BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. AK/AO/221-226/2014]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995

In respect of

M/s. Kotak Mahindra Capital Company Limited (PAN: AAACK5577D); **M/s. DSP Merrill Lynch Limited** (PAN: AAACD0535G); **M/s. Edelweiss Financial Services Limited** (PAN: AAACE1461E); **M/s. ICICI Securities Limited** (PAN: AAACI0996E); **M/s. IDBI Capital Market Services Limited** (PAN: AAACI1268F); **M/s. SBI Capital Market Services Limited** (PAN: AAACS7914E)

In the matter of

Initial Public Offer of Credit Analysis and Research Limited (CARE)

FACTS OF THE CASE

1. M/s. Kotak Mahindra Capital Company Limited, M/s. DSP Merrill Lynch Limited, M/s Edelweiss Financial Services Limited, M/s. ICICI Securities Limited, M/s. IDBI Capital Market Services Limited and M/s. SBI Capital Markets Limited (hereinafter collectively referred to as Book Running Lead Managers – **'BRLMs / the Noticees'**) had filed Red Herring Prospectus (hereinafter referred to as **'RHP'**) for the Initial Public Offer of Credit Analysis and Research Limited (hereinafter referred to as **'CARE/ Issuer/ Company'**) with Securities and Exchange Board of India (hereinafter referred to as **'SEBI'**) on November 27, 2012 for initial public offer (hereinafter referred to as **'IPO'**) of 71,99,700 equity shares of a face value of Rs. 10/- each of the company through an Offer for Sale (hereinafter referred to as the **'Offer'**).

2. The Offer opened for subscription by anchor investors on December 06, 2012 and closed on the same day. The Offer opened for public subscription on December 07, 2012 and closed on December 11, 2012.

3. It was observed that CARE had received a letter dated September 26, 2012 from the Reserve Bank of India (hereinafter referred to as '**RBI'**), in response to CARE's letter dated August 31,

2012, agreeing to exempt non-resident investors participating in the Offer for Sale, from the requirement of obtaining a No Objection Certificate (hereinafter referred to as **'NoC'**) from their respective regulators in relation to their participation in the Offer, subject to certain conditions. One of the conditions stipulated by RBI while exempting non-resident investors participating in the Offer from obtaining NoCs from the respective regulators was that minimum capitalization norms applicable to Non Banking Financial Companies (NBFCs) are strictly adhered to by CARE. Subsequent to the same, it was observed that CARE had written to RBI vide letter dated October 05, 2012 *inter alia* stating therein that – (a) investment by Foreign Institutional Investors (hereinafter referred to as '**FIIs')** and sub-accounts registered with SEBI and investing in the Offer under the Portfolio Investment Scheme (hereinafter referred to as **'PIS'**) in accordance with Regulation 5(2) and Schedule 2 of Foreign Exchange Management (Transfer of Issue of Security by a Person Resident Outside India) Regulations, 2000, as amended (hereinafter referred to as **'FEMA Regulations'**); (b) Non Resident Indians (hereinafter referred to as **'NRIs'**) investing in the Offer on non-repatriation basis under Regulation 5(3)(ii) and Schedule 4 of FEMA Regulations; and (c) Qualified Foreign Investors (hereinafter referred to as **'QFIs'**) investing in the Offer in accordance with the provisions of the Master Circular on Foreign Investments in India dated July 02, 2012 issued by RBI, will not be a foreign direct investment, and that Regulation 5(1) read with Schedule 1 of the FEMA Regulations and the conditions applicable for foreign direct investments including minimum capitalization norms prescribed in the Consolidated Foreign Direct Investment (hereinafter referred to as '**FDI**') Policy and the Master Circular on Foreign Investments in Non-Banking Financial Companies engaged in non-fund based activities, shall not be applicable to the company in respect of the Offer. It was further observed that the company and BRLMs had proceeded with the issue in the absence of any response from RBI.

4. It was further observed that as regards the aforesaid, limited disclosure was made in the RHP on page 228 and 322 by stating that *"RBI by letter dated September 26, 2012 exempted eligible Non-Residents, in their capacity as transferee entities, from the requirement to obtain a no-objection certificate from their respective regulators in relation to participating in the Offer."* Further Page 116 of the RHP under 'Regulations and Policies' providing general information to the investors, the following statement was incorporated under the sub-para 'Consolidated FDI Policy' - *"In case of non-banking financial companies undertaking non-fund based activities, which include credit rating agencies, USD 0.5 million should be brought*

in upfront by the foreign investor irrespective of the level of foreign investment". It was, thus, observed that the disclosure in the RHP did not mention the conditional nature of the exemption granted by RBI to the non-resident investors while exempting them from obtaining a NoC from their respective regulators in relation to participating in the Offer. It was also observed that even the factual aspect of filing of letter dated October 05, 2012 with RBI subsequent to receipt of RBI's letter dated September 26, 2012, wherein it was brought out that investments by FIIs, NRIs and QFIs participating in the Offer shall not be FDI and the conditions applicable to FDI including minimum capitalization norms shall not be applicable to the Offer, was also not disclosed in the RHP.

5. The issue opened for anchor investors on December 06, 2012 and closed on the same day. On the same day i.e. December 06, 2012, the company received a letter from RBI in reply to company's letter dated October 05, 2012 clarifying that:
   i. FIIs can acquire shares under the proposed offer for sale provided total shareholding of FII in the company shall not exceed 10% at any point of time *and minimum capitalization norms are adhered to;*
   ii. QFIs can acquire shares under the proposed offer for sale provided total shareholding of QFI in the company shall not exceed 5% at any point of time *and minimum capitalization norms are adhered to.*

6. CARE vide its letter dated December 07, 2012 again represented to RBI by *inter alia* reiterating that no foreign direct investment (by any non-resident investors under Regulation 5(1) read with Schedule I of the FEMA Regulations) will be permitted into the company under the Offer and that they have specifically prohibited investments by non-resident investors. It was further submitted therein to RBI that in light of the same, it was the company's understanding that the minimum capitalization norms set forth in clause 6.2.24 of the Consolidated FDI Policy dated April 10, 2012 (Circular I of 2012) and the Master Circular will not be required to be met with respect to investment by Eligible FIIs and Eligible QFIs in the Offer. Vide the aforesaid letter, it was also brought to the notice of RBI that the offer opened for subscription for anchor investors on December 06, 2012 and that the offer would open for subscription for other categories of investors on December 07, 2012 and would close on December 11, 2012.

7. However, it is observed from subsequent letter dated December 10, 2012 from CARE to RBI that further to discussions with RBI in the matter, the company understood that minimum capitalization norms must be satisfied in relation to the Offer. Accordingly, vide the said letter CARE *inter alia* approached RBI seeking nine months time from the date of allotment in the Offer to comply with the minimum capitalisation norms. RBI vide its letter of the same date i.e. December 10, 2012 allowed CARE six months time from the date of the issue of the letter to comply with the minimum capitalisation norms of US$0.5 million applicable to non-fund based NBFCs. Accordingly a corrigendum was issued by CARE on December 11, 2012.

APPOINTMENT OF ADJUDICATING OFFICER

8. The undersigned was appointed as the Adjudicating Officer vide order dated August 13, 2013 under rule 4 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as **'Rules'**) read with Section 15 I of SEBI Act to inquire into and adjudge under Section 15HB of the SEBI Act, the alleged violations of the provisions of SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2009 (hereinafter referred to as **'ICDR Regulations'**) and SEBI (Merchant Bankers) Regulations, 1992 (hereinafter referred to as **'Merchant Bankers Regulations'**).

SHOW CAUSE NOTICE, HEARING AND REPLY

9. Show Cause Notice No. EAD-6/AK/VS/25633/2013, EAD-6/AK/VS/25634/2013, EAD-6/AK/VS/25635/2013, EAD-6/AK/VS/25636/2013, EAD-6/AK/VS/25637/2013 and EAD-6/AK/VS/25638/2013 dated October 07, 2013 (hereinafter referred to as **'SCN'**) were issued to the BRLMs/ the Noticees under rule 4 of the Rules to show cause as to why an inquiry should not be held and penalty be not imposed under Section 15HB of SEBI Act for the alleged violation specified in the said SCN. The said SCNs were delivered and acknowledged by the BRLMs/ Noticees. The BRLMs/ Noticees vide letter dated October 18, 2013 sought additional time of four weeks to submit their response to the SCN, which was acceded to. The BRLMs/ Noticees were informed vide email dated October 22, 2013 to file reply to the SCN latest by November 20, 2013. Vide individual letters dated October 28, 2013/ November 11, 2013, as applicable, the BRLMs/ Noticees submitted copies of vakalatnamas appointing M/s. Amarchand & Mangaldas & Suresh A. Shroff & Co. (hereinafter referred to

as the Authorised Legal Representatives **‘ALR’**) to act, appear and plead on their behalf. Vide letter dated November 11, 2013, the ALR on behalf of the BRLMs/ Noticees *inter alia* sought for the inspection of documents which was relied upon in the SCN to frame the allegations/ findings in the notices issued. Vide email dated November 13, 2013, ALR was advised to specify the documents sought for inspection. Vide letter dated November 15, 2013, ALR *inter alia* submitted the following list of documents that they intended to examine at the inspection:

a) Order of the Whole Time Member of SEBI (herein after referred to as ‘**WTM’**) dated August 13, 2013 appointing the Adjudicating Officer;
b) Communication of appointment of the Adjudicating Officer dated October 4, 2013;
c) Documentary basis for the WTM to be satisfied of (i) prima facie inadequate disclosure of the conditional exemption granted by the letter from the RBI dated September 26, 2012 and consequent violation of the provisions of the ICDR Regulations and Merchant Bankers Regulations; and (ii) sufficiency of grounds to enquire into the affairs and adjudicate upon alleged violations in relation to the Offer;
d) Documentary basis for allegation in paragraph 3 of the SCNs that the BRLMs/ Noticees went by the Company’s understanding in relation to the applicability of minimum capitalization norms, without exercising necessary due diligence and satisfying themselves that full and complete disclosures have been made;
e) Documentary basis for allegation in paragraph 3 of the SCNs stating that the BRLMs/ Noticees failed to ensure inclusion of full and complete disclosure in the RHP so as to enable applicants to take an informed investment decision;
f) Documents on the basis of which SEBI has alleged in paragraph 3 of the SCNs stating that the BRLMs/ Noticees suppressed material facts in the RHP;
g) Documentary basis for allegation in paragraph 3 of the SCNs that the BRLMs/ Noticees attempted to mislead investors into believing that RBI had unconditionally exempted eligible non-resident transferees from the requirement of obtaining NoC from their respective regulators;
h) Documentary basis for the allegation in paragraph 4 of the SCNs that the non-disclosures of material information in the RHP makes the BRLMs/ Noticees jointly and severally liable for failing to exercise proper due-diligence on their part in violation of the provisions of the ICDR Regulations and Merchant Bankers Regulations;

i) All correspondence between SEBI and the RBI and any information and letters received from RBI in relation to the present matter;

j) All correspondence between the BRLMs/ Noticees and SEBI, which may have been relied upon by SEBI;

k) All correspondence between the Company and RBI in relation to the Offer, which may have been relied upon by SEBI;

l) All correspondence between SEBI and the Company in relation to the Offer, which may have been relied upon by SEBI;

m) Any additional information, documents or correspondence which SEBI has relied upon while issuing the SCN.

10. On December 19, 2013 following documents along with the copies were made available for inspection and were inspected by the BRLMs/ Noticees and their ALRs:

a) Original order communicating appointment of the Adjudicating Officer dated October 04, 2013;

b) Original copies of Page no. 228 of RHP of CARE and Page No. 228 and 229 of Prospectus of CARE;

c) Original copy of letter dated December 28, 2012 received from BRLMs *inter-alia* containing copy of RBI letter dated September 26, 2012 at Annexure H, letter dated October 05, 2012 submitted by CARE to RBI at Annexure I and RBI letter dated December 06, 2012 at Annexure L;

d) Original copy of letter dated September 30, 2011 referring to Annexure III;

e) Original copy letter dated December 21, 2012 submitted by BRLMs;

f) With respect to documents requested under Point 1 of Annexure 1 of letter dated November 15, 2013, the same was not provided stating confidential.

11. Vide their individual letters dated December 6, 2013, the BRLMs/ Noticees submitted their intention to apply for settlement through consent mechanism and *inter alia* sought for four weeks time from the receipt of the letter to file the same. Subsequent to the same, vide individual letters dated January 03, 2014, the BRLMs/ Noticees *inter alia* requested for further three weeks time i.e. upto January 24, 2014 to conclude their internal discussions and convey their decision to avail of the consent route for settlement in the matter.

However, it is observed that the BRLMs/ Noticees did not file any application for settlement through consent mechanism.

12. Vide individual hearing notice dated December 30, 2013, the BRLMs/ Noticees were given an opportunity for personal hearing on January 09, 2014. In response vide letter dated January 02, 2014, the ALRs of the BRLMs/ Noticees sought time till January 16, 2014 to file a joint written response to the SCN issued to them and further requested to fix the date of the personal hearing post the submission of written response. The said request was acceded to. Vide email dated January 03, 2014, the BRLMs/ Noticees were given time upto January 16, 2014 to reply to the SCN and an opportunity to appear for personal hearing on January 21, 2014. Subsequently on January 16, 2014, ALRs submitted reply to the SCN on behalf of the BRLMs/ Noticees. The submissions *inter alia* made vide the said letter have been discussed in the later part of this Order.

13. Personal hearing in the matter was held on January 21, 2014 wherein Ms. Ipsita Dutta, Ms. Gazal Rawal, Ms. Garima Joshi from Amarchand & Mangaldas & Suresh A. Shroff & Co., the ALRs of the BRLMs/ Noticees, Shri Ajay Vaidya from Kotak Mahindra Capital Company Limited, Shri Nishith Mehta from DSP Merrill Lynch Limited, Shri B Renganathan from Edelweiss Financial Services Limited, Shri Subir Saha from ICICI Securities Limited, Ms. Monica Nagpal from IDBI Capital Market Services Limited, Shri Bhaskar Chakraborty from SBI Capital Markets Limited, (hereinafter collectively referred to as 'Authorised Representatives' **('ARs')**) appeared on behalf of the BRLMs/ Noticees. The ARs reiterated in detail the submissions made vide letter dated January 16, 2014. During the hearing, ARs submitted following documents:

    a. Copy of Foreign Exchange Management (Transfer of Issue of Security by a person Resident Outside India) Regulations, 2000 (FEMA Regulations);
    b. Copy of the consolidated FDI Policy issued by the Department of Industrial Policy and Promotion dated April 10, 2012;
    c. Copy of Master Circular on Foreign Investment in India;
    d. Copies of following case laws:
        - Imperial Corporate Finance & Service (P.) Ltd. Vs SEBI;
        - Adjudication Order against SBI Capital Markets Limited dated April 17, 2009;
        - Burren Energy India Ltd. & Anr. Vs SEBI;

- TATA Cummins Ltd Vs State of Jharkhand & Others;
- Extracts of redline version of the RHP which was enclosed as part of letter dated November 05, 2012 filed with SEBI in response to final observations issued by SEBI in respect of the offer.

During the hearing ARs were *inter alia* advised to submit past non-compliance, if any, of SEBI Act and Regulations made thereunder, by any of the BRLMs/ Noticees, and, action taken by SEBI in the past, if any, against any of the BRLMs/ Noticees during the last five years. ALRs undertook to submit further submissions by January 31, 2014.

14. Vide letter dated January 31, 2014, ALRs submitted a summary of the submissions made during the hearing. The summary of submissions *inter alia* made vide the said letter has been discussed in the later part of this Order.

15. Thereafter, vide supplementary SCN No. EAD-6/AK/VS/8924/2013, EAD-6/AK/VS/8927/2014, EAD-6/AK/VS/8934/2014, EAD-6/AK/VS/8939/2014, EAD-6/AK/VS/8944/2014 and EAD-6/AK/VS/8967/2014 dated March 24, 2014, the BRLMs/ Noticees were clarified that the BRLMs/ Noticees have violated Regulation 13 of Merchant Bankers Regulations read with the following clauses of Code of Conduct for Merchant Bankers as specified in Schedule III:
    a. **Clause 1** - A merchant banker shall make all efforts to protect the interests of investors;
    b. **Clause 4** - A merchant banker shall at all times exercise due diligence, ensure proper care and exercise independent professional judgment;
    c. **Clause 6** - A merchant banker shall ensure that adequate disclosures are made to the investors in a timely manner in accordance with the applicable regulations and guidelines so as to enable them to make a balanced and informed decision;
    d. **Clause 7** - A merchant banker shall endeavour to ensure that the investors are provided with true and adequate information without making any misleading or exaggerated claims or any misrepresentation and are made aware of the attendant risks before taking any investment decision;
    e. **Clause 20** - A merchant banker shall not make untrue statement or suppress any material fact in any documents, reports or information furnished to the Board.

Noticees were also advised to inform the present status of compliance of RBI's letter dated December 10, 2012 regarding compliance with minimum capitalization norms of US$0.5 million applicable to non-fund based NBFCs by the company/ CARE. The BRLMs/ Noticees were advised to offer comments on the aforesaid within 15 days from the receipt of the Notice.

16. Vide email dated April 07, 2014, ALRs sought grant of additional time of two weeks i.e upto April 21, 2014 to submit the response. By return email on the same date i.e. April 07, 2014, it was communicated to the ALRs that the request for additional time to submit the response has been acceded to. Vide letter dated April 21, 2014, the ALRs submitted specific responses to the points mentioned in the supplementary SCN dated March 24, 2014 which is discussed in the later part of this Order.

17. The said reply dated April 21, 2014 *inter alia* indicated that RBI had extended the date of compliance with the minimum capitalization requirement by the company/ CARE from June 09, 2013 to September 30, 2013. The said reply further also informed that the corporate announcements made by the company/ CARE through the websites of the NSE and BSE on September 27, 2013, indicate that the Board of Directors in the meeting held on September 27, 2013 had given the consent for the issue and allotment of 4,46,310 equity shares of Rs. 10/- each to Ascent India Fund III managed by Ascent Capital Advisors India Private Limited at a price of Rs. 560.15 per equity share aggregating to an issue size of Rs. 25,00,00,547 to comply with the minimum capitalisation norms.

18. In the interest of natural justice, the BRLMs/ Noticees were given another opportunity for personal hearing on April 30, 2014 vide hearing notice dated April 22, 2014. Vide email dated April 28, 2014, the ALRs requested for a short extension to May 07 or May 08, 2014 or a suitable date thereafter. Vide return email of the same date i.e. April 28, 2014, it was *inter alia* communicated to the ALRs that their request for short extension has been acceded to and that the fresh date and time will be intimated subsequently.

19. Under the powers conferred upon the Adjudicating Officer under Sub-section 2 of Section 15-I of SEBI Act, information was sought from RBI with respect to the ongoing adjudication proceedings against the BRLMs/ Noticees vide letter dated April 30, 2014, to which RBI

replied vide letter dated May 21, 2014. The aforesaid letter dated April 30, 2014 to RBI and RBI's response dated May 21, 2014 were provided to the BRLMs/ Noticees for seeking their comments vide letter dated May 27, 2014. The BRLMs/ Noticees were advised to give their comments, if any, by June 11, 2014. Vide letter dated June 10, 2014, the ALRs acknowledged the receipt of the letter dated May 27, 2014 and sought additional time of four weeks i.e. upto July 09, 2014 to submit the joint response on behalf of the BRLMs/ Noticees. Vide email dated June 11, 2014, it was communicated to the ALRs that extension of time upto June 30, 2014 to file the response has been granted.

20. Vide letter dated June 18, 2014, ALRs *inter alia* raised queries in consideration of the principles of natural justice in the matter and sought for the inspection of the communication between Adjudicating Officer and RBI and clarification on the specific inferences, if any, drawn by the Adjudicating Officer in relation to the purported RBI communication and the extent and the manner in which it would alter the conclusions and allegations set out in the Notices. In the said letter, ALRs *inter alia* also referred to the inspection held on December 19, 2013 and stated that the RBI communication was neither a part of the Notice nor was it provided to the Noticees during the said inspection.

21. Vide letter dated June 19, 2014, it was clarified to the ALRs that the said RBI's response to letter dated May 21, 2014 came into existence after the inspection conducted by them on December 19, 2013, as such, same could not form part of documents/ information/ evidence relied upon by SEBI during inspection on December 19, 2013. On June 23, 2014, in the interest of natural justice, ALRs were given opportunity to inspect: (i) copy of letter dated April 30, 2014 issued by the Adjudicating officer to RBI along with annexures A, B and C thereto, with the name of the addressee and concerned department of RBI to which it was marked redacted; and (ii) RBI's letter dated May 21, 2014 in original with the name and designation of the RBI Officer who had responded and reference number of the letter redacted. Thereafter vide email dated June 26, 2014, ALRs sought additional time of two weeks from June 30, 2014 to submit their response. Vide letter Ref: EAD-6/AK/VS/18481/2014 dated June 27, 2014, it was *inter alia* further clarified to the ALRs that the precedents submitted by them in their reply in respect of M/s. National Building Corporation Limited and M/s. DLF Limited cannot support the BRLMs/ Noticee's claim that they proceeded with abundant caution and concluded on the non-applicability of the minimum capitalization norms in a reasoned manner, considering the past precedents

where a similar precedent was made, to conclude the non-applicability of minimum capitalization norms to investment made by FIIs in the IPO of CARE. Further, the Noticees vide the said letter were given time till July 11, 2014 for making further submission, if any. Vide letter dated July 03, 2014, the ALRs recorded the inspection undertaken on June 23, 2014 by the ALRs on behalf of the Noticees. Vide letter dated July 11, 2014, ALRs on behalf of the BRLMs/ Noticees submitted their reply to letter dated May 27, 2014 which is discussed in the later part of this Order.

22. It was observed from a perusal of the reply dated July 11, 2014 filed by the ALRs on behalf of the BRLMs/ Noticees that the ALRs while replying had *inter alia* categorised RBI's reply dated May 21, 2014 into View 1, 2 and 3 as follows:

    (a) ***View 1*****:** acquisition of shares by FIIs under PIS in case of an offer for sale will be treated as FDI and minimum capitalisation norms will apply to such investment since acquisition is not made in terms of RBI Circular A. P. (DIR Series) Circular No. 53 dated December 17, 2003 at the ruling market price and the entire process does not take place on the normal window of the stock exchange where secondary market transactions take place;

    (b) ***View 2****:* the Past Precedents are in the nature of letters which are issued on a case to case basis and cannot be made applicable uniformly. Only those communications issued by way of A. P. (DIR Series) Circulars or Notifications or Press Releases under the provisions of the Foreign Exchange Management Act, 1999 (hereinafter referred to as '**FEMA**') which are in the public domain can be made applicable across the board; and

    (c) ***View 3:*** that pursuant to communication between the Company and the RBI with respect to compliance with minimum capitalisation norms, RBI by its letter dated April 21, 2014 to the Company has advised that certain reporting be modified to comply with the relevant guidelines to enable the investment to qualify as FDI.

23. Vide hearing Notice dated July 21, 2014, pursuant to receipt of reply dated July 11, 2014, another opportunity of personal hearing on August 5, 2014 was granted to the BRLMs/ Noticees. Ms. Ipsita Dutta, Ms. Gazal Rawal, Ms. Garima Joshi from Amarchand & Mangaldas & Suresh A. Shroff & Co., the ALRs on behalf of the BRLMs/ Noticees, Shri Ajay Vaidya and Shri Vishal Bandekar from Kotak Mahindra Capital Company Limited, Shri Abhi Abhimanyu

from DSP Merrill Lynch Limited, Shri B Renganathan from Edelweiss Financial Services Limited, Shri Subir Saha from ICICI Securities Limited, Shri Subodh Mallya from IDBI Capital Market Services Limited, Shri Bhaskar Chakraborty from SBI Capital Markets Limited, Authorised Representatives (ARs) appeared on behalf of the BRLMs/ Noticees.

24. During the hearing, the following was clarified based on the categorization of RBI's response dated May 21, 2014 into view 1, 2 and 3, as above, made by the ALRs:

    (a) **View 1:** It was clarified that prima facie it is part of the allegations in the Show Cause Notice dated October 07, 2013;

    (b) **View 2:** It was clarified that the precedents referred by the BLRMs cannot support their claim that they proceeded with abundant caution and concluded on the non-applicability of the minimum capitalization norms in a reasoned manner, by considering the past precedents where a similar distinction was made, to conclude the non applicability of the minimum capitalization norms to investments made by FIIs in the IPO of CARE;

    (c) **View 3:** It was noted that RBI vide letter dated July 09, 2014 had advised CARE that CARE's Offer for Sale was in compliance with the minimum capitalization norms as applicable to non-fund based NBFCs.

25. Further, during the hearing ARs reiterated in detail the submissions made vide letter dated July 11, 2014 read with submissions made on April 21, 2014 and January 16, 2014 and further submitted copies of the following Press Releases issued by RBI - dated February 05, 2010 in the matter of M/s. Sobha Developers Limited, dated December 20, 2011 in the matter of M/s eClerx Services Limited and M/s Polaris Financial Technology Limited, dated May 24, 2012 in the matter of M/s. Housing Development Finance Corporation Limited., dated September 26, 2012 in the matter of M/s. Voltamp Transformers Limited, dated March 19, 2013 in the matter of M/s. Indiabulls Housing Finance Limited, dated March 07, 2014 in the matter of M/s. Manappuram Finance Limited and dated July 03, 2014 in the matter of M/s. Bharti Airtel Limited.

26. Further, certain queries raised at the hearing by the Adjudicating Officer and the summarised response of the ARs to the said queries have been brought out below:

(a) **Query:** It was pointed out that from the documents available on record, there did not appear any documental proof provided to RBI indicating the date of opening of the Offer. The ARs were advised to provide documentary evidence available, if any, intimating RBI about the date of opening of the Offer.

Response of the ARs:

- *As the BRLMs had already restricted the issue only to non-resident investing through the PIS route as set out under FEMA Regulations, they were of the bonafide belief that the minimum capitalization norms were inapplicable to the current issuer and there was no further requirement to engage with the RBI or seek any approvals. It is also not market practice to write to the RBI or any other regulator (other than SEBI) notifying them of the date of the issue opening. In any event, information about the issue opening date was already available/ announced in the public domain.*

(b) **Query:** It was pointed out that letter dated December 21, 2012 claimed that with the submission of letter dated October 05, 2012, the matter with the regulator was closed in view of the claimed recognized legal position. However, from CARE's letter dated December 10, 2012 to RBI, it was observed that after the opening of the Offer, discussions were held with RBI after which it was understood that minimum capitalization norms must be satisfied in relation to the Offer and accordingly an addendum was issued on December 11, 2012. Clarification was sought as to why such measures such as formal discussions to understand RBI's interpretation on the applicability of minimum capitalization norms to the Offer, or, a letter seeking specific clarification from RBI could not be adopted before the opening of the offer, especially in view of the fact that RBI had vide letter dated September 26, 2012 communicated that minimum capitalization norms applicable to NBFCs should be strictly adhered to.

Response of the ARs:

- *The ALRs reiterated the submissions made by them at para 72 of the January 16, 2014 submission. The ARs also reiterated the fact that a strict adherence to the minimum* *capitalization norms would arise only if the issue was open to FDI investors under Schedule 1 of FEMA 20.*

- *The ARs further submitted that since FEMA Regulations and AP DIR Series Circulars/ Master Circulars issued by RBI from time to time were clear (as regards non-applicability of the conditions applicable to FDI including minimum capitalization norms) to the offer made to Eligible FIIs under Schedule 2 of FEMA Regulations, Eligible NRIs under Schedule 4 of FEMA Regulations and Eligible QFIs under the Schedule 8 of the FEMA Regulations, the October 05, 2012 letter was filed as a matter of record and good order only to clarify the aforesaid non-applicability, instead of seeking any approvals from RBI. Hence, no follow-up was required with RBI subsequent to letter dated October 05, 2012. In this regard, the ARs reiterated the detailed submissions made on the applicable regulatory framework as set out under para 20-28 of January 16, 2014 submissions, para 30-40 of the submission dated January 31, 2014, reply dated July 11, 2014 and Annexure 14 enclosing legal opinion from Former Chief Justice of the High Courts of Kerala and Karnataka and a Former Presiding Officer of the Securities Appellate Tribunal., Shri N.K.Sodhi.*

- *It was further submitted that the RBI letter dated September 26, 2012 did not make any specific mention to FIIs, NRIs or QFIs. The specific applicability of minimum capitalization norms to FIIs and QFI was mentioned for the first time in RBI letter dated December 06, 2012. Discussions were held with RBI only subsequent to receipt of this letter, which necessitated such discussions. A detailed letter dated December 07, 2012 was also filed with RBI clarifying that minimum capitalization norms were not applicable. The understanding of the BRLMs that the minimum capitalization issue was closed with the RBI after filing of letter dated October 5, 2012 was further corroborated by the fact that post filing of this letter, the company received a RBI letter dated October 18, 2012 granting an NOC for sale of share by the selling shareholders, who were banks. Company also received letter dated October 25, 2012 from RBI stating that selling shareholders who were NBFCs were not required to obtain NOC.*

(c) **Query:** Clarification was sought in the matter as to if RBI's view vide letter dated December 06, 2012 was found to be not in consonance with FEMA Regulations and AP

DIR Series Circulars/ Master Circulars issued by RBI from time to time, in which case, why the matter was not taken up with RBI for review or before the appropriate forum, after issuing of the addendum on December 11, 2012, especially when adjudication proceedings were initiated by SEBI on the issue.

***Response of the ARs**:*

- *The ARs submitted that upon receipt of the RBI's letter dated December 06, 2012, the company in consultation with the BRLMs/ Noticees filed a detailed letter on December 07, 2012, explaining why the minimum capitalization norms as applicable to FDI investors investing under schedule 1 of FEMA 20 was inapplicable in the present case. However, given that the RBI did not change its stand and the issue had already opened, having regard to the offer and interest of the investors, the company in consultation with the BRLMs/ Noticees agreed to comply with the RBI's instructions. Further, as a matter of practice, it is customary for the issuer to engage with the RBI (as was also done in other offers including NBCCL/ DLF etc) and the merchant bankers appointed as the BRLMs does not lead the discussions with the regulators in matters of government/ regulatory approvals. The underlying approach is also linked to the fact that under law, the obligation to apply and seek government approval is on the issuer and not the Merchant Bankers.*

- *It was further submitted that In the present case, since the RBI had already taken a stand regarding applicability of minimum capitalization norms to the offer after the opening of the issue, the BRLMs/ Noticees felt it was appropriate to immediately issue the addendum which was issued by way of a public advertisement prior to the closure of the Offer to keep the investors informed and the prospectus was duly updated with all the relevant RBI related correspondence.*

- *Further, ARs submitted that in terms of the extant framework within which RBI operates, there is no recognized mechanism that is currently available to appeal from a direction given by the RBI (such as one rendered in the present case) or seek a review. Also, by the time the AO proceedings were initiated, almost a year after the closure of the offer, the company had already received the FDI investment for complying with* *minimum capitalization norms in terms of RBI mandate. As such, there was no basis to engage with the RBI as to the applicability of these norms to the issuer company.*

27. The ARs further sought an additional week's time to file a detailed record of the hearing and detailed responses to the aforesaid queries and stated that the same should be read in conjunction with the earlier submissions and these summary responses. This additional time to file the record of hearing and written responses to the queries was granted. Vide letter dated August 14, 2014, ALRs submitted the record of the second hearing which is discussed in the later part of the Order. Details of the anchor investors who applied in the Offer and were allocated shares and the price at which the shares were allocated, as also details of FIIs and QFIs who applied in the Offer and were allocated shares, together with the details of the daily subscription received from all categories of investors were *inter alia* sought vide email dated September 12, 2014. Further, the details of allocation made category-wise vis-a-vis the subscription received was sought vide email dated September 30, 2014. The said details were received from the ALRs on behalf of the BRLMs/ Noticees vide their letters dated September 24, 2014, October 07, 2014 and October 13, 2014.

28. It was further noted that it was submitted by the ALRs that based on the review of applicable regulatory framework at the time and the legal advice sought, the BRLMs/ Noticees firmly and independently believed that if the Offer was limited to eligible FIIs (investing under Schedule 2 of the FEMA Regulations), eligible NRIs (applying on a non-repatriation basis in accordance with Schedule 4 of the FEMA Regulations) and eligible QFIs, the condition in respect of the minimum capitalisation norms would not apply to the Company. However, no such legal advice received by the BRLMs/ Noticees had been submitted before the Adjudicating Officer. Hence, vide email dated September 30, 2014, the BRLMs/ Noticees were requested to produce such legal advice received, if any, by October 01, 2014.

29. In response vide letter dated October 01, 2014, the ALRs on behalf of the BRLMs/ Noticees have *inter alia* submitted that the BRLMs/ Noticees engaged in discussions with the legal advisors on the Offer i.e. Luthra & Luthra Law Offices (domestic legal counsel to the Noticees) and Amarchand & Mangaldas & Suresh A. Shroff & Co. (domestic legal counsel to the company). It was further stated that the view provided by the legal counsels was in line

with the collective understanding formed by the BRLMs/ Noticees on the matter. To support the fact that the discussions in relation to the applicability of the minimum capitalization norm did take place before the filing of letter dated October 05, 2012 with RBI, the BRLMs/ Noticees requested the legal Counsels to provide a confirmation in this regard from their end. Accordingly, Luthra & Luthra Law Offices vide their letter dated October 01, 2014 addressed to the BRLMs/ Noticees *inter alia* confirmed that post receipt of letter dated September 26, 2012 from RBI, they were involved in various discussions with the company, the BRLMs as well as the Indian Legal Counsel to the company on the applicability of the provisions of and various investment routes under the FEMA Regulations, Master Circular on Foreign Investments in India dated July 02, 2012 issued by RBI and the Consolidated FDI Policy dated April 10, 2012 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India. It was *inter alia* further added therein that the company had filed letter dated October 05, 2012 with RBI, in line with these discussions, and that relevant changes were also made to the Offer document. Similar letter dated October 01, 2014 was also issued by Amarchand & Mangaldas & Suresh A. Shroff & Co. to the BRLMs/ Noticees in the matter. These letters, in turn, were forwarded by the ALRs along with their aforesaid reply dated October 01, 2014.

CONSIDERATION OF ISSUES AND FINDINGS

30. I have carefully perused the written submissions wherever submitted by the Noticees, the facts put forth during the hearings and the documents available on record. The allegation against the BRLMs/ Noticees is that the non-disclosure of the material information in the RHP makes BRLMs jointly and severely liable for failing to exercise proper due-diligence on their part, which is in violation of Clause 1 of Form C of Schedule VI of Regulation 8(2)(b) of ICDR Regulations, Regulation 57(1), Regulation 57(2)(a)(ii), Regulation 64(1) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations which read as follows:

Regulation 8(2)(b), 57 (1), 57 (2) (a) (ii) and 64 (1) of the ICDR Regulations

Documents to be submitted before opening of the issue

8 (2) *The lead merchant banker shall submit the following documents to the Board after issuance of observations by the Board or after expiry of the period stipulated in sub-regulation (2) of regulation 6 if the Board has not issued observation:*

(b) *a due diligence certificate as per Form C of Schedule VI, at the time of registering the prospectus with the Registrar of the Companies.*

Manner of disclosures in the offer document

57 (1) *The offer document shall contain all material disclosures which are true and adequate so as to enable the applicants to take an informed investment decision.*

(2) *Without prejudice to the generality of sub-regulation (1):*

(a) *the red-herring prospectus, shelf prospectus and prospectus shall contain:*

(ii) *the disclosures specified in Part A of Schedule VIII, subject to the provisions of Parts B and C thereof.*

Due diligence.

64 (1) *the lead merchant bankers shall exercise due diligence and satisfy himself about all the aspects of the issue including the veracity and adequacy of disclosure in the offer documents.*

Regulation 13 of the Merchant Bankers Regulations

Code of conduct.

13 *Every merchant banker shall abide by the Code of Conduct as specified in Schedule III.*

Read with the following clauses:

Clause 1 *- A merchant banker shall make all efforts to protect the interests of investors.*

Clause 4 *- A merchant banker shall at all times exercise due diligence, ensure proper care and exercise independent professional judgment.*

Clause 6 *- A merchant banker shall ensure that adequate disclosures are made to the investors in a timely manner in accordance with the applicable regulations and guidelines so as to enable them to make a balanced and informed decision.*

Clause 7 *- A merchant banker shall endeavour to ensure that the investors are provided with true and adequate information without making any misleading or exaggerated claims or any misrepresentation and are made aware of the attendant risks before taking any investment decision.*

Clause 20 *- A merchant banker shall not make untrue statement or suppress any material fact in any documents, reports or information furnished to the Board.*

31. The ALRs on behalf of the BRLMS/ Noticees have *inter alia* submitted as follows:
    - *That post deliberations among the BRLMs/ Noticees themselves as well as with the Company and based on careful consideration of the applicable regulatory framework, the BRLMs/ Noticees were of the view that the approach being taken in the Offer was correct and reasonable and did not anticipate any further regulatory concern in respect of the Offer;*
    - *That from the plain reading of the FEMA Regulations, it was clear that in case of non-banking financial companies, the minimum capitalisation norms apply with respect to investment by way of FDI Route only;*
    - *That PIS Route set out under Regulation 5(2) read with Schedule 2 of the FEMA Regulations, permits FIIs to subscribe to shares of an Indian company in 'public offers'. Since 'public offers' include offer for sale by existing shareholders of a company, FII participation in such public offers is under the PIS Route;*
    - *That in terms of Schedule 2 of the FEMA Regulations as introduced on May 3, 2000, under paragraphs 1(2) and 1(5), FIIs were permitted to purchase shares through registered stock brokers and also through private placement. However, paragraph 1(5) which provides for private placements was substituted via an amendment dated June 18, 2003 ("June Amendment"), with the current paragraph 1(5) bringing public offers within the scope of Schedule 2;*
    - *That subsequently, in a circular dated December 3, 2003 (A.P. (DIR Series) Circular No.38) ("Circular No. 38"), RBI elaborated on the June Amendment stating inter alia that a FII may invest in a particular issue of an Indian company either under Schedule 1 or Schedule 2. It cannot, however, avail of both the routes simultaneously for a particular issue;*
    - *That subsequently, in terms of Circular No. 53, RBI permitted, "SEBI registered FIIs/ sub-accounts of FIIs to buy/sell equity shares/debentures of Indian companies...through stock exchanges in India at the ruling market price,... and also to buy/sell shares and debentures etc. of listed/unlisted companies otherwise than on stock exchange at a price approved by SEBI/ Reserve Bank as per terms and conditions prescribed in the Annexure." (emphasis supplied). In relation to pricing, the Annexure to Circular No. 53*

stated that in the case of public offer, the price of shares to be issued should not be less than the price at which shares are issued to residents;

- *That at View 1 of the RBI Communication, while citing Circular No. 53, it has been mentioned that where an acquisition of shares is not made at the ruling market price on the floor of the stock exchange, it will not be treated as investment under the PIS Route;*
- *That the RBI Communication selectively mentions only the part in the Circular No. 53 which grants general permission to FIIs for undertaking trades on the floor of the stock exchange, and neither mentions, nor explains the wording in relation to buying/ selling shares other than on a stock exchange, i.e., "and also to buy/sell shares and debentures etc. of listed/unlisted companies otherwise than on stock exchange at a price approved by SEBI/ Reserve Bank as per terms and conditions prescribed in the Annexure";*
- *That, a plain reading of Circular No. 53 makes is abundantly clear that the extant regulatory framework also contemplates acquisitions otherwise than on stock exchange at a price approved by SEBI/ RBI as per the terms and conditions prescribed therein;*
- *Further, that at View 1 of RBI Communication, it is clearly mentioned that "such acquisition is treated as investment under the FDI policy and all the FDI conditionalities, including minimum capitalization norms, are made applicable for the same." A plain reading of the same suggests that minimum capitalization norms are applicable only to FDI transactions. Given that investments under the FDI Route were not permitted to be made in the Offer, there was no reason for the FDI conditions, including that in relation to minimum capitalisation norms, to apply;*
- *That specifically, conditions with respect to minimum capitalisation do not find any mention in Regulation 5(2) and Schedule 2 of the FEMA Regulations which sets out limits and conditions applicable to investments by FIIs under the PIS Route. Schedule 4 of the FEMA Regulations dealing with investments by NRIs on a non-repatriation basis does not impose any minimum capitalisation requirements. In terms of Schedule 8 of the FEMA Regulations, QFIs have also been accorded a general permission to invest in public offers without any stipulation of ensuring compliance with minimum capitalisation norms applicable to FDI;*
- *Further, that from the plain reading of the schematic representation as set out under the Master Circular read with the FEMA Regulations, it is clear that FIIs, NRIs and QFIs fall under the PIS Route;*

- *That any interpretation of Circular No. 53 cannot override the provisions of the FEMA Regulations which make it abundantly clear that participation in public offers is permitted for FIIs under the PIS Route. Thus, the applicability of FDI conditionalities to FIIs investing under the PIS Route in the Offer (as set out in the RBI Communication) is not, explicitly or implicitly, supported by any legislation, regulation, notification, circular or press release in the public domain. A plain reading of the applicable laws, including the FEMA Regulations as well as Circular No. 53, does not warrant such an interpretation either;*
- *That the Noticees have since also obtained an independent legal opinion from Former Chief Justice of the High Courts of Kerala and Karnataka and a Former Presiding Officer of the Securities Appellate Tribunal Mr. N.K. Sodhi (hereinafter referred to as* ***'Legal Opinion'****);*
- *That the Noticees firmly believe that the disclosure in respect of the RBI letter dated September 26, 2012, in the section 'Government and Other Approvals' of the RHP was complete and adequate as the disclosure was made in light of the BRLMs/ Noticees understanding that minimum capitalisation norms were not applicable to the Company in the present case;*
- *That as the key approval in this regard was the grant of exemption by the RBI to obtain requisite NoC (since the Company's letters dated May 15, 2012 and August 31, 2012 specifically sought that approval) it was spelt out in the 'Government and Other Approvals' section of the RHP in a manner that is consistent with past practices for disclosures made under this section. The September Letter was accordingly also made available for public inspection to all investors participating in the Offer who had the opportunity to review any conditionalities imposed by the RBI;*
- *That the BRLMs/ Noticees based on the review of applicable regulatory framework at the time and legal advice sought, firmly and independently believed that if the Offer is limited to FIIs (investing under Schedule 2 of the FEMA Regulations), NRIs (applying on a non-repatriation basis in accordance with Schedule 4 of the FEMA Regulations) and QFIs (Schedule 8 of the FEMA Regulations), the condition in respect of the minimum capitalisation norms would not apply to the Company. Accordingly, the Noticees believed with good reason that conditions with respect to minimum capitalization norms were not relevant to be disclosed in the RHP as these were not applicable and disclosure with respect to exemption to eligible non-resident investors having to obtain a NoC as set out*

in the letter dated September 26, 2012 of RBI was a sufficient and relevant disclosure for investors to take an informed investment decision;

- *Further that, in relation to the Company's letter to the RBI dated October 5, 2012, the BRLMs/ Noticees had no reasons to believe that the October 05, 2012 letter was indeed relevant to be disclosed in the RHP as it was neither in the nature of an application for an approval, nor, was it in the nature of an approval itself;*
- *That the October 05, 2012 letter was written to the RBI only as an acknowledgement of the September 26, 2012 letter since the Noticees had reasonable basis to conclude that if no FDI was being permitted in the Offer, the question of compliance with minimum capitalisation norms did not arise. Hence, the Company filed the letter dated October 05, 2012 only as a matter of good practice, without seeking any further clarifications or approvals from the RBI and in view of the steps that were undertaken to ensure that the Draft Red Herring Prospectus (hereinafter referred to as* ***'DRHP'****) was updated to limit the categories of foreign investors participating in the Offer, the BRLMs/ Noticees firmly believed that all issues with respect to the non-applicability of the minimum capitalisation norms to the Company, in the present case were adequately addressed and closed with the RBI;*
- *That the Noticees had no reason to believe that disclosure of the conditions set out in the letter dated September 26, 2012 was inadequate/ misleading or that the inclusion of the letter dated October 05, 2012 in the RHP prior to the issue opening would have assisted the investors who were participating in the Offer in any manner;*
- *That the Noticees had satisfied themselves about all the aspects of the Offer including the veracity and adequacy of the disclosures and are not in violation of any provisions of the ICDR Regulations, as alleged;*
- *That in addition to all of the above, upon receipt of the RBI's letter on December 10, 2012 to comply with minimum capitalisation norms post the Offer, the Noticees promptly prepared an addendum and submitted the same with SEBI on December 10, 2012 itself. This Addendum was published in the newspapers with wide circulation on December 11, 2012 prior to closure of the Offer in the interest of the investors, and, updated and supplemented the RHP with details of all relevant correspondence with the RBI to explain the entire discussion that took place in relation to compliance with minimum capitalisation norms. Further, the prospectus filed with the Registrar of*

Companies on December 15, 2012 was also duly updated with the details in the Addendum;

- *That the filing of the Addendum was not an aberration or an anomaly as the ICDR Regulations themselves contemplate and allow for the publication of advertisements in the event there are material developments post filing of the RHP that are required to be disseminated to the investors. It is also noteworthy that the formats of due-diligence certificates provided under Form D and E of Schedule VI of ICDR Regulations require submission of subsequent advertisements relating to amendments, if any made to RHP. As such, SEBI also recognizes that there may be instances which may require changes to be included to a RHP post filing the RHP with the Registrar of Companies (hereinafter referred to as* ***'ROC'****) by way of issuance of advertisements. As the Addendum constitutes an integral part of the RHP, the Noticees ensured that true, complete and adequate disclosures were provided to the investors to enable them to take an informed investment decision before the closure of the Offer;*
- *That whilst the BRLMs/ Noticees had exercised care and diligence while arriving at their conclusions in relation to the non-applicability of minimum capitalisation norms to the present matter, the conditions were accepted by the Company in the interest of the offer process and the investors;*
- *That the Noticees proceeded on a reasonable and well-deliberated understanding that given the nature of the Offer and the changes made to restrict FDI, the requirement to ensure compliance with minimum capitalisation norms was inapplicable. The manner in which the Noticees' arrived at their conclusions is demonstrative of their bona fides while carrying out their functions as merchant bankers;*
- *That further in the present case (i) no loss was caused to the investors; (ii) no investor grievances were received by the Noticees in relation to the Addendum pursuant to publication of the same; (iii) the Offer was in fact over-subscribed over 30 times; and (iv) the price discovered in the book building issue did not move adversely in subsequent trading in the scrip upon listing. No such allegations have been made in the Notices either.*
- *That the term "due diligence" has not been defined in the Merchant Bankers Regulations or the ICDR Regulations. However, it is abundantly clear that the law does not impose an obligation to meet with, extraordinary or "detective" standards. When a person is required to exercise due diligence the only requirement is that usual ordinary and*

reasonable efforts be exercised having regard to the facts and circumstances of the case. In the case of Imperial Corporate Finance[1]*, the Securities Appellate Tribunal ("SAT") has held that, "A Lead Manager is required to employ reasonable skill and care but he is not required to begin with suspicion and to proceed in a manner of trying to detect a fraud or lie unless such information excites his suspicion or ought to excite his suspicion as a professional man of reasonable competence."*[2]

- *That in the present situation as well, the BRLMs/ Noticees had applied their independent professional judgement at all times and exercised reasonable skill and care in determining whether minimum capitalisation norms were applicable in relation to the Offer. Once an assessment of the relevant factors was made by the BRLMs based on their independent evaluation and advice from legal counsel, the necessary disclosures were included in the offer documents in compliance with Regulation 64(1) of the ICDR Regulations;*
- *That as there was no violation of any of the substantive provisions of law, as applicable, no violation of the Code of Conduct set out in terms of Regulation 13 of the Merchant Bankers Regulations can be established. In the SEBI order dated April 17, 2009 issued in the adjudication proceedings against SBI Capital Markets Limited (in the public issue of Syndicate Bank Ltd.) it has been stated that "the violation of the substantive law is not established, the allegations of violation of the provisions of the Code of Conduct prescribed under the Merchant Bankers Regulations is not sustainable.";*
- *That while arriving at their conclusion in relation to non-applicability of the minimum capitalisation norms, the BRLMs/ Noticees relied on the plain reading of the applicable legal framework, further corroborated by the collective experience of the Noticees as well as, specifically, the Past Precedents, and the legal advice received from the legal counsel;*
- *To substantiate the above submission, the Noticees provided SEBI with the Past Precedents (M/s. National Building Corporation Limited and M/s. DLF Ltd.), where approvals were granted by RBI/* Department of Industrial Policy and Promotion (*DIPP), wherein the regulator/ relevant authority distinguished between investments made under Schedule 1 and those made under Schedule 2 of the FEMA Regulations. That the Noticees considered the applicable legal framework as well as the past regulatory stance*

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[1] *Imperial Corporate Finance and Services Pvt Ltd v SEBI*, SAT Order dated July 7, 2004
[2] Id; see also, *Samir C. Arora v SEBI*, SAT Order dated October 15, 2004

is indeed demonstrative of the fact that the Noticees proceeded with abundant caution in the present matter;

- *That any letters from regulatory authorities are indicative of the manner in which the authorities read and interpret the applicable law. The Past Precedents were not considered by the Noticees in isolation, but with regard to their relevance to the Offer. In terms of the Past Precedents, RBI had clarified that the FDI linked conditions for investment in construction and development sector like capitalisation norms would not be applicable to FII as FII investment in public offers is covered under Schedule 2 of the FEMA Regulations under the PIS Route. The BRLMs/ Noticees considered examples in the construction and development sector since it also has minimum capitalisation conditionalities under the FDI Route, as in the case of non-banking financial companies and had reasonable basis to believe that the law would be similarly interpreted in other cases. For investments in the construction and development sector through PIS Route, no such conditions are applicable. In addition, the Past Precedents also dealt with offers for sale;*
- *Further, that the Noticees did not merely rely on the Past Precedents and did in fact consider regulations, notifications, circulars and press releases in the public domain, none of which state that minimum capitalisations norms apply to investments made under the PIS Route. The Noticees, based on their plain reading of the applicable regulatory framework, together with the collective experience of the Noticees from the Past Precedents, and the legal advice received from the legal counsel, came to the conclusion that minimum capitalization norms were indeed not applicable to the Offer;*
- *That RBI's views vide reply dated May 21, 2014 in this regard do not have the effect of rendering void the efforts undertaken by the BRLMs/ Noticees in arriving at their conclusions. The allegations raised in the Notices and the Clarificatory Notices are in relation to the conduct of the BRLMs/ Noticees. As set out in this reply and also in earlier submissions made in this regard, the BRLMs/ Noticees proceeded with deliberation and only after evaluating of all relevant considerations;*
- *That the allegation by SEBI that the RBI's view (i.e. that it is not open for an entity to rely on regulatory guidance provided by the RBI in formal communications to similar cases in the future) implies that the BRLMs/ Noticees did not proceed with abundant caution, is misplaced. The RBI's view should not have the effect of casting aspersions on the bona fides of the conduct of the Noticees. Whilst the Past Precedents supplemented the*

Noticees's understanding, the Noticees had a strong basis to conclude that minimum capitalisation norms did not apply in the present case;

- *That in relation to the views set out by the RBI, it was submitted that:*
  a. *View 1: The RBI Communication selectively refers only to a part in Circular No. 53 and neither mentions, nor explains the wordings in the same Circular No. 53 which does in fact provide for buying/ selling of shares by FIIs otherwise than on a stock exchange under the PIS Route, which would cover the FII investment made in the Offer. Thus, such investments, being within the scope of Circular No. 53 (and also Schedule 2 of the FEMA Regulations) clearly fall within the PIS Route and accordingly not subject to any minimum capitalization norms. As substantiated by the Legal Opinion obtained, a plain reading of the applicable law is consistent with the conclusions drawn by the BRLMs/ Noticees;*
  b. *View 2: Whilst the BRLMs/ Noticees considered the applicable legal framework and legal advice while considering the applicability of the minimum capitalisation norms, the Past Precedents only substantiated the BRLMs/ Noticees conclusions further and was, in no way, the sole basis for determining the applicability of minimum capitalisation norms. Specially, the conclusion drawn by SEBI that the Noticees did not act in a reasonable manner, in light of View 2 is misplaced since the Noticees did, in fact, rely on a reading of the FEMA, the FEMA Regulations, as well as the circulars issued by the RBI in furtherance of the same. Therefore, the Noticees based their conclusion on a combined consideration of the applicable legal framework, which is demonstrative of the bona fides of their conduct and the measures taken by them to ensure that adequate due diligence was exercised;*
  c. *View 3: The RBI's views are consistent with the submissions made by the BRLMs/ Noticees. The BRLMs/ Noticees have also provided an update on the Company's compliance with the minimum capitalisation norms.*
- *That accordingly, the BRLMs/ Noticees conduct has been in line with the applicable legal framework and specifically, not in violation of either Clause 1 of Form C of Schedule VI read with Regulations 8 (2) (b), Regulation 57 (1), Regulation 57 (2) (a) (ii) and Regulation 64 (1) of the ICDR Regulations, or Clauses 1, 4, 6, 7 and 20 of the Code of Conduct and Regulation 13 of the Merchant Bankers Regulations.*

32. **The issues that, therefore, arise for consideration in the present case are:**

A. What is the significance of *material, true and adequate disclosures* as per Regulation 57(1), Regulation 57(2)(a)(ii), Regulation 64(1), Clause 1 of Form C of Schedule VI of Regulation 8(2)(b) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with clauses 1, 4, 6, 7 and 20 of Code of Conduct for Merchant Bankers as specified in Schedule III?

B. In light of the above, whether RBI letter dated September 26, 2012 and the status of compliance of the same was a material disclosure required to be disclosed in the RHP of CARE so that the foreign investors/ Non-Resident investors {i.e. including FIIs, QFIs} investing in the IPO of CARE could take an informed investment decision?

C. If so, whether the disclosure made in the RHP of CARE with respect to the RBI's letter dated September 26, 2012 and the status of its compliance were true and adequate as per Clause 1 of Form C of Schedule VI of Regulation 8(2)(b), Regulation 57(1), Regulation 57(2)(a)(ii) and Regulation 64(1) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with clauses 1, 4, 6, 7 and 20 of Code of Conduct for Merchant Bankers as specified in Schedule III?

D. If not, whether the BRLMs/ the Noticees suppressed material facts in the RHP of CARE and attempted to mislead the investors into believing that RBI had unconditionally exempted eligible non-resident investors, in their capacity as transferee entities, from the requirement to obtain a NoC from their respective regulators in relation to participating in the Offer?

E. If so, did the BRLMs/ Noticees failed to exercise proper due-diligence on their part in violation of Clause 1 of Form C of Schedule VI of Regulation 8(2)(b), Regulation 57(1), Regulation 57(2)(a)(ii) and Regulation 64(1) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with clauses 1, 4, 6, 7 and 20 of Code of Conduct for Merchant Bankers as specified in Schedule III?

F. Does the violation, if any, on the part of the BRLMs/ the Noticees attract monetary penalty under Section 15HB of the SEBI Act?

G. If so, what would be the monetary penalty under Section 15HB of SEBI Act against the BRLMs/ the Noticees taking into consideration the factors mentioned in Section 15J of the SEBI Act?

FINDINGS

33. Before we move ahead to examine the aforesaid issues, we need to look at the background behind issue of letter dated September 26, 2012 by RBI. However, even before we delve into this aspect, we first need to have an overview of the following:
    - *(A)* the Foreign Direct Investment (FDI) framework in India;
    - *(B)* the applicable Foreign Investment Framework as at the relevant point of time; and
    - *(C)* the broad details about the IPO of CARE

(A) Foreign Direct Investment (FDI) Framework in India: An Overview

The FDI framework in India is governed by the Foreign Exchange Management Act, 1999 along with its Regulations, the Consolidated FDI Policy and the Circulars issued to Authorised Persons by RBI from time to time. The Foreign Exchange Management Act, 1999 (FEMA) is a Central Statute of the Parliament and is the Supreme Act and was enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. The Parliament had enacted the FEMA to replace the Foreign Exchange Regulation Act, 1973 and came into force on the 1st day of June, 2000. FEMA and the Rules and Regulations issued under the FEMA regulate foreign investment in India. The relevant Regulations for FDI are the Foreign Exchange Management (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000 (Notification No. FEMA 20/2000-RB dated May 3, 2000) (FEMA Regulations). RBI is the nodal regulatory authority for all matters connected with foreign exchange transactions in India. Further, under Section 10(4) and 11(1) of the FEMA, RBI has the power to issue general or special directions or orders to 'Authorised Persons' as the RBI may, from time to time, think fit for the purpose of securing compliance with the provisions of the FEMA and of any rules, regulations, notifications or directions made thereunder 'Authorised Persons' are the Authorised Dealers, Money Changers, Banks, etc., who are authorised by the RBI to deal in foreign exchange. These Circulars are operational instructions from the RBI to Banks, etc. and are generally known as *"A.P. (DIR Series) Circulars"*. Once a year on 1st July of every year, RBI issues a Master Circular which consolidates all the existing Circulars at one place. Master Circulars are issued with a sunset clause of one year. The Department of

Industrial Policy and Promotion (hereinafter referred to as **'DIPP'**), Ministry of Commerce & Industry frames the Foreign Direct Investment (FDI) Policy in India which lays down the sectors in which FDI is allowed, the conditions attached and the sectoral caps. It also lays down the sectors in which FDI is Automatic and those in which it requires Approval of the Government of India. The FDI Policy is prepared in the form of the Consolidated FDI Policy. The Policy defines FDI to mean investment by non-resident entities in the capital of an Indian company under Schedule 1 of FEMA Regulations. The Foreign Investment Promotion Board (hereinafter referred to as '**FIPB'**), Department of Economic Affairs, Ministry of Finance is a nodal authority for approving all FDI proposals which require prior Approval of the Government of India. The FIPB provides a single window mechanism for all such FDI proposals, which are not permissible under the automatic route. The FDI Policy is notified by the RBI as amendments to the FEMA Regulations.

(B) Foreign Exchange Management (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000 (Notification No. FEMA 20/2000-RB dated May 3, 2000) (FEMA Regulations)

With the above in place, we will now move on to have a closer view of the FEMA Regulations. The FEMA Regulations have from time to time on a progressive basis been liberalizing the exchange control regime of India. Regulation 5 of the FEMA Regulations, in particular, lays down the terms and conditions subject to which foreign investors would be permitted to invest into Indian securities. Regulation 5 has been classified into its sub components as follows:

Regulation 5 of FEMA Regulations		
Sub-Regulation	Deals with	Applicable schedule
5(1)	Investments by persons or entities resident outside India *(other than citizens of/ entity incorporated in Bangladesh and Pakistan)* under the Foreign Direct Investment Scheme (FDI Scheme)	Schedule 1
5(2)	Investments by registered Foreign Institutional Investors ('FIIs') under the Portfolio Investment Scheme (PIS Scheme)	Schedule 2

Regulation 5 of FEMA Regulations		
Sub-Regulation	Deals with	Applicable schedule
5(3)(i)	Investments by Non Resident Indians ('NRIs') in shares and debentures of an Indian Company under Portfolio Investment Scheme (PIS Scheme)	Schedule 3
5(3)(ii)	Investments by NRIs in shares and debentures of an Indian Company on non-repatriation basis other than under PIS Scheme	Schedule 4
5(4)	Investments in securities other than shares and debentures of an Indian Company by NRIs or registered FIIs or QFIs or any other person resident outside India included in Schedule 5	Schedule 5
5(5)	Investments by registered Foreign Venture Capital Investors (FVCI)	Schedule 6
5(6)	Trades of Registered FIIs in exchange traded derivative contracts approved by RBI/ SEBI to be subject to limits and margin requirements prescribed by RBI/ SEBI, as well as stipulations regarding collateral securities as directed by RBI from time to time	-
5(7)	Investment by NRIs in exchange traded derivative contracts approved by SEBI from time to time out of INR funds held in India on non-repatriable basis subject to limits prescribed by SEBI	
5(7A)	Investment by QFIs in shares of India Company	Schedule 8
5(8)	To purchase, hold or sell Indian Depository Receipts (IDRs) of eligible companies resident outside India and issued in Indian Capital Market by registered FIIs including sub-accounts of FIIs or NRIs	Para 2 of Schedule 7

FIIs can invest in a particular issue of an Indian company either under Schedule 1 or Schedule 2. It cannot, however, avail of both the routes simultaneously for a particular issue.

(C) Initial Public Offer (IPO) of CARE: A Broad Overview

As per the RHP of CARE dated November 24, 2012, the IPO of CARE was to open for public subscription on December 07, 2012 and close on December 11, 2012. The Anchor Investor Bid/Offer Period is one Working Day prior to the Bid/Offer Opening Date, in accordance with the ICDR Regulations. The Offer opened for subscription by anchor investors on December 06, 2012 and closed on the same day. An Anchor Investor in a public issue refers to a Qualified Institutional Buyer (hereinafter referred to as **'QIBs'**) making an application for a value of Rs. 10 crore or more. QIBs *inter alia* include FIIs and sub-accounts registered with SEBI. The issue was by way of an Public Offer of 71,99,700 equity shares of face value of Rs. 10/- each for Sale by the selling shareholders viz. IDBI Bank Limited, Canara Bank, State Bank of India, IL&FS Financial Services Limited, The Federal Bank Limited, IL&FS Trust Company Limited (for equity shares held on behalf of Milestone Private Equity Fund), Milestone Trusteeship Services Private Limited (for equity shares held on behalf of Milestone Army Trust), ING Vysya Bank Limited and Tata Investment Corporation Limited. The Offer Price of CARE's equity shares were to be determined through the 100% book-building process. Thus, the sale of equity shares by the Selling Shareholders under the Offer to bidders including Eligible Non-Resident Investors was at a price discovered through the Book Building Process prescribed under the SEBI Regulations and not through the stock exchange settlement mechanism. The Noticees were appointed as the BRLMs in respect of the Offer. M/s. Amarchand & Mangaldas & Suresh A. Shroff & Co. (AMSS) were appointed the domestic legal counsel to the company/ CARE and M/s. Luthra & Luthra Law Offices (together with AMSS) were appointed as the legal counsel to the BRLMs/ Noticees. The Bids by the Anchor Investors are submitted and allocation to Anchor Investors is completed one Working Day prior to the Bid/ Offer Opening Date. The QIB portion of the Offer (including the Anchor Investor Portion) amounted to not more than 50% of the Offer being 35,99,850 equity shares and was available for allocation to QIBs, including Anchor Investors. Upto 30% of the QIB portion was to be allocated to the Anchor Investors on a discretionary basis by the company and the Selling Shareholders in consultation with the BRLMs. 5% of the QIB portion (excluding the Anchor Investor Portion) or 1,25,995 equity shares were available for mutual funds only.

34. With this in place, we move ahead to look at the background behind issue of letter dated September 26, 2012 by RBI. In order to understand the same, we need to ascertain the approvals/ exemption sought by CARE from RBI to enable foreign investors/ non-resident

investors to invest in the issue of CARE and subsequent correspondence between CARE and RBI. For this purpose, we will chronologically go through the following:

(A) Correspondence between CARE and RBI after the filing of the DRHP with SEBI on September 30, 2011, but, before the issue opened for subscription by anchor investors on December 06, 2012; and

(B) Correspondence between CARE and the RBI post the opening of the issue for subscription by anchor investors and consequent measures taken by the BRLMs to comply with the RBI's advice.

The same is chronologically outlined below:

(A) Correspondence between CARE and RBI after the filing of the DRHP with SEBI on September 30, 2011, but, before the issue opened for subscription by anchor investors on December 06, 2012

1. CARE is a Credit Rating Company i.e. a company engaged in the financial services sector. The **DRHP of CARE was filed with SEBI on September 30, 2011.** As at the relevant point of time, FEMA Regulations as amended *inter alia* required the prior approval of RBI in case of transfer of shares from a Resident to a Non Resident where:
   - *the Indian company whose shares were being transferred was engaged in rendering any financial service*.

Thus, the transfer of shares from a Resident to a Non Resident where the Indian company whose shares were being transferred was engaged in rendering any financial services required the prior approval of the RBI.

2. The Company **vide letter dated October 19, 2011** applied to RBI for grant of approval for sale and transfer of shares by the resident selling shareholders to non-resident investors who may apply in the Offer, *inter alia* since the company being a credit rating company (engaged in financial service sector) required the prior approval of RBI for transfer of equity shares by the Selling Shareholders to the Eligible Non-Resident Investors.

3. **On November 04, 2011,** RBI issued Circular No. A.P. (DIR Series) Circular No. 43 as a measure to further liberalize and rationalize the procedures and policies governing FDI in

India. RBI vide the said circular *inter alia* decided to allow the following without the prior approval of RBI:

- *Transfer of shares from Resident to Non Resident:*
  - ✓ *where the investee company is in the financial sector provided that:*

(i) No Objection Certificates (NOCs) are obtained from the respective financial sector regulators/ regulators of the investee company as well as transferor and transferee entities and such NOCs are filed along with the form FC-TRS with the AD bank; and

(ii) The FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc., are complied with.

4. Further, as per **the Consolidated FDI Policy dated April 10, 2012** (Circular 1 of 2012) issued by DIPP, I note that all permitted non-fund based NBFCs, irrespective of the level of foreign investment, had to bring upfront US$0.5 million subject to the following condition:

   ✓ It would not be permissible for such a company to set up any subsidiary for any other activity, nor, it can participate in any equity of an NBFC holding/operating company.

   It is pertinent to note here that credit rating is classified as a non-fund based non banking financial service activity under the FDI Policy.

5. Vide **letter dated December 02, 2011**, RBI referred to CARE's letter dated October 19, 2011 and advised CARE to peruse its case in light of the aforesaid RBI circular No. A.P. (DIR Series) Circular No. 43 dated November 4, 2011. It was further intimated by RBI vide the said letter that the communication should not be construed as their no-objection for the proposed transaction and in case the transaction or any part of the transaction falls outside the ambit of A.P. (DIR Series) Circular No. 43 dated November 4, 2011, the company should approach RBI for prior approval for the same.

6. Subsequent to the same, CARE in consultation with the BRLMs and the Legal Counsel filed following **three letters dated May 15, 2012** with the RBI (as per the requirements of the RBI Circular):

   (a) Request for NOC from RBI as the regulator of selling shareholders who were banks, (i.e. IDBI Bank Limited, Canara Bank, State Bank of India, The Federal Bank Limited and ING

Vysya Bank Limited), for transfer of shares to eligible non-residents. RBI conveyed its 'no-objection' for sale of shares vide its letter dated October 18, 2012;

(b) Request for NOC from RBI as the regulator of selling shareholders who were Non-Banking Financial Companies (NBFCs) (i.e. IL&FS Financial Services Limited and Tata Investment Corporation Limited), for transfer of shares to eligible non-residents. RBI vide its letter dated October 25, 2012 communicated to CARE that such selling shareholders were not required to obtain NOCs since they held the shares as investments;

(c) Request for exempting non-resident investors (i.e. transferees in the Offer) from the requirement of obtaining NOCs from their respective regulators for subscribing to the shares in the Offer, on the grounds that the investors who would subscribe to the proposed Offer through the book building process may not be identifiable at the outset and may involve a large number of entities.

7. As regards the exemption sought by CARE vide aforesaid letter dated May 15, 2012 in respect of non-resident investors, **RBI vide letter dated June 22, 2012** *inter alia* advised that in terms of A.P. (DIR Series) Circular No. 43 dated November 4, 2011, the NOC from the respective regulators of the resident investee company/ resident transferors as well as non-resident investors should be filed with the RBI at the time of submission of Form FC-TRS with the Authorised Dealer bank.

8. CARE in consultation with the BRLMs and the Legal Counsel again wrote **letter dated August 31, 2012 to RBI** seeking an exemption for non-resident investors from obtaining NOCs from their respective regulators for subscribing to the shares in the Offer *inter alia* citing the following reasons:

(a) That the eligible non-resident investors who will subscribe to the proposed Offer cannot be identified in advance until the basis of allocation is approved by the designated stock exchange, which typically takes place within seven to eight working days from the date of closure of the offer, and will involve a large number of entities from different jurisdictions;

(b) That in the event such eligible non-resident investors approach the regulators in their home jurisdictions, such regulators may not appreciate the relevance or urgency of such an NOC and may not release the NOC in a timely manner or at all;

(c) That in the event any of the potential non-resident investors decide not to participate in the offer due to introduction of this new requirement to obtain an NOC, it may adversely affect the prospects of the proposed offer;

(d) Further that NOC from regulators of non-resident investors appears to be more appropriately applicable in case of private sale arrangements, where transferees are identified at early stages of a transaction prior to allotment of shares as compared to public offers being made through book building process, where the potential transferees who would be eligible for allotment of shares would be identifiable only closer to the stage of allotment, which does not provide adequate time to the transferees to approach their regulators for obtaining a NOC.

9. In response to CARE's letter dated August 31, 2012, **RBI vide letter dated September 26, 2012** *inter alia* agreed to exempt non-resident investors participating in the Offer from obtaining NOCs from their respective regulators in relation to their participation subject to the following conditions:

   (i) That the minimum capitalization norms applicable to NBFCs are strictly adhered to;

   (ii) That the post-issue shareholding pattern of the company is submitted to RBI on completion of the Offer; and

   (iii) That the reporting formalities in terms of A.P. DIR Series Circular 63 dated April 22, 2009 read with A.P. DIR Series Circular 43 dated November 04, 2011 is adhered to.

   Thus, the company/ CARE being a credit rating agency classified as a non-fund based non banking financial service activity under the FDI Policy was required to bring upfront an investment of USD0.5 million by foreign investors.

10. In the matter the BRLMs have *inter alia* submitted that upon receipt of RBI's letter dated September 26, 2012, whereby RBI imposed conditions as aforesaid with respect to compliance with minimum capitalisation norms, the BRLMs and the Company decided to limit the category of foreign investors eligible to apply in the Offer to FIIs investing under the PIS Route, NRIs investing on non-repatriation basis and QFIs. BRLMs vide the said letter have further stated that, as such, it was concluded that compliance with minimum capitalisation norms would not be required if it were clarified that investors investing through the FDI Route were not permitted to participate in the Offer. The BRLMs have submitted that prior

to agreeing on this approach, the representatives of the BRLMs deliberated the matter amongst them and also sought guidance from the Legal Counsels, in addition to discussions with the Company.

11. It was further submitted that the contents of the draft response to RBI's letter dated September 26, 2012 were discussed between the Company, the BRLMs and the Legal Counsels. I note here that Luthra & Luthra Law Offices (domestic legal counsel to the Noticees) and Amarchand & Mangaldas & Suresh A. Shroff & Co. (domestic legal counsel to the company) have confirmed that post receipt of letter dated September 26, 2012 from RBI, they were involved in various discussions with the company and the BRLMs and that the company had filed letter dated October 05, 2012 with RBI, in line with these discussions, and that relevant changes were also made to the Offer document. The ALRs on behalf of the BRLMs/ Noticees, I find, have further submitted that based on these discussions, the BRLMs were of the view that the approach was reasonable, correct and within the applicable regulatory framework. BRLMs have submitted that accordingly, in response to RBI's letter dated September 26, 2012 and as a matter of good practice, the Company having consulted the BRLMs and the Legal Counsels, as above, submitted a letter dated October 05, 2012 to RBI. The **company vide letter dated October 05, 2012**, *inter alia* informed RBI that:

(i) The company is proposing to offer equity shares in the offer only to the following category of investors:
   - ✓ Residential investors;
   - ✓ FIIs and sub-accounts registered with SEBI and investing in the Offer under the PIS in accordance with Regulation 5(2) and Schedule 2 of FEMA Regulations, as amended *(Eligible FIIs),*
   - ✓ NRIs investing in the offer on non-repatriation basis under Regulation 5(3)(ii) and Schedule 4 of FEMA Regulations*(Eligible NRIs),*;
   - ✓ QFIs investing in the Offer in accordance with the provisions of the Master Circular on Foreign Investments in India dated July 02, 2012 issued by RBI *(Eligible QFIs);*

(ii) That accordingly investments by Eligible FIIs, Eligible NRIs and Eligible QFIs will not be foreign direct investment (FDI) under Regulation 5(1) read with Schedule 1 of the FEMA Regulations and that the conditions applicable for foreign direct investments (FDI), including the minimum capitalisation norms prescribed in the Consolidated FDI Policy and the Mater Circular on Foreign Investments in respect of NBFCs engaged in non-fund based activities, shall not be applicable to the company in respect of the Offer;

(iii) That as regards the post offer shareholding pattern of the Company, the same shall be submitted to RBI by the Company after the completion of the Offer; and,

(iv) That the reporting formalities in terms of circular A.P. DIR Series Circular 63 dated April 22, 2009 read with A.P. DIR Series Circular 43 dated November 04, 2011 shall be complied with.

12. The BRLMs, I find, have *inter alia* submitted here that:

- Based on the discussions and conclusions arrived at, the RHP was filed with the RoC on November 26, 2012. The RHP was submitted with SEBI on November 27, 2012;
- That the specific disclosures included in the RHP made it abundantly clear that foreign investment through the FDI route was not permitted in the Offer;
- That for the purpose, the BRLMs/ Noticees also worked in parallel to review and revise the DRHP dated September 30, 2011 in detail to clarify that the categories of investors who would be permitted to participate in the Offer were being confined to only eligible FIIs (investing under Schedule 2 of the FEMA Regulations), eligible NRIs (applying on a non-repatriation basis in accordance with Schedule 4 of the FEMA Regulations) and eligible QFIs;
- That the detailed and exhaustive nature of modifications undertaken in the DRHP were reflected in the redline version of the updated DRHP;
- That CARE's letter dated October 05, 2012 was filed with RBI for the sake of completeness and to ensure good order; and
- That the BRLMs were not merely're-submitting' information *via* the October 05, 2012 letter as set out in paragraph 2D of the SCN, in fact, the BRLMs strongly believed that all regulatory concerns with respect to the applicability of minimum capitalisation requirements in the present case had been duly addressed and eliminated before the decision to proceed with the filing of the RHP with the RoC was taken.

13. In the matter, I further find that ALRs on behalf of the BRLMs/ Noticees have submitted a legal opinion dated July 08, 2014 from the Former Chief Justice of the High Courts of Kerala and Karnataka and a Former Presiding Officer of the Securities Appellate Tribunal, Mr. N.K. Sodhi along with reply dated July 11, 2014 filed in response to letter dated May 27, 2014.

The said legal opinion obtained after the adjudication proceedings were initiated, I find, *inter alia* states as follows:

- That FDI conditions including minimum capitalization norms are applicable to foreign investments only if it is made under Schedule 1 of the FEMA Regulations and not otherwise;
- That in the present case the investment was made by FIIs under the PIS route through a public offer in terms of Schedule 2 and therefore the conditions prescribed under the FDI Scheme would not apply;
- That it is clear from Regulation 5 that the FDI Scheme and the PIS Scheme are distinct from each other and they both have their own terms and conditions subject to which investment could be made under these schemes;
- That the company is not required to comply with the minimum capitalization norms in respect of the public offer as only three categories of non-resident investors were allowed to participate viz. FIIs under the PIS route, NRIs on non-repatriation basis and QFIs in terms of Schedule 2, Schedule 4 and Schedule 8 of FEMA Regulations respectively;
- that FIIs under the PIS route are not restricted to make investments only through a stock broker on the floor of a stock Exchange. Schedule 2 read with Regulation 5(2) of the FEMA Regulations permits them to purchase shares of Indian companies through a public offer and also through private placement.

14. The Offer opened for subscription by anchor investors on December 06, 2012 at 10 a.m. and closed on the same day at 3:30 p.m. The Offer opened for public subscription on December 7, 2012 and closed on December 11, 2012.

(B) Correspondence between the Company and the RBI post the opening of the issue for subscription by anchor investors and consequent measures taken by the BRLMs to comply with the RBI's advise are outlined below

1. The BRLMs have submitted that on the evening of December 06, 2012 itself and post the conclusion of the bidding period for anchor investors *(and after a period of almost 60 days from previous correspondence with the RBI),* the Company received a **letter dated December 06, 2012 from RBI** responding to Company's letter dated October 05, 2012

stating that FIIs and QFIs can participate in the Offer subject to compliance with minimum capitalization norms. The BRLMs have further submitted that RBI's letter dated December 06, 2012 was an event that occurred after the Offer had closed for anchor subscription.

2. It is noted that **RBI vide letter dated December 06, 2012**, in response to Company's letter dated October 05, 2012, invited the company's attention to the fact that:

(i) FIIs can acquire shares under the proposed Offer for Sale provided total shareholding of the FII in the company does not exceed 10% at any point of time and minimum capitalisation norms are adhered to;

(ii) That QFIs can acquire shares under the proposed offer for sale provided total shareholding of the QFIs in the company does not exceed 5% at any point of time and minimum capitalisation norms are adhered to.

3. It is further noted that pursuant to discussions had with RBI after receipt of RBI's aforesaid letter dated December 06, 2012, the **Company wrote letter dated December 07, 2012** to RBI. The said letter dated December 07, 2012 *inter alia* highlighted to RBI that Clause 5 of Schedule 2 of FEMA Regulations provides as follows:

"A registered FII is permitted to purchase shares/ convertible debentures of an Indian Company through Offer/ Private Placement, subject to the ceiling specified in sub-paragraph (4) of this paragraph and the Indian Company is permitted to issue such shares:

Provided that-

(a) In case of Public Offer, the price of shares to be issued is not less than the price at which shares are issued to residents, and…."

The said letter emphasized that the Offer for Sale to FIIs was through the PIS route, as FIIs have been permitted to purchase shares of an Indian Company through an Offer, and in this context, the general permission is understood as extending to purchases made when an offer is made with the involvement of the company, and, not merely a primary issuance by the company. It was further *inter alia* added therein that else the use of the words '*purchase*' and *'offer'* should have read '*subscribed*' and *'issued'* respectively and that this is the understanding based on which FIIs have participated under the PIS route in the offer for sale transactions by any unlisted and/ or listed company, including by the Government of India on various disinvestments. The letter reiterated further that, thus, they believe that the issue is compliant with Schedule 2 of FEMA Regulations and that the minimum capitalisation norms as mentioned by RBI vide letter dated December 06, 2012 would not be required to be met with respect to investment by Eligible FIIs and Eligible QFIs in the Offer.

4. However, immediately thereafter it is noted that **CARE vide letter dated December 10, 2012** wrote to RBI that based on further discussions with RBI on the subject matter, they understood that minimum capitalisation norms must be satisfied in relation to the Offer. It was, however, brought to the notice of RBI through the said letter dated December 10, 2012 that RBI's letter dated December 06, 2012 was received post the filing of the RHP with ROC. Accordingly, CARE inter *alia* requested RBI to grant them time of nine months from the date of allotment in the Offer to comply with the minimum capitalisation norms to allot equity shares to non-resident investor(s) to bring an investment of atleast US$0.5 million in accordance with the minimum capitalisation norms as applicable, as they would have to follow preferential allotment guidelines for listed companies under the ICDR Regulations, as amended.

5. In the matter, the BRLMs, I note, have *inter alia* submitted as follows:

(i) That upon receipt of the letter dated December 06, 2012, the Company, in consultation with the BRLMs, immediately engaged with the RBI;

(ii) That in terms of a letter dated December 07, 2012, the Company confirmed once again to the RBI that no FDI is being permitted in the Offer and accordingly minimum capitalisation norms would not be applicable;

(iii) That as such, it was the collective understanding of the Company, the BRLMs and the Legal Counsels that the minimum capitalisation norms will not apply to the Offer;

(iv) That the Company and the BRLMs continued to engage with the RBI on this matter till December 10, 2012;

(v) That the possibility of arriving at an immediate resolution to the matter (well within the time period while the Offer was still open for subscription) without prejudicing the interest of the investors was felt to be extremely difficult, as the Company and the BRLMs anticipated that the RBI would have to undertake internal deliberations and discussions to consider the position set out by the Company;

(vi) That, hence, notwithstanding the fact that there was no specific stipulation under law requiring the Company to comply with the minimum capitalisation, since FDI investment was already restricted in the Offer, due to lack of any other option at that stage to

conclude the matter, and, considering the fact that the Offer was scheduled to close on December 11, 2012, the Company in consultation with the BRLMs decided to follow the directions of the RBI's mandate in the interest of completing the transaction;

(vii) That based on the conditions imposed in RBI's letter dated December 06, 2012 and further discussion with the RBI, the Company submitted a letter dated December 10, 2012 stating that they "understand that minimum capitalisation norms must be satisfied with in relation to the Offer" and sought time to comply with minimum capitalisation norms post completion of the Offer.

6. Vide **RBI's letter dated December 10, 2012**, RBI advised the Company to comply with the minimum capitalisation norms of USD$0.5 million applicable to non-fund based NBFCs within a period of six months from the date of issue of RBI's letter.

7. BRLMs have submitted that to ensure due disclosure of this development, the BRLMs immediately worked with the Company to ensure that an Addendum as below was published in the relevant newspapers with wide circulation on December 11, 2012 to supplement the RHP, in the interest of investors, prior to the closure of the Offer and that the Prospectus was also duly updated. The Addendum was also available on the website of the BRLMs, the stock Exchanges and SEBI. BRLMs have *inter alia* further submitted that the underlying purpose for providing detailed information in the Addendum was to make sure that the investors had proper background as to why the Company was now required to comply with minimum capitalisation norms and consequently publish the Addendum. The Prospectus dated December 13, 2012 that was filed with the RoC was also duly updated to include the information set out in the Addendum below:

Addendum:

The Notice to Investors dated December 10, 2012 (As published) has been verbatim brought out below:

"The Company vide its letter dated August 31, 2012 had applied to the Reserve Bank of India (the "RBI") to exempt Non-Resident investors from obtaining no objection certificate ("NoC") from their respective regulators to participate in the Offer. Subsequently, the RBI vide its letter dated September 26, 2012 clarified that Non-Resident investors were not required to obtain NoCs from their respective regulators for participating in the Offer, provided that the

minimum capitalization norms applicable to companies engaged in non-banking finance activities are met (i.e., an investment of USD 0.5 million by foreign investors for companies engaged in non fund based activities) (the "Minimum Capitalization Norms"). The Company by its letter dated October 5, 2012 clarified to the RBI that the Company shall offer Equity Shares in the Offer to only (i) FIIs and sub-accounts investing under the portfolio investment scheme; (ii) NRIs investing on non-repatriation basis; and (iii) QFIs. The Company clarified to the RBI that no foreign direct investment by Non-Residents will be permitted in the Offer and accordingly, the Minimum Capitalization Norms were not applicable. The Company received a letter from the RBI on December 6, 2012, stating inter alia that the FIIs and QFIs can participate in the Offer subject to adherence with the Minimum Capitalization Norms. The Company filed a letter dated December 7, 2012 with the RBI reiterating that Minimum Capitalization Norms are not applicable and that FIIs and QFIs should be permitted to participate in the Offer. The Company filed a letter dated December 10, 2012 with the RBI and the RBI has on December 10, 2012 permitted the Company to comply with the Minimum Capitalization Norms within six months from the date of their letter. Accordingly, the Company will be required to allot the requisite number of Equity Shares in accordance with applicable law and approvals, within this period, to meet the Minimum Capitalization Norms."

35. With this background, we now move ahead to examine the issues listed out for consideration at Para 32 of the Order.

(A) The first issue for consideration is what is the significance of *material, true and adequate disclosures* as per Regulation 57(1), Regulation 57(2)(a)(ii), Regulation 64(1), Clause 1 of Form C of Schedule VI of Regulation 8(2)(b) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with clauses 1, 4, 6, 7 and 20 of Code of Conduct for Merchant Bankers as specified in Schedule III?

1. I note that the aforesaid provisions of ICDR Regulations and Merchant Bankers Regulations require that the offer document shall contain all material disclosures which are true and adequate so as to enable the applicants to take an informed investment decision. However, what is to be considered as *'material disclosure'* has not been defined under the ICDR Regulations. But, it is based on the disclosures made in the

prospectus that an investor decides whether to invest in a particular company or not. Hence *'material disclosure'* has to be determined objectively from the view point of a reasonable investor. In the matter, under *'Explanation'* to Regulation 5 of SEBI (Issue and Listing of Debt Securities) Regulations, 2008, I find that *'material'* has been defined to mean anything which is likely to impact an investors investment decision.

2. Here it, however, needs to be noted that the word *'material'* means *'important'*. Materiality is not the same as completeness. One might possess *all material* information without necessarily possessing *all true and adequate* information. Hence, ICDR Regulations has tried to strike a balance by requiring issuers to disclose in the offer document all material disclosures which are true and adequate, so as to enable the investors to take an informed investment decision.

3. Now to examine what constitutes material disclosures that are true and adequate from the investors point of view, we need to look at the aspect of what investors expect in a disclosure. Investors, in general, expect explicit statements bringing out the real facts and how it would directly or indirectly affect their investments *qua* the issuer company. Hence, disclosures in prospectus should be based on actual facts at the time of the issue and not based on some speculation or hypothesis or some undisclosed claimed belief. In case any event or outcome happens, which may directly or indirectly affect the issuer company and / or investors, an investor has the right to know and the BRLMs are required to inform the investors all the facts necessary to ensure the understanding of what has occurred. Concern regarding what impact such truthful disclosure would have on an investor should not weigh in the mind of the BRLMs while making disclosures in the prospectus. Further, the subjective views of the BRLMs, if any, thus, does not factor into this analysis.

(B) In light of the above, whether RBI letter dated September 26, 2012 and the status of compliance of the same was a material disclosure required to be disclosed in the RHP of CARE so that the foreign investors/ Non-Resident investors {i.e. including FIIs, QFIs } investing in the IPO of CARE could take an informed investment decision?

1. I note that RBI's letter dated September 26, 2012 *inter alia* exempting Non-Resident Investors participating in the Offer from the requirement of obtaining a *NoC* from their respective regulators subject to certain conditionalities was disclosed under the section on '*Government and Other Approvals*' at page 228 of the RHP as follows:

   'RBI by letter dated September 26, 2012 exempted eligible Non-Residents, in their capacity as transferee entities, from the requirement to obtain a no-objection certificate from their respective regulators in relation to participating in the Offer.'

2. I also note that RBI's letter dated September 26, 2012 was one of the Material Documents for Inspection in the RHP of CARE dated November 24, 2012 at page 322 of the RHP under the section on '*Material Contracts and Documents for Inspection',* which could be inspected at the Registered Office between 10 a.m. and 5 p.m. on all Working Days from Bid/Offer Opening Date until the Bid/Offer Closing Date.

3. From the disclosures made as aforesaid in the RHP, I note that the BRLMs / Noticees considered the disclosure of RBI letter dated September 26, 2012 as a material disclosure and therefore incorporated reference to the said letter under the section on '*Government and other Approvals*' and also under the section on '*Material Contracts and Documents for Inspection'*. The same has not been denied by the BRLMs/ Noticees in the submissions made before me.

4. Besides, even otherwise, the entry level norms for investment by foreign investors/ non-resident investors in an Indian Company constitute implied material information.

(C) If so, whether the disclosure made in the RHP of CARE with respect to the RBI's letter dated September 26, 2012 and the status of its compliance were true and adequate as per Clause 1 of Form C of Schedule VI of Regulation 8(2)(b), Regulation 57(1), Regulation 57(2)(a)(ii) and Regulation 64(1) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with clauses 1, 4, 6, 7 and 20 of Code of Conduct for Merchant Bankers as specified in Schedule III?

1. To examine the same, we need to weigh what was disclosed in the RHP of CARE vis-à-vis the information that was not disclosed, and, how a reasonable investor would have

placed the undisclosed information vis-à-vis the disclosed information. The following steps would be involved in the process:

I. Determine what was RBI's directive vide letter dated September 26, 2012 and the factual status of its compliance as on the date of RHP dated November 24, 2012;

II. Determine what were the disclosures made in the RHP of CARE dated November 24, 2012 with respect to the said RBI letter dated September 26, 2012;

III. Determine whether all material disclosures with respect to the said letter dated September 26, 2012 were disclosed based on actual facts at the time of the issue and not based on some speculation or hypothesis or some undisclosed claimed belief.

We will now move ahead with the analysis as per the steps outlined above, based on the submissions made before me by the BRLMs/ Noticees and the documents available on record.

I. What was RBI's directive vide letter dated September 26, 2012 and the factual status of its compliance as on the date of RHP dated November 24, 2012?

1.1 It is noted from the preceding paras that RBI vide its letter dated September 26, 2012 had *inter alia* agreed to exempt non-resident investors participating in the Offer from obtaining a NOC from their respective regulators in relation to their participation, subject *inter alia* to strict adherence to the minimum capitalization norms applicable to NBFCs.

1.2 Further, the factual status of compliance of RBI's letter dated September 26, 2012 as on the date of RHP dated November 24, 2012 was that the company in consultation with the BRLMs and the legal Counsels had filed letter dated October 05, 2012 with RBI. The said letter dated October 05, 2012 filed by CARE with RBI, *inter alia* communicated to RBI that CARE had decided to restrict the category of foreign investors eligible to apply in the Offer to – (i) FIIs investing under the PIS Route (Eligible FIIs); (ii) NRIs investing on non-repatriation basis (Eligible NRIs); and (iii) QFIs (Eligible QFIs). Further, vide the said letter it was also communicated to RBI that investments by Eligible FIIs, Eligible NRIs and Eligible QFIs will not be foreign direct investment (FDI) under Regulation 5(1) read with Schedule 1 of the FEMA Regulations and that the conditions applicable for FDI, including the minimum capitalisation norms prescribed in the Consolidated FDI Policy and the Master Circular on Foreign Investments in respect of NBFCs engaged in non-fund based activities, shall not be applicable to the company in respect of the Offer.

II. Vis-à-vis the status as aforesaid, what were the disclosures made in the RHP of CARE dated November 24, 2012 with respect to the said RBI letter dated September 26, 2012?

1.1 As brought out in the earlier paras of this Order, the following disclosures were made in the RHP of CARE dated November 24, 2012 with respect to RBI's letter dated September 26, 2012:

(a) Under the section on '*Government and Other Approvals*' at page 228 of the RHP, the following disclosure was made:

'RBI by letter dated September 26, 2012 exempted eligible Non-Residents, in their capacity as transferee entities, from the requirement to obtain a no-objection certificate from their respective regulators in relation to participating in the Offer.'

(b) Further, the RBI's letter dated September 26, 2012 was one of the Material Documents for Inspection in the RHP of CARE dated November 24, 2012 at page 322 of the RHP under the head '*Material Contracts and Documents for Inspection',* which could be inspected at the Registered Office between 10 a.m. and 5 p.m. on all Working Days from Bid/Offer Opening Date until the Bid/Offer Closing Date.

1.2 It becomes pertinent to note here that neither the conditions based on which RBI had agreed to exempt non-resident investors participating in the Offer from obtaining NOCs from their respective regulators in relation to their participation, nor, the actual status of filing of letter dated October 05, 2012 by the company with RBI was disclosed in the RHP.

1.3 In the matter, I find that the RBI's letter dated September 26, 2012 was with respect to the entry level norms for investment by foreign investors/ non-resident investors in the Offer. True and adequate disclosure about the said RBI letter in the RHP of CARE, including the conditions imposed by RBI while granting the said exemption to the non-resident investors assumes significance. This is because as per the said RBI directive the foreign investors/ non-resident investors intending to invest in the Offer could do so, without obtaining a NoC from the respective regulators, provided the issuer company/ CARE ensured that the minimum capitalisation norms as per the RBI directive were strictly adhered to. The criticality of this issue can be further adjudged by the fact that under Section 13 (1) of FEMA, if any person contravenes any provision of the FEMA or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under the said Act, or contravenes any condition subject to which an authorization is issued by RBI, he/ she shall upon adjudication, is liable to a penalty up to thrice the sum involved in such contravention, where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable. Further, where such contravention is a continuing one, such person becomes further liable to a penalty which may extend to five thousand rupees, for every day after the first day during which the contravention continues. Also, under Section 13(2) of FEMA, any Adjudicating Authority adjudging any contravention under sub-section 13 (1) of FEMA, may if he thinks fit, in addition to any penalty which he may impose for such contravention, direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government. He may further also direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf. Subject further to the provisions of sub-section (2) of section 19 of FEMA, under Section 14(1) of FEMA, if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he becomes liable to civil imprisonment.

1.4 Thus, it can be observed from the above that true and adequate knowledge of the status of compliance of minimum capitalization norms by CARE, was a material disclosure of great consequence from the point of foreign investors/ non-resident investors participating in the Offer. Ignorance about conditions imposed by RBI would have resulted in the non-resident investors contravening FEMA, which in turn, would have resulted in steep penalties being imposed on them, had RBI not permitted six months time to CARE to comply with the minimum capitalisation norm of US$0.5 million applicable to non-fund based NBFCs vide its letter dated December 10, 2012, and further extended the same upto September 30, 2013 vide its letter dated March 21, 2013. Besides, failure to make such payments could have made the non-resident investors liable to civil imprisonment.

1.5 Further, I note that the factual aspect of filing of October 05, 2012 letter with RBI was also not disclosed in the RHP. The said letter dated October 05, 2012 filed by CARE with RBI assumes significance in view of the fact that pursuant to the said filing, BRLMs considered that the matter with the regulator RBI regarding applicability of minimum capitalization norm to the Offer was closed in view of the claimed recognized legal position.

1.6 In the matter, I find that the BRLMs have submitted that usually only the final approval/ exemption letter from the regulator is disclosed in the offer document instead of the entire chain of correspondence between an issuer company and a regulator, and that this approach was also followed for disclosing the NOCs/ exemptions received from RBI in the Offer. It has been submitted that the underlying rationale is to highlight/ include only the actual governmental/ regulatory approvals in the offer document. Further, that the same is consistent with the requirement of Schedule VIII Part A Clause (2)(X)(B) of the ICDR Regulations, which provides for disclosure of only the government/ regulatory approvals.

1.7 I find here that the ICDR Regulations do not restrict a merchant banker to disclose only the final approval/ exemption letter received from the regulator. Regulation 64 (1) of ICDR Regulations, I find, requires that the lead merchant bankers should exercise due diligence and satisfy itself about all the aspects of the issue, including the veracity and adequacy of disclosure in the offer documents. The intent here is that a reasonable investor should receive complete and accurate information in order to make up his or her mind about the potential investment. The same is the intent under Regulations 57(1), 57(2)(a)(ii) and Clause 1 of Form C of Schedule VI of Regulation 8(2)(b) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with clauses 1, 4, 6, 7 and 20 of Code of Conduct for Merchant Bankers as specified in Schedule III.

III. In view of the above, the next question that arises is whether all the material disclosures with respect to RBI's letter dated September 26, 2012 were disclosed based on actual facts at the time of the issue, which were true and adequate, and, not based on some speculation or hypothesis or some undisclosed claimed belief.

1.1 It is observed from the above that though the exemption granted by RBI vide its letter dated September 26, 2014 to eligible Non-Residents investors, in their capacity as transferee entities, from the requirement of obtaining a NoC from their respective regulators in relation to participating in the Offer was disclosed in the RHP dated November 24, 2012 under the para on '*Government and Other Approvals*', the conditions based on which the said exemption was granted by RBI and the status of its compliance were not disclosed in the RHP. Further, the factual status of filing of reply dated October 05, 2012 by CARE with RBI, whereby CARE in consultation with the BRLMs and the legal Counsels and the applicable legal framework, believed that the minimum capitalisation norms applicable to NBFCs engaged in non-fund based activities shall not be applicable to the company in respect of the Offer since they had restricted the category of foreign investors who could participate in the Offer, was also not disclosed in the RHP.

1.2 It was, hence, *inter alia* alleged in the SCN that full and complete disclosure in the matter of grant of exemption to Non Resident Investors from the requirement of obtaining NoC from their respective regulators in relation to their participation was not made in the RHP. The SCN *inter alia* also pointed out that even the subsequent correspondence made by the company with RBI i.e. letter dated October 05, 2012 was not included in the RHP. The SCN had, thus, *inter alia* alleged that the BRLMs/ Noticees had failed to ensure in the RHP that all material disclosures which are true and adequate, so as to enable the applicants to take an informed investment decision were made.

1.3 In the matter, the BRLMs/ Noticees in its submissions while denying the allegations in its entirety have *inter alia* claimed that they had exercised their independent professional judgment to ensure compliance with the applicable regulatory framework. BRLMs, I find, have further stated that though a determination or ruling on the applicability of minimum capitalisation norms was not the subject matter of the notices issued, however, to explain the *bona fide* conduct of the BRLMs to demonstrate that they had exercised their independent professional judgment on the issues, the applicable laws governing the foreign investment regime and the minimum capitalisation norms, and, the manner in which the Noticees read the same at the time of the Offer need to be explained.

1.4 In the matter, the BRLMs have stated that they referred to the FEMA Regulations, the Master Circular issued by RBI and the FDI Policy, which together contain the extant regulatory framework on foreign investments in India. It has been further submitted that the regulatory framework governing foreign investment in India through Foreign Direct Investment Scheme (FDI Route) and Portfolio Investment Scheme (PIS Route) are distinct from one another. The BRLMs *inter alia* also submitted that they discussed the applicability of minimum capitalisation norms on receipt of the September 26, 2012 letter from RBI in multiple rounds of discussions with the Company and the Legal Counsel and premised their understanding of non-applicability of the same on the basis of the following:

(a) ***FEMA Regulations:***

(i) The relevant part of the FEMA Regulations as verbatim brought out below by the BRLMs in their submissions made:

- Regulation 5 (1) of the FEMA Regulations reads: *"A person resident outside India.. or an entity [incorporated outside India]..., may purchase shares ... of an Indian company under Foreign Direct Investment Scheme, subject to the terms and conditions specified in Schedule 1".*
- Regulation 5 (2) of the FEMA Regulations reads: "*A registered foreign institutional investor (FII) may purchase shares or convertible debentures of an Indian company under the Portfolio Investment Scheme, subject to the terms and conditions specified in Schedule 2 [and the limits and margin requirements prescribed by RBI/ SEBI as well as the stipulations regarding collateral securities as specified by the Reserve Bank from time to time.]"*
- Paragraph 1(5) of Schedule 2 of the FEMA Regulations which reads: "*A registered FII is permitted to purchase shares... of an Indian company through offer/ private*

placement, subject to the ceiling specified in sub-paragraph (4) of this paragraph and the Indian company is permitted to issue such shares: Provided that –

- ✓ *In case of Public Offer, the price of the shares to be issued is not less than the price at which shares are issued to residents; and*
- ✓ *...”*

(ii) that paragraph 1(5) of Schedule 2 of the FEMA Regulations (reproduced as above) was amended in 2003 specifically to include ‘offer’/ ‘public offer’ (“2003 Amendment”);

(iii) that Schedule 1 (i.e. ‘FDI scheme’) of the FEMA Regulations, specifically Annexure B (which deals with sector-specific restrictions for foreign investment) - reference to minimum capitalisation norms are only prescribed in Annexure B to Schedule 1 and that too only in the context of investments under the FDI route and there is no reference of or mention of a similar obligation in Schedule 2 (i.e. “Purchase/ sale of shares.. of an Indian Company by a registered foreign institutional investor under portfolio investment scheme”) or for that matter Schedule 4 and Schedule 8 which deal with NRIs (investing on non-repatriation basis) and QFIs respectively;

(iv) Additionally, as illustrations, (which contained relevant extracts of Annexure B of Schedule 1 of the FEMA Regulations) reference was made to indicate that in sectors such as ‘credit information companies’ and ‘infrastructure companies in securities market’, different limits have been prescribed for investments under the FDI route and investments by registered FIIs under the PIS route. It was also submitted that whilst in relation to certain sectors under Annexure B, a specific reference to FIIs was made under Schedule 1 (for instance, where a consolidated sectoral cap for FDI and FII is set out), minimum capitalisation norms have been prescribed only with reference to investments being made under the FDI route;

(v) That Paragraph 24 of Annexure B of Schedule 1 of the FEMA Regulations deals with and permits 100% FDI in non-banking finance companies. From a plain reading of Paragraph 24 of Annexure B, it is amply clear that no such conditions have been prescribed in respect of any investment by either registered FIIs, or QFIs or NRIs (investing on a non-repatriable basis);

(vi) In addition, that conditions with respect to minimum capitalisation do not find any mention in Regulation 5 (2) and Schedule 2 of the FEMA Regulations which sets out

limits and conditions applicable to investments by FIIs under the PIS route. Schedule 4 of the FEMA Regulations dealing with investments by NRIs on a non-repatriation basis does not impose any minimum capitalisation requirements. In terms of Schedule 8 of the FEMA Regulations, QFIs have also been accorded a general permission to invest in public offers without any stipulation of ensuring compliance with minimum capitalisation norms applicable to FDI;

(vii) Consequently, that the conditions that have been set out in relation to minimum capitalisation norms are understood to only apply to investments under the FDI route.

(b) ***RBI Circulars:***

(i) Reference was made to the following RBI circulars:

- *Paragraph 7.2 of the RBI Circular dated December 3, 2003 to clarify that the objective of the 2003 Amendment was to liberalise the framework governing foreign investment in India, whereby inter alia, registered FIIs were permitted to purchase shares of an Indian company through public offer as well as private placement, subject to applicable ceiling as indicated in Schedule 2 to Notification No. FEMA 20/2000-RB dated 3rd May 2000" (i.e. the FEMA Regulations);*
- *Paragraph 7.2 of the RBI Circular dated December 3, 2003 to further clarify that the same also provides that "an FII may invest in a particular issue of an Indian company either under Schedule 1 or Schedule 2. It cannot however avail of both the routes simultaneously for a particular issue.";*
- *Schematic representation in respect of foreign investment in India (which forms part of the Master Circular) which categorically differentiates between investments made under the FDI route and PIS route. It was submitted that from the plain reading of the schematic representation, it is clear that FIIs, NRIs and QFIs fall under the PIS route and that this re-affirmed the understanding of the BRLMs that minimum capitalisation norms were not applicable in case of investments under the PIS route.*

1.5 It was submitted by the BRLMs/ Noticees that, hence, based on a careful consideration of the legal framework which was applicable to the Offer and on a plain reading of the applicable law, the Noticees had no reason to believe that minimum capitalisation norm, which is essentially a condition linked to investments under the FDI route, could also extend to investments under the PIS route in terms of Schedule 2 of the FEMA Regulations, after the issue was restricted to foreign investments only through the PIS route.

1.6 To support the BRLMs/ Noticees reading of the applicable regulatory framework based on which they concluded that minimum capitalisation norms were inapplicable to the Company in the present case, the ALRs at the hearing held on January 21, 2014 pointed out to the Adjudicating Officer that *"It is well settled that when the plain and grammatical meaning of the provisions in an Act or Notification are clear, then the literal rule of interpretation has to be applied"*. Copies of some case laws in support thereof were also provided.

1.7 One of such case law submitted is of ***Tata Cummins Ltd. v State of Jharkhand and Others*,** [3] (hereinafter referred to as '**Tata Cummins Case**'). It was pointed out at the hearing that paragraph 17 of the Tata Cummins Case also referred to *Hiralal Rattanlal v. State of U.P.*[4] which also states that "*In construing a statutory provision, the first and foremost rule of construction is the literary construction. All that [the court has] to see at the very outset is what does that provision say. If the provision is unambiguous and if from that provision, the legislative intent is clear; [the court] need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear*".

1.8 Also, a copy of the case of ***Burren Energy India Ltd. v. Securities and Exchange Board of India***[5]*,* was submitted, wherein the Hon'ble Securities Appellate Tribunal (hereinafter referred to as '**SAT'**) had dismissed an attempt to ascribe a wider meaning to certain clauses of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, on the grounds that "*when the words of a statute are clear, plain or unambiguous and are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences*".

1.9 Further, the BRLMs/ Noticees have also submitted before me a legal opinion dated July 08, 2014 obtained pursuant to the initiation of adjudication proceedings in the matter,

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3 (2006) 6 Supreme Court Cases 336
4 2 (1973) 1 SCC 216
5 Appeal No.132/2006

from the Former Chief Justice of the High Courts of Kerala and Karnataka and a Former Presiding Officer of the Securities Appellate Tribunal, Mr. N.K. Sodhi, which *inter alia* states that minimum capitalization norm was not applicable to the company in respect of the public offer, as investment was made by FIIs under the PIS route through a public offer in terms of Schedule 2, and therefore, the conditions prescribed under the FDI Scheme would not apply.

1.10 I find it pertinent to mention here that under section 32 of the SEBI Act, the provisions of the SEBI Act are in addition to and not in derogation of the provisions of any other laws for the time being in force. RBI vide letter dated September 26, 2012 had exempted non-resident investors from obtaining a NoC from the respective regulators in relation to their participation in the Offer, subject however, to strict adherence to minimum capitalisation norms. And non-resident investors include FIIs and QFIs. Again vide letter dated December 06, 2012, in response to CARE's letter dated October 05, 2012, RBI clarified that the minimum capitalisation norms were applicable to the Offer, even after the Offer was restricted to FIIs investing under the PIS Route, NRIs investing on non-repatriation basis and QFIs. Thus, in the matter under consideration I note that RBI which is the nodal regulatory authority for all matters connected with foreign exchange transactions in India, has after examining the issue given its ruling regarding applicability of minimum capitalization norms to the Offer, even after the BRLMs claimed that the Offer was restricted through the PIS route.

1.11 Further, going ahead I note that the aforesaid ruling of RBI has been accepted by the BRLMs/ Noticees as well as the company/ CARE, which becomes evident from the company's letter dated December 10, 2012 to RBI wherein the company has admitted that after further discussions on the matter, they understood that the minimum capitalization norms must be satisfied in relation to the Offer. Besides, I also note that in view of the same, the company and the BRLMs issued an appropriate addendum bringing out the true facts in the matter on the last day of the Offer to make sure that the foreign investors had proper background as to why the Company was required to comply with minimum capitalisation norms and consequently publish the Addendum. The Prospectus dated December 13, 2012 that was filed with the RoC was also duly updated to include the information set out in the Addendum.

1.12 In the matter, I find that the BRLMs/ Noticees have *inter alia* submitted that notwithstanding the fact that there was no specific stipulation under law requiring the Company to comply with the minimum capitalisation norm since FDI investment was already restricted in the Offer, but, due to lack of any other option at that stage, to conclude the matter, and, considering that the Offer was scheduled to close on December 11, 2012, the Company in consultation with the BRLMs/ Noticees decided to follow the directions of the RBI's mandate in the interest of completing the transaction.

1.13 However, I note that thereafter too, the company has not filed any writ petition before the High Court or any appropriate fora in the matter against RBI's directive vide its letter dated December 06, 2012 regarding applicability of minimum capitalisation norm to the Offer. Nor did the company refer back to RBI for reconsidering its decision. In the matter, I refer to the case of ***Krishnadevi Malchand Kamathia & Ors. V. Bombay Environmental Action Group & Ors. [2011] 3 S.C.R. 291***, wherein the Hon'ble Supreme Court has observed that *"even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason."*

1.14 On the contrary, I note here that the company has complied with the minimum capitalisation norm applicable to non-fund based NBFCs and the same has been confirmed by RBI vide its letter dated July 09, 2014. Thus, I conclude from the above that the company and the BRLMs/ Noticees have accepted the legal requirement regarding applicability of minimum capitalisation norm to the Offer. Hence at this juncture, I cannot usurp the jurisdiction of RBI in the matter and carry out an in-depth analysis of the applicable laws governing the foreign investment framework in India, to re-open an issue already decided by RBI.

1.15 Further, in view of the above, I conclude that such Order of RBI dated September 26, 2012 granting exemption to non-resident investors (which includes FIIs and QFIs) from obtaining NoC from their respective regulators subject *inter alia* to the company complying with minimum capitalization norm, which was further confirmed by RBI vide its Order dated December 06, 2012, cannot be challenged by the BRLMs/ Noticees in a collateral proceeding before me, when RBI is not a party before me. In the matter, I refer to the case of ***M. Meenakshi v. Metadin Agarwal [(2006) 7 SCC 470]*** wherein the Hon'ble Supreme Court held that *"It is a well-settled principle of law that even a void order is required to be set aside by a competent court of law in as much as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non est. An order cannot be declared to be void in a collateral proceeding and that too in the absence of the authorities who were the authors thereof. The orders passed by the authorities were not found to be wholly without jurisdiction. They were not, thus, nullities."*

1.16 In the present matter, I am of the view that the letter dated December 06, 2012 was only a reiteration of the condition regarding applicability of minimum capitalization norm set out by RBI in its letter/ Order dated September 26, 2012. The letter dated September 26, 2012 of RBI referred to non-resident investors which includes FIIs and QFIs. I further find that the BRLMs/ Noticees have accepted the directions issued by RBI under its letter dated December 06, 2012 and issued an addendum accordingly. The company has also complied with the minimum capitalization norm without contesting the same before the appropriate fora. This implies that the condition earlier set out by RBI vide its letter/ order dated September 26, 2012 were valid and applied to the Offer. I, therefore, neither find it necessary nor appropriate to re-examine the issue of applicability of minimum capitalization norm to the Offer, after RBI on examining the matter has taken a view on the same. I shall, thus, go by the view of RBI in the matter regarding the applicability of minimum capitalization norm to the Offer, as is clear from the correspondences placed before me.

1.17 Hence, the limited issue for consideration before me here is subsequent to RBI's specific directive to CARE vide its letter dated September 26, 2012 to ensure strict adherence to the minimum capitalization norms, whether the BRLMs/ Noticees as a part of its due diligence had ensured that the same were strictly adhered to by the company. If, however, the same could not be/ were not adhered to, for whatever reasons, whether appropriate disclosure providing the reasons for non-adherence to the said directive of RBI and the factual status of the same, was disclosed by the BRLMs/ Noticees in the RHP of CARE for the information of foreign investors/ non-resident investors participating in the Offer.

1.18 Thus, I conclude that the case before me is not whether RBI's view in the matter was correct or not, but, whether the disclosures made in the RHP by the BRLMs/ Noticees were factually true and adequate and based on the actual facts at the time of the issue and not based on some undisclosed claimed belief. As has been discussed in the earlier part of this Order, I find that true and adequate disclosure with respect to RBI's letter dated September 26, 2012 and its factual status of compliance becomes particularly relevant, especially in view of the fact that contravention of RBI's directive regarding strict adherence to the minimum capitalization norm by the company was, in turn, resulting into contravention of the RBI's directive by the non-resident investors participating in the Offer, as the exemption provided by RBI vide letter dated September 26, 2012 was meant for them. Further, true and adequate disclosure about the conditionalities attached to the entry norms for participation by foreign investors/ non-resident investors in an Indian company and its status of its compliance is material information from the foreign investors/ non-resident investors point of view.

1.19 In the matter, I note that the BRLMs/ Noticees considered the exemption granted by RBI to non-resident investors participating in the Offer from the requirement of obtaining a NoC from their respective regulators, which is *inter alia* one of the conditions under the FDI Route where an investee company is in the financial sector, material enough to be disclosed in the RHP of CARE. On the other hand, I find that the BRLMs/ Noticees did not consider the condition imposed by RBI regarding applicability of minimum capitalisation norm while granting such exemption, which is the other condition under the FDI route material enough to be disclosed in the RHP. The fact that BRLMs could apply different legal standards to arrive at divergent conclusions with respect to the same issue of applicability of conditionalities linked to the FDI Scheme to the Offer, therefore, appears to be with a purpose to circumvent RBI's directive regarding applicability of minimum capitalization norm to the Offer.

1.20 In the matter, I further find that the BRLMs/ Noticees have submitted that in addition to the independent review of the applicable legal framework and seeking legal advice they had also relied upon the BRLMs/ Noticees collective experience with RBI/ DIPP in the past. It was pointed out that in the past, RBI/ DIPP had granted approvals in public offers (primarily construction development sector) clarifying either that FIIs were permitted to invest subject to conditions set out in Schedule 2 of the FEMA Regulations, and/ or that conditions applicable to investments made under FDI route (including minimum capitalization norms) would not be applicable to FIIs investing under Schedule 2 of the FEMA Regulations. In support of the same, the BRLMs/ Noticees further submitted before me that they had relied upon the following (among others) as precedents to confirm their understanding of RBI's view on the issue:

i. **M/s. National Building Corporation Limited**, which was approved by RBI on September 6, 2011, wherein RBI had clarified that the FDI linked conditions for investments in construction and development sector like capitalization norms would not be applicable to FIIs as FIIs investment in public offers is covered under Schedule 2 of the FEMA Regulations; and

ii. **M/s. DLF Limited**, which was approved by DIPP on April 13, 2006 and by RBI on April 24, 2006. DIPP, in the matter had clarified that purchase of shares of an Indian company by FIIs under the PIS route is governed under Regulation 5(2) of the FEMA Regulations. RBI noted the clarification provided by DIPP and further clarified that relevant regulations (which pertains to conditions applicable to FDI investment in the relevant sector, including minimum capitalization norms) would not be applicable.

1.21 In view of BRLMs claim as aforesaid, vide letter dated April 30, 2014, views of RBI were *inter alia* sought on the aforesaid approvals granted by them vis-à-vis the explanation given by the BRLMs/ Noticees in their reply dated January 31, 2014. Copy of the letter dated April 30, 2014 to RBI and RBI's response dated May 21, 2014 to the same were provided to the BRLMs/ Noticees vide letters Ref: EAD-6/AK/VS/15167/2014, EAD-6/AK/VS/15167/2014/1, EAD-6/AK/VS/15167/2014/2, EAD-6/AK/VS/15167/2014/3, EAD-6/AK/VS/15167/2014/4 and EAD-6/AK/VS/15167/2014/5, each dated May 27, 2014. Further, in the interest of natural justice, inspection of the aforesaid letters and an opportunity of hearing was also provided to the BRLMs/ Noticees on June 23, 2014.

1.22 RBI vide letter dated May 21, 2014 stated that the aforesaid letters in case of M/s. National Building Corporation Limited and M/s. DLF Limited are addressed to specific entities and are not in the form of A.P. (DIR Series) Circulars or Notifications or Press Releases issued under the provisions of FEMA. RBI has *inter alia* further also stated that such letters are issued on a case to case basis based on the special merits of each case and therefore cannot uniformly be made applicable to other cases. RBI, I find, has also clarified that only those communications which are issued by way of A.P. (DIR Series) Circulars or Notifications or Press Releases issued under the provisions of FEMA, which are in public domain, can be made applicable across the board.

1.23 In view of the above, it becomes further evident that even the aforesaid precedents cannot support the BRLMs/ Noticees claim that they proceeded with abundant caution and concluded on the non-applicability of the minimum capitalization norms in a reasoned manner, considering the past precedents wherein a similar distinction was made, to conclude the non-applicability of minimum capitalization norms to investments made by FIIs in the IPO of CARE.

1.24 Further I note that at the material point in time, based on a plain reading of the disclosures made in the RHP of CARE dated November 24, 2012, the BRLMs/ Noticees belief that the minimum capitalization norm was not applicable to the Offer, as has been submitted before me and was brought out in its letter dated October 05, 2012 to RBI, was also not made clear to the non-resident investors (including FIIs and QFIs) participating in the Offer. This is because from the disclosures made in the RHP, I note, that at the material point in time, the RHP on one hand disclosed that other than Eligible FIIs (investing under Schedule 2 of the FEMA Regulations), Eligible NRIs (applying on a non-repatriation basis in accordance with Schedule 4 of the FEMA Regulations) and Eligible QFIs, Non-Residents were not permitted to participate in the Offer. On the other hand, the RHP also disclosed that RBI by letter dated September 26, 2012 had exempted eligible Non-Residents, in their capacity as transferee entities, from the requirement to obtain a NoC from their respective regulators in relation to their participation in the Offer. This is one of the condition governing foreign investments through the FDI route as set out under Schedule 1 of the FEMA Regulations, where the investee company is in the financial sector. The fact that RBI had granted the said exemption subject, however, to strict adherence by the company with the minimum capitalization norm was not disclosed in the RHP. I, thus, note that at the material point in time, based on the plain reading of the disclosures as made in the RHP of CARE, the foreign investors/ non-resident investors participating in the Offer were kept completely in the dark about the applicability of the minimum capitalization norm to the Offer.

From all of the above, I, thus, conclude that disclosures made by the BRLMs in the RHP of CARE with respect to RBI letter dated September 26, 2012 were not true and adequate and not based on actual facts at the time of the Offer, but, in fact misleading from the non-resident investors point of view, and were based on the claimed belief of the BRLMs which was not disclosed in the RHP.

(D) If not, whether BRLMs/ the Noticees suppressed material facts in the RHP of CARE and attempted to mislead the investors into believing that RBI had unconditionally exempted eligible Non-Resident Investors, in their capacity as transferee entities, from the requirement to obtain a NoC from their respective regulators in relation to participating in the Offer?

1. The ICDR Regulations under Regulations 57(1), 57(2)(a)(ii), 64(1) and Clause 1 of Form C of Schedule VI of Regulation 8(2)(b) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with clauses 1, 4, 6, 7 and 20 of Code of Conduct for Merchant Bankers as specified in Schedule III on the manner of disclosures in the offer document has highlighted the fact that the offer document should contain all material disclosures which are true and adequate so as to enable the applicants to take an informed investment decision. Thus, I note that the disclosures in the RHP could not be half true, untrue and/ or misleading.

2. In the extant matter, I find that RBI vide letter dated September 26, 2012 had *inter alia* directed that minimum capitalization norms were required to be strictly adhered to in respect of the Offer. As such, I note that the said fact together with the status of compliance by the company/ CARE was required to be known to non-resident investors before applying in the offer, so that they could have a true understanding of the facts as

they stood, before making an investment in the Offer. This, as has been brought out in the preceding paras, further assumes significance in view of the fact that non-compliance by the company in adhering to the minimum capitalization norm was, in turn, leading to contravention by the non-resident investors, which in turn, made them liable to steep penalties under Section 13(1) of FEMA.

3. In the RHP, I find that the BRLMs, by disclosing only the half-truth with respect to RBI's letter dated September 26, 2012, had misled the non-resident investors into believing that RBI had unconditionally exempted the non-resident investors from obtaining an NOC from the respective regulators in relation with their participation in the offer. The fact that RBI had exempted the non-resident investors from obtaining a NoC from the respective regulators in relation to their participation in the Offer, subject to the company strictly adhering to the minimum capitalization norms as per the FDI Policy and FEMA Regulations, was concealed from the non-resident investors in the RHP.

4. In the matter, I find that the BRLMs/ Noticees have *inter alia* submitted that RBI's letter dated September 26, 2012 was also one of the documents for Inspection in the RHP of CARE dated November 24, 2012 under the head '*Material Contracts and Documents for Inspection'.* Here, it may be pertinent to note that the Anchor Investor Bid/ Offer period, during which Bids by Anchor Investors were to be submitted and allocation to Anchor Investors was to be completed, was one Working Day prior to the Bid/Offer Opening Date. On the contrary as per the RHP, the copies of the Material Contracts and Documents for Inspection could be inspected only at the Registered Office of CARE between 10 a.m. and 5 p.m. on all Working Days from Bid/Offer Opening Date until the Bid/Offer Closing Date. The Bid/ Offer Opening date was December 07, 2014, whereas the Offer opened and closed for Anchor Investors on December 06, 2014, thereby making the right of anchor investors to inspect infructuous.

5. Even otherwise, a non-resident investor cannot be expected to come to the Registered Office of the issuer company to inspect documents before investing in the Offer to hunt for material facts not otherwise disclosed in the RHP. RHP is the primary disclosure document in which all material facts have to be disclosed. An opportunity of inspection of Material Contracts and Documents that is provided to the investors in the RHP is only secondary to the actual disclosure of the material facts in the RHP. And it is the BRLMs

who hold the ultimate responsibility for ensuring that the RHP meets these disclosure standards and carry the primary liability for failure to meet them. The investors cannot be expected to spend time and resources inspecting to unearth material facts concealed by the BRLMs, as each one's efforts will duplicate another's. The investors could, however, if they feel necessary, verify some of the information disclosed in the prospectus and this verification can lend credence to the rest. Thus under no circumstances, providing of an inspection opportunity could substitute for true and adequate disclosure of material facts to be made in RHP. Hence, this argument of the BRLMs that RBI's letter dated September 26, 2012 was one of the documents for Inspection in the RHP too does not hold.

6. Further, I find that the BRLMs have submitted that letter dated October 05, 2012 was filed with RBI as a matter of record and good order, instead of seeking any approval from RBI, only to clarify to RBI regarding the non-applicability of minimum capitalization norm to the Offer in view of restricting of the Offer subsequent to RBI's letter dated September 26, 2012. I also find that the BRLMs/ Noticees considered that the issue with respect to minimum capitalization was closed with RBI after the filing of said letter with RBI. This according to me tantamount to BRLMs unilaterally dictating RBI's verdict on the issue. In the matter, I find that RBI's directive vide letter dated September 26, 2012 to CARE to comply with the minimum capitalization norm while granting exemption to non-resident investors, was in the form of an Order granting exemption. This is because it was binding on CARE to comply with the minimum capitalization norm so that non-resident investors participating in the Offer could be exempted from the applicability of one of the entry norms applicable to the Offer under the FDI route. Hence, the BRLMs/ Noticees and the company in consultation with the legal counsels could not have unilaterally considered such directive given by RBI as closed, by merely filing letter dated October 05, 2012 with RBI clarifying thereto the non-applicability of minimum capitalization norm to the Offer by considering the Offer under the PIS route, due to restricting the category of non-resident investors who could apply in the Offer.

7. I would like to mention here that it is a settled legal proposition that even if an order is void or non-est, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is

void or non-est. And in the given case the competent forum could have been RBI itself which had given the said directive to comply with the minimum capitalization norm while granting exemption to non-resident investors participating in the Offer. Further, I note that RBI vide its letter dated December 06, 2012, after examining CARE's letter dated October 05, 2012 *inter alia* reiterated its earlier directive of applicability of minimum capitalization norm to CARE's Offer for Sale. Thus, I note that though the BRLMs/ Noticees had considered the matter of applicability of minimum capitalization norm to the Offer as closed after the filing of letter dated October 05, 2012 with RBI, RBI which is the nodal regulatory authority for all matters connected with foreign exchange transactions in India, did not consider it to be so, and had once again reiterated the applicability of minimum capitalization norm to CARE's Offer for Sale.

8. On the issue, I would prefer to refer to the matters of ***State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil (dead) & Ors.,*** **AIR 1996 SC 906;** ***Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd. etc,*** **AIR 1997 SC 1240;** ***M. Meenakshi & Ors. v. Metadin Agarwal (dead) by L.Rs. & Ors.*** **(2006) 7 SCC 470; and** ***Sneh Gupta v. Devi Sarup & Ors.,*** **(2009) 6 SCC 194**, wherein the Hon'ble Supreme Court held that whether an order is valid or void, cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum.

9. Further, in the matter of ***State of Punjab & Ors. v. Gurdev Singh, Ashok Kumar,*** **AIR 1991 SC 2219**, the Hon'ble Supreme Court had held that a party aggrieved by the invalidity of an order has to approach the court for relief of declaration that the order against him is inoperative and therefore not binding upon him. While deciding the said case, this Court placed reliance upon the judgment in *Smith v. East Ellore Rural District Council,* [1956] 1 All ER 855 wherein *Lord Radcliffe* observed:- "An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

10. Also in the matter of ***Sultan Sadik v. Sanjay Raj Subba & Ors.,*** **AIR 2004 SC 1377**, the Hon'ble Supreme Court took a similar view observing that once an order is declared *non-est* by the Court only then the judgment of nullity would operate *erga omnes* i.e. for and against everyone concerned. Such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/competence and therefore, it comes to the conclusion that the order suffers from patent and latent invalidity.

11. Thus, from all of the above it emerges that even if the order is void/ voidable, the party aggrieved by the same cannot decide that the said order is void or non-est. It has to approach the competent forum/ court for seeking such declaration. Further, the BRLMs could not have considered that the matter with RBI was closed on the basis of letter dated October 05, 2012 filed by company with RBI, when RBI had specifically vide its letter dated September 26, 2012 advised the company that the minimum capitalization norm should be strictly adhered to while granting exemption to the non-resident investors participating in the Offer. The BRLMs ought to have advised the company to seek clarification from RBI before going ahead with the Offer, especially since the implication of violation of FEMA by the non-resident investors was quite serious.

12. In the present case, I further note that even the factual aspect of filing of October 05, 2012 letter with RBI was not disclosed in the RHP. In the matter, I find that the BRLMs/ Noticees have *inter alia* further submitted that their understanding that the minimum capitalization issue was closed with the RBI after the filing of letter dated October 05, 2012 with RBI was further corroborated by the fact that post filing of the said letter, they did not receive any further instructions from the RBI regarding the applicability of the minimum capitalisation norm to the Offer prior to the date of the issue opening. However during the intervening period, RBI continued to correspond with the Company on other matters relating to the Offer in terms of its letters dated October 18, 2012 and October 25, 2012. It is pertinent to note here that RBI's letters dated October 18, 2012 and October 25, 2012 are in the matters concerning the Selling Shareholders i.e. the transferor entities, whereas, October 05, 2012 letter filed by CARE with RBI was with respect to category of non-resident investors who would be participating in CARE's Offer for Sale as 'transferee entities'. Further, it is difficult to comprehend how the BRLMs/

Noticees could consider that the minimum capitalisation norms issue was closed with RBI due to non-receipt of any reply from RBI during the intervening period, especially when RBI was not even notified about the date of the opening of the Offer.

13. In the matter, the BRLMs/ Noticees have submitted that there is no legal requirement under the ICDR Regulations or market practice to specifically intimate regulators (other than SEBI and the ROC with whom the RHP is required to be filed) of the date of the issue opening. There may not have been any legal binding on the BRLMs/ Noticees to intimate RBI about the issue opening date. However, I consider that it was neither in good practice, nor, in order on the part of the BRLMs/ Noticees to usurp the jurisdiction of RBI to conclude the non-applicability of minimum capitalisation norm to the Offer and treat the issue as closed on their own volition. The BRLMs/ Noticees could have atleast notified RBI about the issue opening date, so that RBI on perusing CARE's October 05, 2012 letter could have clarified its view in the matter before the opening of the Offer. The fact that issue opening date was widely circulated in the public domain cannot go in the favour of the BRLMs/ Noticees, as it did not preclude the BRLMs/ Noticees from specifically notifying RBI of the issue opening date. This issue assumes significance as though the BRLMs after filing of letter dated October 05, 2012 by CARE with RBI had unilaterally assumed that the condition imposed by RBI regarding applicability of minimum capitalization norm to the Offer as closed, RBI on considering CARE's reply dated October 05, 2012 did not view the matter likewise and reiterated its earlier stand regarding applicability of minimum capitalization norm to the Offer.

14. In the matter, I further note that the BRLMs have stated that no investors were aggrieved and no investor complaints were received in relation to the issue by the BRLMs/ Noticees. In addition, it has been submitted that even the price discovered in the book building issue did not move adversely in subsequent trading in the scrip upon listing. However, at the same time, it also becomes pertinent to mention here that if RBI vide its letter dated December 10, 2012 had not permitted six months time to CARE to comply with the minimum capitalization norm and further extended the same upto September 30, 2013, FIIs who participated in the Offer would have become liable to steep penalties under Section 13(1) of FEMA.

15. The BRLMs in their submissions have further emphasized that the filing of the Addendum was not an aberration or an anomaly, as the ICDR Regulations themselves contemplate and allow for the publication of advertisements, in the event there are material developments post filing of the RHP that are required to be disseminated to the investors. In support of the same, the BRLMs have brought out instances in the past of Coal India Limited, VA Tech Wabag Limited, Kolte-Patil Developers Limited and Aster Silicates Limited where due to the nature of the material development (post filing of the red herring prospectus) being grave, in accordance with SEBI's directions, the issuer companies and the BRLMs had extended the bid/issue period and were required to provide an option to all the applicants who submitted their bids in the issue to withdraw their applications. The BRLMs/ Noticees have submitted that no such directions, similar to the aforementioned instances, were issued by SEBI in the present case, which further demonstrates the fact that the minimum capitalisation related disclosures filed as part of the Addendum, would not, and, did not jeopardise the offer process or affect the interest of the investors participating in the Offer.

16. I find it important to mention here that unlike the instances pointed out by the BRLMs/ Noticees above, in the given case, the development was not post issue. This is because though RBI vide letter dated December 06, 2012 i.e. on the day the issue opened and closed for subscription by anchor investors, had after examining CARE's letter dated October 05, 2012 clarified that FIIs and QFIs can acquire shares under the proposed Offer for Sale provided *inter alia* that minimum capitalization norms are adhered to, it had only reiterated its earlier advise given vide letter dated September 26, 2012 in the matter, *inter alia* regarding the applicability of minimum capitalization norm to the Offer. And non-resident investors include FIIs and QFIs. Hence the BRLMs argument that September 26, 2012 letter of RBI was in respect of FDI investors too does not hold.

17. I, thus, note that in the extant case the grave situation was created due to suppression of material facts in the RHP of CARE with respect to RBI's letter dated September 26, 2012 and the status of its compliance and not because of any material development post filing of RHP. The material facts that were not disclosed and why the same constitutes suppression is brought out below:

A. RBI letter dated September 26, 2012:

(i) ***What was disclosed***:

RHP disclosed that RBI by letter dated September 26, 2012 exempted eligible Non-Residents, in their capacity as transferee entities, from the requirement to obtain a NoC from their respective regulators in relation to their participation;

(ii) ***What was not disclosed:***

RHP concealed the condition regarding applicability of minimum capitalization norm to the Offer which RBI had imposed while agreeing to exempt non-resident investors from obtaining NOCs from their respective regulators in relation to their participation;

(iii) Why the non-disclosure constitutes suppression:

The non-disclosure constitutes suppression since:

- ✓ the entry norms for participation by foreign investors/ non-resident investors in an Indian company is material information from the foreign investors/ non-resident investors point of view;
- ✓ For an investee company in the financial sector, RBI vide circular dated November 04, 2011 had allowed transfer of shares from Resident to Non Resident under the FDI route without the prior approval of RBI provided *inter alia* that –
    - the transferee entities obtain NoCs from their respective regulators in relation to their participation; and
    - the company complies with the minimum capitalization norms as per the FDI policy and FEMA regulations;
- ✓ Thus, what was disclosed in the RHP and what was not disclosed in the RHP - both constituted conditions under the FDI route for transfer of shares from Resident to Non-Resident;
- ✓ Since the BRLMs disclosed exemption obtained from RBI in respect of one of the conditions under the FDI route as a material disclosure in the RHP, it becomes clear that the BRLMs were within knowledge of the fact that the Offer was under the FDI route. Thus, non-disclosure of the other condition under the FDI route and status of compliance of the same, despite RBI specifically directing the same vide its letter dated September 26, 2012 while granting exemption to

the non-resident investors, tantamount to suppression of material facts in the RHP.

B. Filing of letter dated October 05, 2012 by CARE with RBI:

(i) What were the contents of the said letter?

The following were *inter alia* the contents of letter dated October 05, 2012 filed by CARE with RBI:

✓ The company/ CARE vide letter dated October 05, 2012, in response to RBI's letter dated September 26, 2012 as aforesaid, *inter alia* informed RBI that:

- That the company was proposing to offer equity shares in the offer only to the following category of investors:
  - Residential investors;
  - FIIs and sub-accounts registered with SEBI and investing in the Offer under the PIS route in accordance with Regulation 5(2) and Schedule 2 of FEMA Regulations, as amended *(Eligible FIIs),*
  - NRIs investing in the offer on non-repatriation basis under Regulation 5(3)(ii) and Schedule 4 of FEMA Regulations*(Eligible NRIs),*;
  - QFIs investing in the Offer in accordance with the provisions of the Master Circular on Foreign Investments in India dated July 02, 2012 issued by RBI *(Eligible QFIs);*
- That accordingly investments by Eligible FIIs, Eligible NRIs and Eligible QFIs will not be foreign direct investment (FDI) under Regulation 5(1) read with Schedule 1 of the FEMA Regulations and that the conditions applicable for foreign direct investments (FDI), including the minimum capitalisation norms prescribed in the Consolidated FDI Policy and the Master Circular on Foreign Investments in respect of NBFCs engaged in non-fund based activities, shall not be applicable to the company in respect of the Offer;

(ii) ***Whether the said letter was disclosed in the RHP?***

Neither the contents of the said letter, nor, any reference to the same was made in the RHP;

(iii) ***Why the non-disclosure constitutes suppression?***

The non-disclosure constitutes suppression since:

- ✓ The BRLMs presumed that the issue of applicability of minimum capitalization norm to the Offer was closed with the filing of the said letter dated October 05, 2012 in consultation with the company and the legal counsels. That despite unilaterally taking the said view on a material issue involving entry norm with respect to participation by foreign investors/ non-resident investors in an Indian company, at the material point in time based on a plain reading of the disclosures made in the RHP, it is observed that the said belief was not made clear to the non-resident investors (including FIIs and QFIs) participating in the Offer;
- ✓ The non-disclosure of filing of letter dated October 05, 2012 with RBI in the RHP tantamount to suppression of material facts, as the BRLMs put the FIIs at a great risk, since the FIIs participating in the Offer (*BRLMs have informed that there was no subscription received from QFIs)* were left completely in the dark about the chain of events that preceded the issue of letter dated December 06, 2012 by RBI;
- ✓ The same assumes significance since clause 12(j) under Part A of Schedule XI of ICDR Regulations as amended w.e.f. October 12, 2012 prohibits withdrawal or lowering of the size of the bids by qualified institutional buyers and non-institutional investors at any stage, thus, rendering even the addendum issued on December 11, 2012 infructuous in respect of FIIs who participated in the Offer before the said date;
- ✓ In fact, if RBI had not permitted six months time to CARE for complying with the minimum capitalisation norm vide its letter dated December 10, 2012 i.e. just a day prior to the closure of the Offer, FIIs who had invested in the Offer prior to December 11, 2012 would have ended up contravening FEMA, the implications of which were quite serious.

18. Further from all of the above I note that it was not as if the BRLMs/ Noticees were not aware of the applicability of the minimum capitalisation norm to the Offer, when exemption from applicability of one of the conditions under the FDI route as per RBI's circular A.P. (DIR Series) No. 43 dated November 04, 2011was sought by CARE from RBI vide its letters dated May 15, 2012 and August 31, 2012. Hence, the act of the BRLMs/ Noticees to restrict the non-resident investors who could participate in the Offer and unilaterally conclude the non-applicability of minimum capitalisation norm to the Offer as a result thereof, only after the receipt of RBI's letter dated September 26, 2012 advising strict adherence to the same and not before, appears to be with a purpose to

circumvent RBI's directive regarding applicability of minimum capitalization norm to the Offer.

From all of the above, it becomes noticeably clear that the BRLMs suppressed material fact in the RHP regarding applicability of minimum capitalization norms to the Offer and its status which was directed by RBI vide its letter dated September 26, 2012 while granting exemption to the non-resident investors participating in the Offer. The BRLMs thereby attempted to mislead the non-resident investors into believing that minimum capitalization norms were not applicable to the offer and that RBI had unconditionally exempted eligible Non-Residents, in their capacity as transferee entities, from the requirement to obtain a NoC from their respective regulators in relation to their participating in the Offer.

(E) If so, did the BRLMs/ Noticees failed to exercise proper due-diligence on their part in violation of Clause 1 of Form C of Schedule VI of Regulation 8(2)(b), Regulation 57 (1), 57(2)(a)(ii) and Regulation 64(1) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with clauses 1, 4, 6, 7 and 20 of Code of Conduct for Merchant Bankers as specified in Schedule III

1. I find that the BRLMs vide their letter dated August 14, 2014 have submitted that 'due diligence' has not been defined in the Merchant Bankers Regulations or in the ICDR Regulations. The BRLMs have further stated that the law does not impose an obligation to meet with extraordinary or 'detective' standards. Also that they exercised due diligence, ensured proper care and exercised independent professional judgement *inter alia* in view of the following:

a. *That the conduct of the BRLMs was based on a careful consideration of the legal framework which was applicable to the Offer, and on a plain reading of the applicable law, the BRLMs had no reason to believe that minimum capitalisation norm, which is essentially a conditionality linked to investments under the FDI Route, could also extend to the Eligible Foreign Investors;*

b. *That the BRLMs corroborated their understanding with advice from legal counsel and their collective past experience, but, did not merely rely on the Past Precedents to arrive at their conclusions;*

c. That the BRLMs satisfied themselves about all the aspects of the Offer including the veracity and adequacy of disclosures in all offer documents and specifically, took all steps to ensure that the RHP and the Prospectus contained all material disclosures;

d. That the September letter of RBI made no mention of the applicability of minimum capitalisation norms to investors other than FDI investors, and was in any event, adequately disclosed in the RHP and also available for public inspection, while the October Letter was filed by CARE with the RBI only for the sake of completeness and good order and did not require disclosure, not being a governmental approval or application for approval;

e. That pursuant to the October Letter, the DRHP was adequately revised to restrict FDI investors from applying in the Offer;

f. That true and adequate disclosures were made to the investors prior to closure of the Offer to enable them to take an informed investment decision;

g. That RBI, for the first time, set out their intention that the minimum capitalisation norms are applicable, specifically with respect to investments by FIIs and QFIs as well, only in the December Letter;

h. That upon receipt of the December Letter, which was considered as a material development post filing of the RHP with the RoC, the Noticees acted in a prompt manner to ensure that adequate disclosures were brought to the notice of investors by way of an Addendum published in newspapers prior to closure of the Offer;

i. That the Addendum was published in newspapers with wide circulation prior to closure of the Offer in order to provide the investors with sufficient information in relation to the developments since filing of the RHP;

j. That filing of the Addendum was not an aberration or an anomaly, as the ICDR Regulations themselves contemplate and allow for the publication of advertisements in the event there are material developments post filing of the RHP that are required to be disseminated to the investors;

k. That the conduct of the Noticees in no manner caused any loss to the investors, rather, the condition of imposition of minimum capitalisation norms was accepted by the Company and the BRLMs in the interest of the investors and in the interest of completing the transaction;

l. That there were in fact no investor grievances received by the BRLMs in relation to the Addendum pursuant to publication of the same;

m. That the price discovered in the book building issue did not move adversely in subsequent trading in the scrip upon listing;

n. That although the BRLMs took note of the observations set out in the RBI Letter with all due respect, the same cannot be relied upon to draw any adverse inference on the BRLMs conduct in terms of the due diligence undertaken by them, the exercise of their independent professional judgment and the adequacy of disclosure that they have ensured in relation to the Offer; and

o. That RBI has confirmed compliance by the Company of the minimum capitalisation norms.

2. I note that the BRLMs have submitted that 'due diligence' has not been defined in the Merchant Bankers Regulations or the ICDR Regulations. Also that the law does not impose an obligation to meet with extraordinary or 'detective' standards. In the matter, the ALRs have referred the case of ***Imperial Corporate Finance and Services Pvt Ltd v. SEBI,*** [6] whereby the Hon'ble SAT had held that "*it can be safely said that lack of due diligence should run from the facts of each case and ultimately there can be no hard and fast rule as to what constitutes lack of due diligence*" and "*before any person is found to have violated the concept of "due diligence" there must be an enquiry and the findings must be sustained by higher degree of proof than required in a civil suit, yet falling short of proof required to sustain a conviction in a criminal prosecution.*" The ALRs on behalf of the BRLMs/ Noticees have *inter alia* submitted that given the developments with respect to RBI's letter dated December 06, 2012 were inconsistent with the plain reading of the law as well as the past collective experience of the BRLMs/ Noticees, the BRLMs/ Noticees cannot be held liable for lack of due diligence and proper care on account of not anticipating regulatory directives which were unexpected.

3. In the matter, I find that the determination of whether the BRLMs were duly diligent or not does not involve any complex definition or criteria, but, is based on a simple fact as to whether the BRLMs took 'all reasonable steps', which must be considered in the specific context of the 'particular issue' which comprised the contravention in question, and not in the context of a broader duty of care. The standard to be applied is what a reasonable Merchant Banker in the particular circumstances of the particular case

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would have done and will largely be governed by the Code of Conduct as specified in Schedule III Regulation 13 of Merchant Banker Regulations read with the following clauses*:*

Clause 1 - A merchant banker shall make all efforts to protect the interests of investors.

Clause 4 - A merchant banker shall at all times exercise due diligence, ensure proper care and exercise independent professional judgment.

Clause 6 - A merchant banker shall ensure that adequate disclosures are made to the investors in a timely manner in accordance with the applicable regulations and guidelines so as to enable them to make a balanced and informed decision.

Clause 7 - A merchant banker shall endeavour to ensure that the investors are provided with true and adequate information without making any misleading or exaggerated claims or any misrepresentation and are made aware of the attendant risks before taking any investment decision.

Clause 20 - A merchant banker shall not make untrue statement or suppress any material fact in any documents, reports or information furnished to the Board.

4. I, thus, consider that the test for due diligence as twofold:
    a. Firstly, whether the issue was reasonably foreseeable; and
    b. If so, did the BRLMs take all reasonable care by taking all reasonable steps to ensure that the contravention did not occur?

5. With this in place, it is essential to first determine whether the contravention was reasonably foreseeable. I find that RBI vide letter dated September 26, 2012, while exempting Non Resident Investors participating in the Offer from the requirement of obtaining a NoC from their respective regulators had *inter alia* incorporated the condition that minimum capitalization norms applicable to NBFCs should be strictly adhered to. I, however, note that the BRLMs/ Noticees have submitted that the said September letter of RBI made no mention of the applicability of minimum capitalisation norms to investors other than FDI investors. Also that RBI for the first time set out its intention regarding the applicability of minimum capitalisation norm specifically with respect to investments by FIIs and QFIs, only in its letter dated December 06, 2012. I note from a perusal of RBI's letter dated September 26, 2012 that such directive of strict adherence to minimum capitalization norm was not meant for FDI investors alone. RBI

had given the said directive, while issuing its Order/ letter granting exemption to non-resident investors from obtaining NoC from their respective regulators, as sought for by CARE. And non-resident Investors includes FIIs and QFIs. Even RBI vide A.P. (Dir Series) Circular No. 8 dated August 09, 2011 has defined QFI to mean Non-Resident Investors (other than SEBI registered FIIs and SEBI registered FVCIs) who meet the KYC requirements of SEBI.

6. Besides, even otherwise, it is reiterated that the BRLMs/ Noticees could not have believed the Offer to be under the PIS route, when they had themselves considered the exemption granted by RBI vide letter dated September 26, 2012, which was one of the conditions under the FDI route in case where an investee company is in the financial sector, material enough to be disclosed in the RHP under the section on '*Government and Other Approvals*'at page 228 of the RHP.

7. Further, it has been submitted before me that the BRLMs/ Noticees and their Legal Counsel believed that based on the applicable legal framework, the minimum capitalization norm was not applicable to the Offer, and accordingly, CARE had filed letter dated October 05, 2012 with RBI as a matter of good order. However, I note that at the material point in time, based on a plain reading of the disclosures made in the RHP, the same was not made clear to the non-resident investors (including FIIs and QFIs) participating in the Offer. On the contrary, I find that the BRLMs/ Noticees considered one of the conditions under the FDI route, in respect of which RBI had granted exemption to non-resident investors participating in the offer, material enough to be disclosed in the RHP. Thus, I note that the issue which resulted in the BRLMs/ Noticees contravening the relevant provisions of ICDR Regulations was clearly within the knowledge of the BRLMs/ Noticees and reasonably foreseeable.

8. In which case, the next question that arises is did the BRLMs take all reasonable care by taking all reasonable steps as specified in the Code of Conduct under Schedule III Regulation 13 of Merchant Bankers Regulations specifically read with clauses (1), (4), (6), (7) and (20), just as a reasonable Merchant Banker in the particular circumstances of the particular case would have done, to prevent the reasonably foreseeable problem from occurring.

9. In the matter, under the facts and circumstances of the case, I find, any prudent Merchant Banker would have sought clarification from RBI before going ahead with the issue, especially since consequence of contravention of FEMA by the non-resident investors are quiet serious. In the matter, I note that the Hon'ble Supreme Court in the matter of ***Chander Kanta Bansal vs. Rajinder Singh Anand*** **[*(2008) 5 SCC 117*]** has discussed the concept of *'due diligence'* and observed that due diligence meant '*reasonable diligence; …. such diligence as a prudent man would exercise in the conduct of his own affairs.'*

10. In the extant case, I note that the BRLMs/ Noticees disclosed in the RHP the material fact regarding exemption granted by RBI from the applicability of one of the conditions under the FDI route, but, suppressed the other material fact regarding applicability of the other condition under the FDI route, despite RBI's specific directive regarding strict adherence with the same while granting such exemption vide its letter dated September 26, 2012. This, in turn, resulted in the grave situation that occurred when RBI vide letter dated December 06, 2012, in response to company's letter dated October 05, 2012, once again reiterated that the non-resident investors viz. FIIs and QFIs can acquire shares under the proposed Offer *inter alia* subject to the condition that minimum capitalisation norms are adhered to. It has been brought out by the BRLMs/ Noticees before me that FIIs cannot participate through the FDI route and the PIS route simultaneously. Since CARE had sought exemption from RBI from applicability of one of the conditions under the FDI route, and, had considered the same material enough to disclose such exemption granted by RBI in the RHP, the question of allowing FIIs to simultaneously invest through the PIS route did not arise. Thus, I conclude that the BRLMs/ Noticees knowingly kept the non-resident investors (including FIIs and QFIs) in the dark about the condition regarding strict adherence to the minimum capitalization norm to the Offer imposed by RBI vide its letter dated September 26, 2012 while granting exemption to non-resident investors participating in the Offer.

11. I further note that the ALRs during the hearing on August 05, 2014 submitted copies of press releases (ranging from 2010 to 2014) published by the RBI on its website, to confirm that FIIs are permitted to invest through the primary market and on stock

exchanges as a part of the PIS Route. Subsequently vide its Record of Submission of the Second hearing held on August 05, 2014, the ALRs have further submitted that the RBI vide its press release dated February 5, 2010 on *'Investment by FIIs under PIS: M/s. Sobha Developers Limited'* in relation to enhancing FII investment limit has declared that, *"Foreign Institutional Investors can now purchase under the Portfolio Investment Scheme through primary market and stock exchanges, equity shares of M/s. Sobha Developers Limited …….".* Similarly, that the press release dated May 24, 2012 on *'Investment by FIIs under PIS: M/s. Housing Development Finance Corporation Limited'* referred to a board resolution passed to enhance the limit for *"purchase of its equity shares and convertible debentures by Foreign Institutional Investors (FIIs), through primary market and stock exchanges, under the Portfolio Investment Scheme up to 100 per cent of its paid up capital."*

12. I once again reiterate here that CARE, in the matter, has not filed any writ petition before the High Court or any appropriate fora against RBI's directive regarding applicability of minimum capitalisation norm to the Offer. Nor has it referred back to RBI for reconsidering its decision given vide its letter dated December 06, 2012 in response to CARE's letter dated October 05, 2012. On the contrary, I find that RBI vide its letter dated July 09, 2014 has confirmed that the minimum capitalisation norms applicable to non-fund based NBFCs has been complied with by CARE. Hence, the submission of the aforesaid press releases by the BRLMs/ Noticees at the time of second hearing held on August 05, 2014 in support of its belief that FIIs were permitted to invest through the primary market and on stock exchanges as a part of the PIS Route becomes infructuous.

13. Thus, on facts, I note that there was a clear lack of diligence on the part of the BRLMs, which appears rather deliberate, since even presuming that the understanding held by the BRLMs was correct based on the applicable legal framework at the time in force, then too, the BRLMs could never have dissected RBI's letter dated September 26, 2012 providing exemption from the applicability of one of the conditions applicable to NBFCs under the FDI route and strict adherence to the other, by disclosing one as material and suppressing the other.

14. I note here that the BRLMs have *inter alia* submitted that In the ***SEBI order dated April 17, 2009 issued in the adjudication proceedings against SBI Capital Markets Limited (in the public issue of Syndicate Bank Ltd.)*** it has been stated that *"the violation of the substantive law is not established, the allegations of violation of the provisions of the Code of Conduct prescribed under the SEBI (Merchant Bankers) Regulations, 1992 is not sustainable".* However, in the present case it stands established that the BRLMs suppressed material fact in the RHP of CARE regarding the applicability of minimum capitalization norms to the Offer and its status. The BRLMs thereby attempted to mislead the non-resident investors into believing that minimum capitalization norms were not applicable to the offer and that RBI had unconditionally exempted eligible Non-Residents, in their capacity as transferee entities, from the requirement to obtain a NoC from their respective regulators in relation to participating in the Offer. Hence, I note that the aforesaid Order of the Adjudicating Officer referred by the BRLMs does not support BRLMs case in the extant matter.

Thus, from all of the above, I conclude that the BRLMs/ Noticees did not take reasonable steps to avoid the particular issue from occurring. On the contrary, I find that the BRLMs/ Noticees applied different legal standards to arrive at divergent conclusions with respect to the same issue regarding applicability of conditions linked to the FDI Scheme to the Offer, and ended up making untrue statements and suppressing material facts in the RHP of CARE with respect to RBI's letter dated September 26, 2012. In view of all of the above, I conclude that BRLMs/ the Noticees failed to exercise proper due-diligence on their part in violation of Clause 1 of Form C of Schedule VI of Regulation 8(2)(b) of SEBI ICDR Regulations, Regulation 57(1), 57(2)(a)(ii), 64(1) of SEBI ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with the clauses 1,4,6,7 and 20, and kept the non-resident investors participating in the Offer in the dark about the factual aspect regarding the entry norms applicable to them.

(F) Does the violation, if any, on the part of the BRLMs/ the Noticees attract monetary penalty under Section 15HB of the SEBI Act? If so, what would be the monetary penalty under Section 15HB of SEBI Act against the BRLMs/ Noticees taking into consideration the factors mentioned in Section 15J of the SEBI Act?

1. The Hon'ble Supreme Court of India in the matter of ***SEBI Vs. Shri Ram Mutual Fund* [2006] 68 SCL 216(SC)** held that "In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant…".

2. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under Section 15HB of the SEBI Act which reads as follows:

   <u>Penalty for contravention where no separate penalty has been provided</u>

   15HB. *Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees.*

3. While determining the quantum of monetary penalty under Section 15HB, I have considered the factors stipulated in Section 15-J of SEBI Act, which reads as under:-

   15J - Factors to be taken into account by the adjudicating officer

   While adjudging quantum of penalty under Section 15-I, the adjudicating officer shall have due regard to the following factors, namely:

   (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

   (b) the amount of loss caused to an investor or group of investors as a result of the default;

   (c) the repetitive nature of the default.

4. In view of the charges as established, the facts and circumstances of the case and the judgments referred to and mentioned hereinabove, the quantum of penalty would depend on the factors referred in Section 15-J of SEBI Act and stated as above. As per Section 15 HB of the SEBI Act, whoever fails to comply with any provision of the Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees. Further, under Section 15-J of the SEBI Act, the adjudicating officer

has to give due regard to certain factors which have been stated as above while adjudging the quantum of penalty.

5. I have taken note of the submissions made by the ALRs on behalf of the BRLMs in the matter that no loss was caused to the investors. Further that no investor grievances were received by the BRLMs in relation to the Addendum pursuant to publication of the same. Also that the price discovered in the book building issue did not move adversely in subsequent trading in the scrip upon listing.

6. However, at the same time, I note that irrespective of whether any actual loss was caused to FIIs who participated in the Offer or not *(ALRs have confirmed that QFIs did not participate in the Offer)*, if RBI had not permitted six months time to CARE to comply with the minimum capitalization norm of US$0.5 million and further extended the same upto September 30, 2013, FIIs who participated in CARE's Offer for Sale would have become liable to steep penalties under Section 13(1) of FEMA, due to the inadequate disclosure in the RHP by the BRLMs/ Noticees with respect to the conditional exemption granted by RBI vide its letter/ Order dated September 26, 2012.

7. I note from records that each of the six BRLMs/ Noticees, who have signed the due diligence certificate in the present case, have been issued administrative warnings/ deficiency letters by SEBI on one or more occasions during the last five years advising to be careful and/ or diligent in future and/ or not to repeat the irregularities observed in respect of disclosures/ to improve their compliance standards etc., pursuant to inspection of their books and records or otherwise as below:

- M/s. Kotak Mahindra Capital Company Limited was advised vide SEBI's letter dated May 23, 2011 to be careful in future and improve the compliance standards pursuant to inspection conducted in October 2010.
- M/s. DSP Merrill Lynch Limited with respect to the disclosures made in the RHP of IPO of Mundra Port and Special Economic Zone Ltd. (Mundra Port) was advised vide SEBI's letter dated January 13, 2010 to be careful and diligent in future and to ensure that the disclosures made in the Offer document are true and fair and reflect the factual position accurately.

- M/s. Edelweiss Financial Services Limited vide SEBI's letter dated November 20, 2012 pursuant to inspection conducted during June 2012 was issued an administrative warning *inter alia* advising to be careful in future and to improve compliance standards. Subsequent to the same, again vide SEBI's letter dated August 12, 2013, M/s. Edelweiss Financial Services Limited was issued a deficiency letter pursuant to inspection of their books and records conducted in September 2012, wherein they were *inter alia* advised not to repeat in future the irregularities observed, which *inter alia* included non-disclosure of material information in terms of SEBI circular no. CIR/ MIRSD/ 1/2012 dated January 10, 2012.

- M/s. ICICI Securities Limited was one of the BRLMs who vide SEBI's letter dated April 19, 2010 in the matter of IPO of Parabolic Drugs Ltd. was advised to be careful and diligent in future since certain information with respect to the said proposed IPO was either not disclosed or not accurately disclosed in the DRHP filed with SEBI. I also note that M/s. ICICI Securities Limited was again one of the BRLMs, whereby SEBI vide its letter dated June 24, 2010 in the matter of IPO of Parabolic Drugs Ltd. expressed its strong displeasure at the laxity on the part of the Merchant Bankers in not exercising the required level of diligence. Subsequently again vide SEBI's letter dated May 10, 2011, I note that warning letter was issued to M/s. ICICI Securities Limited in the matter of Rights Issue of M/s. Adani Enterprises Ltd. advising to exercise due diligence and to ensure proper care in future since there was a delay of five months in complying to SEBI's observation regarding appointment of independent director by the issuer company within six months of the date of final observation letter. Also vide letter dated November 25, 2011, pursuant to inspection conducted during March 2011, M/s. ICICI Securities Limited was again *inter alia* advised to be careful in future and improve compliance standards.
- M/s. IDBI Capital Market Services Limited vide SEBI's letter dated January 10, 2013 pursuant to inspection conducted during May 2012 was issued an administrative warning *inter alia* advising to be careful in future and to improve compliance standards.
- M/s. SBI Capital Market Services Limited in the RHP of IPO of Mundra Port and Special Economic Zone Ltd. (Mundra Port) was advised vide SEBI's letter dated January 13, 2010 to be careful and diligent in future and to ensure that the disclosures made in the Offer document are true and fair and reflect the factual position accurately. Again vide SEBI's

letter dated November 25, 2011, M/s. SBI Capital Market Services Limited was advised to be careful in future and to avoid recurrence of instances brought out during inspection conducted in September–October 2010, which *inter alia* included allotments made to SEBI prohibited persons. Once again vide SEBI's letter dated July 15, 2013, a deficiency letter was issued to M/s. SBI Capital Market Services Limited advising not to repeat the irregularities observed in future pursuant to inspection conducted in September 2012.

8. In the extant case, I note that the CARE's Offer for Sale was of 71,99,700 equity shares of face value of Rs. 10/- each for Sale by the selling shareholders at an issue price of Rs. 750/- per share. The QIB portion of the Offer (including the Anchor Investor Portion) was 35,99,850 equity shares (not more than 50% of the Offer). Upto 30% of the QIB portion i.e. 10,79,955 shares were to be allocated to the Anchor Investors on a discretionary basis by the company and the Selling Shareholders in consultation with the BRLMs.

9. The ALRs vide letter dated September 24, 2014, in reply to information sought vide email dated September 12, 2014, have clarified that a total of 12 investors applied under the anchor investor category and they were allocated a total of 10,79,954 shares at Rs. 750/- per share. The shares were allocated to the anchor investors on December 06, 2012 itself. Subsequently the Board of Directors of the company at its meeting held on December 21, 2012 approved allotment of equity shares to successful applicants, including anchor investors. ALRs have stated that there were a total of 5 FIIs who applied under the anchor investor category and were allocated 5,86,620 shares in the anchor investor portion. Thus, I note that these 5 FIIs who had invested approx. Rs. 43.99 crore in the CARE's Offer for Sale on December 06, 2012 and were allocated shares in the anchor investor portion on the same date could not have availed the benefit of the addendum issued on December 11, 2012.

10. Besides, on perusal of letters dated September 24, 2014 and October 13. 2014 submitted by the ALRs in response to information sought vide email dated September 12, 2014, I also note that 10 FIIs who had applied for 72,45,620 shares on December 10, 2012, were allocated 1,59,101 shares on December 21, 2012. I further find that clause

12(j) under Part A of Schedule XI of ICDR Regulations, as amended w.e.f. October 12, 2012, prohibits withdrawal or lowering of the size of the bids by qualified institutional buyers and non-institutional investors at any stage. Thus, I note that these 10 FIIs too could not have availed the benefit of the addendum issued on December 11, 2012.

11. Thus, I note that in the extant case a total of 15 FIIs who were allocated a total of 7,45,721 shares of CARE (i.e. approx. 10% of the Offer) and who had invested approx. Rs.55 crore in the Offer were kept in the dark by the BRLMs/ Noticees about the condition regarding strict adherence to minimum capitalization norm imposed by RBI while granting exemption to them vide letter dated September 26, 2012 from obtaining a NoC from their respective regulators in relation to their participation in the Offer. If RBI would not have permitted six months time to CARE to comply with the minimum capitalization norms of US$0.5 million applicable to non-fund based NBFCs and further granted extension upto September 30, 2013 to CARE to comply, it would have resulted in rejection of these FII applications, which in turn, would have created confusion in the market and also vitiated the market sentiments.

12. In the context, I find it pertinent to mention here that a statement in the prospectus need not always be false in order to be misleading. Facts may be artfully stated so as to accomplish the same. In the given case, I find that the BRLMs/ Noticees totally distorted the significance of the material fact that was disclosed in the RHP by dissecting RBI's letter dated September 26, 2012 providing exemption from the applicability of one of the conditions applicable to NBFCs under the FDI route and strict adherence to the other, by disclosing one as material and suppressing the other. Further, on a plain reading of the disclosures made in the RHP, I note that the BRLMs/ Noticees belief regarding non-applicability of minimum capitalization norm to the Offer due to restricting of the Offer to non-resident investors participating under the PIS route was not made clear to the non-resident investors (including FIIs and QFIs) participating in the Offer.

13. Also, I find that the company did not file any writ petition before the High Court or any appropriate fora in the matter against RBI's directive vide its letter dated December 06, 2012 reiterating its earlier stand of applicability of minimum capitalisation norm to the Offer as communicated vide letter dated September 26, 2012. Nor was the matter

referred back to RBI for reconsidering its decision, despite the BRLMs/ Noticees claim regarding non-applicability of minimum capitalisation norm to the Offer due to the issue being restricted to PIS route. On the contrary, I note that the company duly complied with the minimum capitalisation norms as applicable to non-fund based NBFCs and the same has been confirmed by RBI vide its letter dated July 09, 2014.

14. In the matter, I find that it has been submitted before me that in terms of the extant framework within which RBI operates, there is no recognised mechanism that is currently available to appeal from a direction given by RBI (such as one rendered in the present case) or for seeking a review. However, I note that the High Courts are empowered under article 226 of the Constitution to issue a writ for enforcement of any legal right and also grant a stay in such matter, if required. Further, in the extant case, I find that subsequent to company's letter dated December 07, 2012 to RBI, in response to RBI's letter dated December 06, 2012 reiterating its earlier directive regarding applicability to minimum capitalisation norm to the Offer, further discussions were held with RBI on the subject matter, after which the company did accept the legal requirement that minimum capitalisation norm was applicable to the Offer and complied with the same.

15. Hence, I conclude that the letter/ order dated December 06, 2012 issued by RBI after taking into consideration the company's reply dated October 05, 2012 to its letter/ Order dated September 26, 2012 regarding applicability of minimum capitalization norm to CARE's Offer for Sale, cannot be challenged by the BRLMs/ Noticees in a collateral proceeding before me, and that too in the absence of RBI as a party before me, who, in the first place, has given such a directive after examining the view of the company in the matter.

16. I find that true and adequate disclosure with respect to condition imposed by RBI concerning entry norms for participation by non-resident investors (which includes FIIs and QFIs) in an Indian company was a material disclosure in the RHP. The argument of the BRLMs/ Noticees, I find is that since investments under the FDI Route were not permitted to be made in the Offer, hence, based on the applicable legal framework there was no reason why the FDI conditions including that in relation to minimum

capitalisation norms would apply. This, however, stands nullified by the fact that the BRLMs/ Noticees simultaneously considered the exemption granted by RBI regarding applicability of the other condition applicable under the FDI route, as a key approval, and disclosed the same as material disclosure in the RHP of CARE. However, while making such material disclosure in the RHP, the BRLMs/ Noticees suppressed the condition regarding strict adherence to minimum capitalization norm by CARE subject to which RBI, in the first place, had given such an exemption to the non-resident investors participating in the Offer.

17. Thus, when the whole issue is seen in its entirety, it is proved that the BRLMs/ Noticees have concealed and suppressed material facts in the RHP of CARE, by making partial and fragmentary disclosure of a material fact regarding conditional exemption granted by RBI to the non-resident investors participating in the IPO of CARE, thereby keeping the non-resident investors in the dark about vital information regarding applicability of minimum capitalization norms to CARE's Offer for Sale. And, it is the BRLMs who certify the veracity and adequacy of all disclosures and are responsible for protecting the interest of the investors by bringing out all relevant facts and by ensuring that no material information/fact is suppressed. It may be pertinent here to note the observations of the Hon'ble SAT in the matter of ***HSBC Securities and Capital Markets (India) Pvt. Ltd. vs. SEBI, Hon'ble SAT Appeal No. 99 of 2007***, wherein it held that *"ensuring the truth and correctness of the letter of offer is a fundamental responsibility of the merchant banker which he has to discharge by exercising due diligence."* Though the BRLMs/ Noticees have contended that RBI's letter dated September 26, 2012 was also one of the documents for Inspection in the RHP, it is unfair to expect investors to spend time and resources inspecting to unearth material facts concealed by the BRLMs.

18. Thus, in the extant case it stands established that the disclosure with regard to RBI's letter dated September 26, 2012 granting conditional exemption to non-resident investors for participating in the IPO of CARE was imprecise, inadequate and apt to mislead the non-resident investors participating in the IPO of CARE. Further, from all of the above, I conclude that the BRLMs/ Noticees deliberately suppressed crucial material facts concerning entry norms for participation by non-resident investors in an Indian company, which is material information from the non-resident investors point of view,

by preferring to disclose one of the conditions under the FDI route as material and suppressing the other, as a result of which, the non-resident investors participating in the Offer remained ignorant of crucial information concerning entry norms in respect of their participation.

19. While making disclosures in the RHP, the BRLMs cannot pick and choose some material facts that they prefer to disclose and suppress some material facts. The very basis of the ICDR Regulations rests on the disclosure of true and adequate (complete) facts in the prospectus. If material facts are suppressed or distorted as in the extant case, the very safety and integrity of the securities market would become a cause of concern for the regulators and the investors. To attribute the disclosure of one of the conditions under the FDI route in the RHP as material disclosure due to the fact that CARE had specifically sought such approval from RBI, and, omitting the disclosure of the other condition applicable to the Offer under the FDI route *(though the compliance of the same was specifically directed by RBI while granting exemption to non-resident investors participating in the Offer)* by unilaterally assuming the non-applicability of the said condition based on an undisclosed claimed belief of the BRLMs that the Offer was under the PIS route, according to me, is a singularly unconvincing explanation that the BRLMs could use in defense of their acts. It was only since RBI on the penultimate day of the closing of CARE's Offer for Sale permitted six months time to CARE to comply with the minimum capitalization norm and further granted extension upto September 30, 2013, the FIIs who participated in the Offer prior to the issue of the addendum by the BRLMs did not end up contravening FEMA. Nevertheless, this cannot undermine the act of the BRLMs to misrepresent/ suppress material facts in the prospectus with respect to RBI's letter dated September 26, 2012 to CARE, which was against the interest of the non-resident investors participating in the Offer. Suppression of material facts by the BRLMs/ Noticees in the RHP of CARE has, thus, been viewed seriously.

ORDER

36. After taking into consideration all the facts and circumstances of the case and having regard to the nature and gravity of the charges established, I impose the maximum penalty prescribed under Section 15 HB of the SEBI Act i.e. **Rs. 1,00,00,000/- (Rupees One Crore Only),** on the **BRLMs/ Noticees** viz. **M/s. Kotak Mahindra Capital Company Limited, M/s.**

DSP Merrill Lynch Limited, M/s. Edelweiss Financial Services Limited, M/s. ICICI Securities Limited, M/s. IDBI Capital Market Services Limited and M/s. SBI Capital Market Services Limited in the matter of **Initial Public Offer of Credit Analysis and Research Limited (CARE)** for the violation of Clause 1 of Form C of Schedule VI of Regulation 8(2)(b), Regulation 57 (1), Regulation 57(2)(a)(ii) and Regulation 64(1) of ICDR Regulations and Regulation 13 of Merchant Bankers Regulations read with clauses 1, 4, 6, 7 and 20 of Code of Conduct for Merchant Bankers as specified in Schedule III. The Noticees shall be **jointly and severally liable** to pay the said monetary penalty which will be commensurate with the violations committed by the BRLMs/ Noticees.

37. The Noticee shall pay the said amount of penalty by way of demand draft in favour of “SEBI - Penalties Remittable to Government of India”, payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Shri V S Sundaresan, Chief General Manager, Corporation Finance Department, SEBI Bhavan, Plot No. C – 4 A, “G” Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

38. In terms of rule 6 of the Rules, copies of this order are sent to the Noticees and also to Securities and Exchange Board of India.

Date: November 28, 2014 **Anita Kenkare**

Place: Mumbai **Adjudicating Officer**