;
- The plaintiff has been using its 'RED SOLE' trademark since 1992;
- The plaintiff's 'RED SOLE' trademarks is known to customers in India;
- The plaintiff was sole licensor of the Christian Louboutin trademarks and has successfully enforced its rights in the said trademarks;
- The plaintiff has extensively promoted its luxury products under its Christian

Louboutin trademarks including the 'RED SOLE' trademark in India;

- The plaintiff has extensive presence over the Internet and the plaintiff's website is accessible to consumers in India; and
- The plaintiff has received various awards and accolades for the luxury products made available under the plaintiff's well-known trademarks including the 'RED SOLE' trademark.

The judgment is available at: http://lobis.nic.in/ddir/dhc/MUG/judgement/12-12-2017/MUG12122017SC7142016.pdf

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