WTM/RKA/CFD/ 08 / 2014

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

UNDER SECTIONS 11(1), 11(4)(b), 11A(1)(b) AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH REGULATION 107 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2009 AGAINST VIBGYOR ALLIED INFRASTRUCTURE LTD., MR.RAJA BHADRA, MR. RANA BHADRA AND MR. RABINDRA NATH DEY

IN THE MATTER OF ISSUANCE OF OPTIONALLY FULLY CONVERTIBLE DEBENTURES BY VIBGYOR ALLIED INFRASTRUCTURE LIMITED.

Appearances:

For Noticees.

1. Mr. Keyoor Bakshi, Company Secretary
2. Mr. N. Dube, Advocate
3. Ms. Sara Sancheti, Advocate
4. Mr. Bimal Sancheti, Chartered Accountant
5. Mr. Pankaj Lunawat

For SEBI:

1. Mr. Santosh Kumar Shukla, Joint Legal Adviser
2. Mr. Anindya Das, Deputy General Manager
3. Mr. Peeyush Gaurav Soni, Assistant Legal Adviser
4. Mr. Arun E. A, Assistant Manager

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1. Securities and Exchange Board of India ('SEBI') received several complaints alleging that Vibgyor Allied Infrastructure Limited (hereinafter referred to as " VAIL/ Company") is soliciting subscriptions from public for secured and unsecured optionally fully convertible debentures ('OFCDs') in violation of the statutory requirements.

2. Thereafter, SEBI, vide letter dated February 11, 2010, advised VAIL to provide (within 10 days from the date of receipt of the letter) certain details such as the documents through which the subscription

for OFCDs was solicited, copy of the application form, copies of the pamphlets and other promotional materials circulated to entice subscription, details regarding the number of application forms circulated, number of applications received, number of allottees, list of allottees, date of opening and closing of the subscription of its OFCDs ,date of allotment and date of dispatch of debenture certificates, etc.

3. Jhunjhunwala and Company, Solicitors and Advocates, vide their letter dated March 23, 2010, submitted on behalf of VAIL, that its shareholders had passed a special resolution under section 81(1A) of the Companies Act, 1956 ('Companies Act') at its extra-ordinary general meeting (EGM) held on May 22, 2009 for the issue and allotment of OFCDs by way of private placement to friends, associates, group company, employees and other individuals who are associated/affiliated or connected in any manner with 'Vibgyor group of companies' without giving any advertisement to the general public. Further, the Board of Directors of VAIL had passed a resolution on May 27, 2009 for issue and allotment of OFCDs. It was denied that VAIL was soliciting subscription for its OFCDs from general public. It was further submitted by them that VAIL is an unlisted public company and OFCDs issued by it on private placement basis are not intended to be listed on any recognized stock exchange in India, and hence section 55A of the Companies Act would not be applicable to it.

4. As VAIL had not provided the information sought from it by SEBI, several reminders were sent to it whereupon VAIL, vide its letter dated July 19, 2010, stated that it had filed Red Herring Prospectuses (RHPs) with the Registrar of Companies (RoC), West Bengal as required under section 55A(c) read with the first proviso to section 56(3), 60B and 81(1A) of the Companies Act. Along with the said letter, VAIL had also enclosed a certified copy of its Memorandum of Association, Articles of Association, copy of approval letter and RHPs (relating to both secured and unsecured debentures) and a copy of the application form which contained the terms and conditions for allotment of OFCDs. However, it was noted that VAIL had not provided all the information required by SEBI despite several opportunities given to it.

5. It was *prima facie* felt that the VAIL has issued OFCDs to public in non-compliance of the provisions of the Companies Act, Securities and Exchange Board of India Act, 1992 ("SEBI Act") and the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ("DIP Guidelines") (*since rescinded*) and SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("ICDR Regulations") SEBI initiated investigation in the matter on September 28, 2010. The Investigating Authority issued summons to VAIL, on October 5, 2010, under section 11C of the SEBI Act asking it to provide by October 20, 2010, the following information/documents in respect of the issuance of its OFCDs:

   (a) Details regarding number of application forms circulated, inviting subscription for OFCDs by VAIL;

(b) Details regarding number of applications and subscription amount received for OFCDs;
(c) Date of opening and closing of the subscription list for the OFCDs;
(d) Number and list of allottees (name and address) of the OFCDs and the number of OFCDs allotted and value of such allotment against each allottee's name;
(e) Date of allotment of OFCDs;
(f) Copies of resolutions authorizing issuance of the OFCDs;
(g) Copies of the minutes of Board/Committee meeting in which the resolution has been passed;
(h) Copies of the Annual Reports filed with the RoC for the immediately preceding three financial years;
(i) Date of dispatch of debenture certificates, etc.

6. In reply to the summons, VAIL, vide its letter dated October 20, 2010, stated that there was no offer to the public for subscription and hence, no forms were circulated in general to the public and there was no opening and closing date for subscription as the OFCDs were issued on a private placement basis as and when the need arose and as and when interest was shown by the investors. VAIL also attached a Compact Disk (CD) containing details regarding the investors in OFCDs, copies of its annual reports, copy of the resolution authorizing the issue, minutes of meeting of its board of directors, etc. VAIL also submitted that there were 49,562 applications and the subscription amount received was ₹ 61,76,00,000/-.

7. It was noted from the information provided by VAIL that vide resolutions passed at the EGMs held on May 22, 2009 and June 8, 2009, consent of the members of VAIL was obtained for issuance of OFCDs, and that the RHPs of VAIL were filed with the RoC, West Bengal on May 28, 2009 (for issuance of Unsecured OFCDs) and on June 11, 2009 (for issuance of Secured OFCDs). It was further observed from the RHPs that VAIL had issued OFCDs having varying tenure, varying redemption value and conversion period to the tune of 6,17,600 OFCDs in number, and the subscription amount raised was ₹ 61.76 crore from 49,562 investors. From the CD submitted by VAIL, it was observed that the applications for the amount ranging between₹ 1000 and ₹ 3,000 were made by investors in various categories which constituted 15,985 out of 50402 applications (i.e. around 32%). Out of 50402 applications, total 40,333 (i.e. around 80%) applications were for amounts in the range of ₹ 1000 to ₹10,000 (made in various categories of the OFCDs).It was further observed that most of the addresses of the investors were incomplete and ambiguous. In more than 41, 000 entries, only the names of the village and post office were mentioned without any details regarding the house number or street name.

8. While the investigation in the matter was in progress, the RoC, West Bengal informed SEBI on October 18, 2010, that VAIL had raised money by way of issue of debentures from a large number of persons, without complying with various provisions of law. In the said letter it was further stated that

VAIL had apparently violated the provisions of the Companies Act, for which appropriate action is being taken. The RoC also requested SEBI to take appropriate action against VAIL for violating SEBI Regulations/Guidelines.

9. Upon completion of the investigation in the matter, SEBI issued a combined Show Cause Notice ('SCN') dated March 12, 2012 to VAIL and its directors (who had signed the RHPs dated May 28, 2009 and June 11, 2009) viz; Mr. Raja Bhadra (Promoter and Director), Mr. Rana Bhadra (Director) and Mr. Ravindra Nath Dey (Director) (hereinafter collectively referred to as 'the Noticees' and individually by their respective names) under sections 11(1), 11(4), 11A and 11B of the SEBI Act read with regulation 107 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as the "ICDR Regulations"). It was alleged in the SCN that the Noticees had violated sections 56(1), 56(3), 73 and 117B of the Companies Act and clauses 2.1.1, 2.1.4, 2.1.5, 2.2, 2.5, 2.8, 4.11, 4.14, 5.3.1, 5.6.2, 6.0 to 6.15, 8.8.1, 10.0 to 10.2, 10.4, 10.6 and 10.9 of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter referred to as the "DIP Guidelines") (since rescinded) and regulations 4(2), 5(1), 5(7), 6, 7, 20(1), 25, 26, 36, 37, 46 and 57 read with regulation 111 of the ICDR Regulations.

10. Mr. Raja Bhadra and Mr. Rana Bhadra, vide their separate letters dated April 3, 2012, informed SEBI that they are not the directors in VAIL anymore and they had forwarded the SCN dated March 12, 2012 to VAIL for necessary action. VAIL, vide letter dated April 3, 2012, submitted that Mr. Raja Bhadra and Mr. Rana Bhadra have resigned from its board of directors since March 01, 2012 and March 12, 2010, respectively. It further submitted that it will submit its reply to SCN within the stipulated time. However, vide its letter dated April 9, 2012, VAIL sought additional 30 days' time to submit its reply to the SCN and submitted that its replies may also be treated as the replies for and on behalf of past and present directors of VAIL to whom the SCN has been issued. Vide another letter dated May 7, 2012; VAIL submitted that no evidence has been provided in respect of certain allegations contained in the SCN. Further, it stated that SEBI has relied on a letter received from RoC, West Bengal, but VAIL had not been provided the copy of the said letter to it. VAIL also requested for inspection of documents and photocopies thereof.

11. VAIL, vide letter dated May 10, 2012 furnished its reply to SCN wherein it made, *inter alia*, the following submissions: -

(a) The OFCDs were issued on private placement basis to friends, associates, group companies, employees and other individuals who are associated or affiliated or connected in any manner with VAIL, without giving any advertisement to the general public with a condition that the offer to subscribe be extended to the persons to whom it has been addressed and hence, it is not an offer to the public.

(b) SEBI does not have jurisdiction to administer issue and allotment of OFCDs and consequently, there is no infirmity in the RHPs filed with the ROC. DIP Guidelines and ICDR Regulations have no application to the issue of OFCDs by VAIL and VAIL has not violated the DIP Guidelines or ICDR Regulations in any manner.

(c) VAIL did not intend to get the OFCDs listed on any stock exchange in India or abroad and therefore the issuance of OFCDs does not come under the purview of SEBI in terms of section 55A of the Companies Act. The word *"intend"* also appears in section 55A(b) of the Companies Act and under the said provision, only to those Companies which intend to get their securities listed on any stock exchange, the provisions of various sections of the Companies Act are to be administered by SEBI.

(d) Since the total number of subscribers to OFCDs was to exceed 50 in number, VAIL sought legal advice and was advised that since VAIL was not a listed company and had no intention to get its securities listed with any stock exchange, the issue of OFCDs was to be administered only by the Central Government and not by SEBI. The Company was also advised that the proposal to allot OFCDs to more than 50 persons may be deemed to be an offer made to public by reason of the deeming provision contained in section 67 of the Companies Act and consequently, VAIL, in good faith filed the RHPs dated May 29, 2009 and June 09, 2009 with the RoC, West Bengal.

(e) In case of all deemed public issues, listing of securities is not mandatory and the Company has an option whether to list its securities or not.

(f) Section 67 of the Companies Act contains deeming provisions and should be strictly construed. Section 73 of the Act is not attracted and has no application whatsoever to a deemed public issue within the meaning of section 67 of the Companies Act. Section 73 is attracted when there is actual intention and it cannot extend to the deemed public issue

(g) It has further submitted that it was unable to deal with vague allegations made in the complaints received by SEBI that VAIL is soliciting subscriptions from the public for OFCDs since SEBI has not furnished copies of the said complaints. It has denied that the addresses of the investors are incomplete or ambiguous and has submitted that the applications contained photographs and identification details such as Voter ID, Ration Card, etc. of the applicants.

(h) It has appointed debenture trustees at a Board Meeting held on July 30, 2009 and created charge on its properties in favour of the debenture trustees on the same day. The charge was registered in the office of the ROC, West Bengal on August 17, 2009. There might have been some technical delays in creating charge in favour of debenture trustees but the interests of the investors were fully secured.

12. In the above reply, VAIL further agreed and undertook that it shall abide by the decision of the Hon'ble Supreme Court in the matter of issuance of OFCDs by Sahara India Real Estate

Corporation Limited and Sahara Housing Investment Corporation Limited wherein the above issues of law were pending for determination by Hon'ble Supreme Court at that time

13. Vide its letter dated September 3, 2012, VAIL submitted that with regard to its issue of OFCDs and RHPs, RoC had issued show cause notices to it and its directors for violations under sections 60, 60B, 62, 63, 68, 73(1), 73(3) and 290 of the Companies Act. The said violations were duly compounded by the Regional Director, Eastern Region under section 621A of the Companies Act. Mr. Raja Bhadra, Mr. Rana Bhadra and Mr. Rabindra Nath Dey vide their separate letters dated September 9, 2012, adopted the replies of VAIL.

14. Thereafter, VAIL, vide letter dated September 25, 2012, provided a list containing the details of entities falling under the Vibgyor group and submitted that all the applications were genuine and bona fide. In villages, the applicants are known by their names and areas of residence and the villages do not have any door number or street name as sough to be alleged in the SCN. It further reiterated its submissions made vide its previous replies and emphasised that:-

(a) The OFCDs were issued to persons who were associated or connected with the Company in any manner with a condition that the offer to subscribe to debentures was extended to the person to whom it was addressed with no right of renunciation.
(b) The application forms were despatched to targeted persons identified with the group during the period June 12, 2009 to June 15, 2009 through Department of Posts, India in different lots.
(c) The application forms contained full names of the addressees and their relationship with the group.

15. The Noticees were afforded an opportunity of personal hearing in the matter on November 6, 2012, when the authorized representatives of the Noticees along with directors of VAIL appeared and made oral submissions. Vide its letter dated November 16, 2012, VAIL also filed a written memorandum of the oral submissions made during the hearing, which, *inter alia*, contained the following averments:

(a) The case is different from that of OFCD issuances by Sahara group companies as Sahara issued OFCDs to very large number of persons without any clear relationship with the issuer whereas VAIL issued its OFCDs to an identified group of persons who were members of the Vibgyor Institute of Studies, a society under the Vibgyor Group.
(b) The power to administer the violations of Companies Act, if any, is vested with the Central Government under section 55A(c) and not SEBI. The Central Government has also vindicated the said stand by compounding the offences under section 60(1), 73(1), 73(3) together with section 291(1) of the Companies Act.
(c) Section 67(1) or section 67(2) of the Companies Act would be attracted only if it is established that the offer was made to the public or a section of public.

(d) Section 67(1) and 67(2) of the Companies Act are independent and section 67(3) is an exception to the provisions of section 67(1) and 67(2). Further, the first proviso to section 67(3), that prescribes the number 50 or more to determine a public issue, is an exception to provisions of section 67(3) only and not to the provisions of section 67(1) and (2). If the case does not fall under exception of section 67(3) then both these independent provisions, viz. section 67(1) and 67(2) are required to be examined to determine whether an offer or invitation is made to public even if it is made to fifty persons or more. Section 67(1) or 67(2) of the Companies Act would be attracted only if it is established that the offer was made to the public or a section of public. According to the Noticees the term 'public' in section 67 should be construed to mean public at large and an issue should be treated as such if it is open to all wherein anyone can apply. Similarly, while interpreting the expression "section of public" under section 67, it should be kept in mind that element of 'public' remains and it should mean an issue open for subscription to unidentified persons of a section of public. In this case the issue was to identified group of persons with clear and uniform relationship with the issuer and it cannot be covered under section 67(1) or 67(2) so as to treat it as issue to public or a section of public even if their number is fifty or more.

(e) VAIL has issued OFCDs to members of a society, viz. Vibgyor Institute of Studies, who had undertaken vocational training for establishment of their own venture, which cannot be regarded as public or section of public. Thus, section 67(1) and 67(2) are not attracted and section 67(3) is not relevant as the Noticees had not claimed the exemption under the said section.

(f) Once the offence is compounded by the Central Government, no further prosecution should lie on VAIL on the principle of double jeopardy.

16. Vide a separate letter dated November 16, 2012, the Noticees made an application for settlement of the charges alleged against them in the SCN through a consent order. However, the same was rejected and communicated by SEBI on August 7, 2013. Upon rejection of settlement proposal of the Noticees, they sought another opportunity of personal hearing and the same was granted to them on October 3, 2013 when the authorised representatives of the Noticees appeared and reiterated the submissions made by them vide their previous replies.

17. Vide letter dated October 10, 2013, the Noticees filed another written memorandum of their oral submissions wherein they, inter alia, submitted that VAIL has completed the refund to OFCD investors by August 2013, and also attached a copy of a certificate of a Chartered Accountant to that effect. Vide another letter dated October 11, 2013; Mr. Raja Bhadra and Mr. Rana Bhadra through their Advocate, Mr. N. D. Dube submitted their written arguments. Mr. Raja Bhadra and Mr. Rana Bhadra, vide the said letter, reiterated their previous replies and, inter alia, made the following additional submissions:

(a) SEBI fixed the date for hearing without considering their reply to the SCN and without intimating whether the cause shown by VAIL is accepted or not. Such act of SEBI amounts to non-application of mind.

(b) The SCN was issued under section 11(1), 11(4)(b), 11A(1)(b) and 11B of the SEBI Act read with regulation 107 of the ICDR Regulations. Section 11(1) deals with the duties of SEBI which is not relevant at this stage. Sections 11(4)(b) and 11A(1)(b) deal with punishment in form of restraint from accessing the securities market and, therefore, the sections may be implemented after the enquiry or investigation is complete and not prior to that. Section 11B finds its application after completion of the enquiry or investigation. Only regulation 107 is the relevant regulation which empowers SEBI at this stage to enquire or investigate either suo motto or on the basis of information and this regulation is without prejudice to sections 11, 11A, 11B and 11C of the SEBI Act.

(c) If any proceeding is to be proceeded on the basis of a complaint, the nature of the complaint has to be disclosed to the person against whom the complaint has been made and opportunity to redress the grievances should also be given. Regulation 107 specifies that enquiry would be conducted by SEBI either suo motto or on the basis of information. Information has been defined in the Right to Information Act, 2005 and means any material in any form. As the SCN has been issued on the basis of a complaint and not on the basis of information, even the issuance of SCN and all proceedings based thereupon are illegal and irrelevant and are liable to be dropped forthwith.

(d) The Central Government had the powers to regulate the issuance of OFCDs and accordingly approval of the Central Government was taken in terms of section 60B of the Companies Act by filing RHP. The Central Government also did not intimate at any point of time that in this case, it is the jurisdiction of SEBI and therefore they had reasons to believe that they were correct.

(e) While passing the compounding order, the Regional Director also did not say that it does not have the jurisdiction to decide or else SEBI is the appropriate forum.

(f) SEBI while initiating the investigation in the matter did not find out reasonable ground for doing so and hence the SCN is liable to be withdrawn and / or the same becomes defective.

(g) Prior to the judgment passed by the Hon'ble Supreme Court in the Sahara matter, the Central Government had the power in respect of issues made to friends, associates and other related persons without inviting public at large and the Company having intention not to go for listing.

18. I have carefully considered the SCN, the written and oral replies/submissions of the Noticees and other material available on record. Before dealing with the merits of the case, I deem it necessary to deal with certain technical objections raised by two directors of VAIL namely, Mr. Raja Bhadra and Mr. Rana Bhadra. They have contended that SEBI fixed the date for hearing without considering the reply to the SCN and without intimating whether the cause shown by VAIL is accepted or not

and such act of SEBI amounts to non-application of mind. In this regard, I find that in this case, in observance of principles of natural justice the opportunity of personal hearing was also provided to the Noticees after receipt of their written replies. In these proceedings, the final order is passed after considering all replies and submissions of the Noticees. I, therefore, do not find any infirmity in these proceedings as contended by the Noticee and therefore, reject the said contention.

19. They have further contended that section 11(1) of the SEBI Act deals with the duties of SEBI which is not relevant at this stage. Sections 11(4) (b) and 11A (1) (b) deal with punishment in form of restraint from accessing the securities market and, therefore, the sections may be implemented after the enquiry or investigation is complete and not prior to that. Section 11B finds its application after completion of the enquiry or investigation. According to them, only regulation 107 is the relevant regulation which empowers SEBI at this stage to enquire or investigate either *suo motto* or on the basis of information and this regulation is without prejudice to sections 11, 11A, 11B and 11C of the SEBI Act. Regulation 107 specifies that enquiry would be conducted by SEBI either *suo motto* or on the basis of information. Information has been defined in the Right to Information Act, 2005 and means any material in any form. As the SCN has been issued on the basis of a complaint and not on the basis of information, even the issuance of SCN and all proceedings based thereupon are illegal and irrelevant and are liable to be dropped forthwith. If any proceeding is to be proceeded on the basis of a complaint, the nature of the complaint has to be disclosed to the person against whom the complaint has been made and opportunity to redress the grievances should also be given.

20. I note that section 11(1) confers upon SEBI the power to take '*measures'* as it deems fit in order to fulfil its duties under the SEBI Act. It is well settled position that the word *'measure'* has to be understood in the sense in which it is generally understood in the context of the powers conferred upon the concerned authority. According to *Corpus Juris Secundum*, 'measure' means- *'anything desired to be done with a view to the accomplishment of a purpose,, a plan or course of action intended to obtain some object, any course of action proposed or adopted by the Government'*. Measure is also understood *'as a means to an end'*. Section 11(4) of the SEBI Act enumerates certain measures that the Board may by an order, in the interest of investors and the securities market, take either pending investigation or inquiry or on completion of such investigation or inquiry. This power of the Board is without prejudice to the powers conferred upon it under section 11 (1) and 11B. Section 11B provides that *'save as otherwise provided in section 11, if after making or causing to made an enquiry',* the Board may issue directions in the interest of investors or orderly development of the securities market to any person associated with the securities market, intermediary or to any company in respect of matters specified in section 11A.

21. I note that the above provisions of SEBI Act are unambiguous with respect to SEBI's power to issue directions. In this regard, it is also noted that the scope of power of SEBI, to issue directions under the aforesaid provisions has been settled by Courts and Hon'ble Securities Appellate Tribunal (SAT). For instance, Hon'ble Bombay High Court in *Ramrakh R. Bohra v. SEBI [1999] 96 Comp Cas 623 (Bom), Anand Rathi & Others Vs. SEBI (2002 (2) Bom CR 403 and,* SAT's order in the case of *Karvy Stock Broking Ltd. Vs. SEBI. Appeal No.92/2006*, etc. It is a well settled position that section 11B is an enabling provision enacted to empower SEBI to protect interest of investors and to promote the development of and to regulate the securities market and to prevent malpractices and manipulations. The power to issue directions under section 11B carries with it, by necessary implication, all powers and duties incidental and necessary to make the exercise of these powers fully effective including the power to pass interim orders in aid of the final orders. Further, the provisions of section 11(4) and 11B are meant to arm the Board with authority so as to be able to effectively exercise power and achieve the declared objectives of the Act. It has also been settled that the directions under section 11(4) and 11B can be issued either pending investigation or enquiry or on completion of investigation or enquiry. Section 11A(1)(b) (i) that empowers the Board to prohibit any company from issuing prospectus, etc. soliciting money from the public for issue of securities is not subject to any enquiry or investigation. The guiding principle for invoking the said provision is the 'protection of investors'. Regulation 107 of the ICDR Regulations empowers the Board to issue certain directions either *suo motu* or on receipt of information or on completion or pendency of any inspection, inquiry or investigation. The guiding principles for invoking this provision are interest of investors or the securities market. This provision is also without prejudice to the powers under sections 11, 11A, 11B, 11D , 12 (3) and 24 of the SEBI Act or section 621 of the Companies Act. In my view, invoking either of the provisions of the SEBI Act or ICDR Regulations does not exclude the other powers conferred upon the Board under the said Act and Regulations and the Board is fully empowered to invoke any or all of its powers.

22. In this case, as discussed hereinabove, the SCN has been issued after completion of the investigation under section 11C of the SEBI Act and not on the basis of the complaints as contented by these Noticees. As already discussed hereinabove, on receipt of the complaint in the matter, SEBI had started inquiries in the matter from VAIL. The background for initiating investigation in the matter has been discussed in detail hereinabove. I, therefore, find that the SCN in the case is fully in accordance with the provisions of the SEBI Act and the ICDR Regulations and reject all the contentions of the Noticees in this regard.

23. The Noticees have also contended that the Central Government has compounded the offences under section 60(1), 73(1), 73(3) together with section 291(1) of the Companies Act thereby vindicating the stand that the power to administer the said provisions lies with the Central Government. Further, once the offence is compounded by the Central Government, no further

prosecution should lie on the Company on the principle of double jeopardy under Article 20(2) of the Constitution of India. In this regard, I note that under section 621A of the Companies Act, the Central Government can compound any offence punishable with imprisonment only, or with imprisonment and also with fine under the Companies Act either before or after the institution of any prosecution. Such compounding bars only institution of prosecution for the offence under the Companies Act which has been compounded. Such compounding does not apply with regard to an offence under the SEBI Act and the regulations and it does not bar or preclude the civil proceedings under the Companies Act or the SEBI Act or the regulations made thereunder. In my view, the preventive or remedial or other directions contemplated under sections 11(1), 11(4)(b), 11A(1)(b) and 11B of the SEBI Act read with regulation 107 of the ICDR Regulations against the Noticees in this case are civil actions and do not amount to double jeopardy and are not against the provisions of Article 20(2) of the Constitution of India as contended by the Noticees.

24. It is an admitted fact that VAIL had invited subscriptions to its secured and unsecured OFCDs by issuing two separate RHPs that were filed by it with ROC, West Bengal on May 28, 2009 (for issuance of unsecured OFCDs) and June 11, 2009 (for secured OFCDs). It is also an admitted position that VAIL had issued total 6,17,600 OFCDs to 49,562 applicants and had received the subscription amount of ₹ 61.76 crore from them.

25. I note that in the reply dated May 10, 2012, the Noticees contended that issuance of OFCDs was made on private placement basis to friends, associates, group companies, employees and other individuals who are associated or affiliated or connected in any manner with VAIL, without giving any advertisement to the general public with a condition that the offer to subscribe be extended to the persons to whom it has been addressed and hence, it is not an offer to the public. At the time when the Noticees filed their replies the questions of law as raised by them in this case , particularly with regard to number of applicants, intention to list , interpretation of section 67(3) , SEBI's jurisdiction on OFCDs and their issuances in the manner as in this case , etc. were pending determination by Hon'ble Supreme Court in the matter of *Sahara India Real Estate Corporation and Ors v. SEBI*. While the proceedings in this matter were pending, all the controversies with regard to questions such as whether an offer is public issue or private placement, SEBI's jurisdiction on issuance of securities including OFCDs to 50 persons or more, intention/obligation to list such securities, etc. were settled by the Hon'ble Supreme Court in its judgement and order dated August 31, 2012 *in matter of Sahara India Real Estate Corporations Limited & Ors. Vs SEBI & Anr. -Civil Appeal No. 9813 and 9833 of 2011 [(2013) 1 SCC 1]* (hereinafter referred to as the *"Sahara Order"*).

26. I note that in the above mentioned *Sahara Order* Hon'ble Supreme Court held that an offer to fifty or more persons becomes public issue by virtue of first proviso to section 67(3) of the Companies Act. Hon'ble Supreme Court also decided the issues whether listing of securities issued to 50

persons or more is mandatory , Hon'ble Supreme Court has further held in the said *Sahara Order* as following :

"…. after the amendment to the Companies Act, 1956 on 13.12.2000, ***every private placement made to fifty or more persons becomes an offer intended for the public*** *and attracts the listing requirements under Section 73(1). Even those issues which satisfy Sections 67(3)(a) and (b) would be treated as an issue to the public if it is issued to fifty or more persons, as per the proviso to Section 67(3) and as per Section 73(1), an application for listing becomes mandatory and a legal requirement. Reading of the proviso to Section 67(3) and Section 73(1) conjointly indicates that any public company which intends to issue shares or debentures to fifty persons or more is legally obliged to make an application for listing its securities on a recognized stock exchange."*

27. In this case, the OFCDs were offered to more than 49 persons through RHPs, which are prospectuses that are always issued in case of public issues. In my view, they were public issues and not private placements as contended by the Noticees. I note that while registering its RHPs with RoC, West Bengal, VAIL was cognizant and aware of the position that issuance of its OFCDs would be a public issue by virtue of provisions of section 67(3) of the Companies Act. I further note that along with the RHP dated June 09, 2009 the directors of VAIL had filed an affidavit with RoC stating therein *inter alia* that VAIL shall not make public issue of such securities without compliance of SEBI Act, Rules and Regulations and shall always comply with the same at every stage as and when applicable.

28. The Noticees have further contended that SEBI does not have the jurisdiction in respect of the issuance of OFCDs since VAIL was not a listed company and did not have any intention of getting listed on any stock exchange. The Noticees have further contended that the issue of OFCDs was to be administered only by the Central Government and not by SEBI. In this regard, I note that the Hon'ble Supreme Court in the *Sahara Order* has conclusively held that SEBI has the power to administer the provisions referred to in section 55A which relate to issue and transfer of securities and non-payment of dividend by public companies, which have issued securities to fifty persons or more, though not listed on a recognized stock exchange and whether they intend to list their securities or not. The following observations of Hon'ble Supreme Court in this regard are worth noting:

"The main part of Section 55A confers jurisdiction on SEBI with regard to three categories i.e. issue of securities, transfer of securities and non-payment of dividend. The expression "all other matters" mentioned in the explanation would refer to powers other than the above mentioned categories. Further, it may also be remembered that the explanation does not take away the powers conferred on SEBI by other sections of the Companies Act. At the same time, matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares be exercised by the Central Government, Tribunal, Company Law

Board, Registrars of Companies, as the case may be. Further, Section 60B(9) clearly indicates that upon closing of the offer of securities, a final 'prospectus' has to be filed in the case of listed company with SEBI and Registrar, ***hence the explanation to Section 55A can never be constructed or interpreted to mean that SEBI has no power in relation to the prospectus and the issue of securities by an unlisted public company, if the securities are offered to more than forty nine persons."***

29. Admittedly, in the present case, VAIL issued OFCDs to 49,562 persons. As held by the Hon'ble Supreme Court in the *Sahara Order*, SEBI has the jurisdiction over the issuance of OFCDs by VAIL since the number of allotees exceeded 49 in number. I therefore, reject the contentions of the Noticees that SEBI has no jurisdiction to administer applicable provisions of the Companies Act in this case.

30. I further note that in terms of provisions of section 73 of the Companies Act, listing of securities issued pursuant to a public issue is mandatory and not optional at the intention of the issuer. Thus, when shares or debentures are issued by any company including an unlisted company to 50 or more persons, it is under a legal obligation to make an application on a recognized stock exchange for listing thereof. I, therefore, do not find merit in arguments of the Noticees that SEBI has no jurisdiction in case of issuances of its OFCDs since VAIL did not intend to list its OFCDs on any recognised stock exchange and reject the same. In this regard, I note that in the above mentioned *Sahara Order*, Hon'ble Supreme Court has held as under:

"Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. ***Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts****. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act.*

Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons*. In view of the clear statutory mandate, the contention raised, based on Rule 19 of the SCR Rules framed under the SCR Act, has no basis. Legal obligation flows the moment the company issues the prospectus expressing the intention to offer shares or debentures to the public, that is to make an application to the recognized stock exchange, so that it can deal with the securities. A company cannot be heard to contend that it has no such intention or idea to make an application to*

the stock exchange. ***Company's option, choice, election, interest or design does not matter,*** *it is the conduct and action that matters and that is what the law demands."*

31. It is pertinent to mention that in their initial reply dated May 10, 2012, Noticees had agreed and undertaken that they shall abide by the decision of the Hon'ble Supreme Court in the above mentioned Sahara case and had submitted the following:

"*The question whether OFCDs issued on private placement basis by an unlisted company, is to be administered by SEBI or not, is pending adjudication before Hon'ble Supreme Court in the matter of Sahara India Real Estate Corporation Limited and the company agrees to abide by the decision of the court on the said question on principal basis.*"

32. However, after the controversies were set at rest by the Hon'ble Supreme Court vide *Sahara Order* dated August 31, 2012, the Noticees changed their stand during the personal hearing and in their written arguments and claimed that facts of VAIL's case are different from those of Sahara as the Sahara group entities issued OFCDs to very large number of persons without any clear relationship between the issuer and the subscribers whereas VAIL issued its OFCDs to an identified group of persons. I further note that earlier the Noticees had claimed that VAIL had offered its OFCDs to friends, associates, group company, employees and other individuals who are associated/affiliated or connected in any manner with 'Vibgyor group of companies'; however, later during the personal hearing they claimed that OFCDs were offered and allotted to members of the Vibgyor Institute of Studies, a society under the Vibgyor Group. It is pertinent to note that admittedly VAIL had issued two RHPs inviting subscription from more than 49 persons and its RHPs were filed and registered with RoC , West Bengal. I find that though it has changed its stand with regard to identity of persons who were offered its OFCDs for subscription, VAIL had not been able to establish either of its claims on the basis of any cogent evidence. I find from the information submitted by VAIL during inquiry/investigation that it had invited subscription to its OFCDs from investors residing in villages and small towns of several districts of various states including West Bengal, Jharkhand, Assam, Bihar, Orissa, Uttar Pradesh, Andhra Pradesh, and Tripura and from Union Territory of Andaman. This fact itself is sufficient to reject the claim of the Noticees that the OFCDs in this case were offered to identified group of investors or to members of the Vibgyor Institute of Studies. Come what it may, the RHPs of VAIL were prospectuses according to Explanation of sub-section (4) of section 60B of the Companies Act. I find that in this case the RHPs were issued generally. In terms of section 2(36) read with section 60B of the Companies Act, a RHP is always issued inviting offers from public for subscription or purchase of shares or debentures in any body corporate. In this case, the OFCDs were offered by VAIL to more than 49 persons and the subscribers were from the public at large. I, therefore, do not find any merit in the arguments of the Noticees.

33. According to the Noticees section 67(1) and 67(2) of the Companies Act are independent and section 67(3) is an exception to the provisions of section 67(1) and 67(2). Further, the first proviso to section 67(3), which prescribes the number 50 or more to determine a public issue, is an exception to provisions of section 67(3) only and not to the provisions of section 67(1) and (2). If a case does not fall under exception of section 67(3) then the independent provisions of section 67(1) and 67(2) are required to be examined to determine whether an offer or invitation is made to public even if it is made to fifty persons or more. Section 67(1) or 67(2) of the Companies Act would be attracted only if it is established that the offer was made to the public or a section of public. According to the Noticees, the term 'public' in section 67 should be construed to mean public at large and an issue should be treated as such if it is open to all wherein anyone can apply. Similarly, while interpreting the expression "section of public" under section 67, it should be kept in mind that element of 'public' remains and it should mean an issue open for subscription to unidentified persons of a section of public. In this case, the issue was clearly to identified group of persons with clear and uniform relationship with the issuer and it cannot be covered under section 67(1) or 67(2) so as to treat it as issue to public or a section of public even if their number is fifty or more. In order to deal with these fresh contentions of the Noticees raised after their undertaking to abide by *Sahara Order*, I deem it necessary to refer to the provisions of section 67 of the Companies Act as it applied at the relevant time and provided as under:-

"**Construction of references to offering shares or debentures to the public, etc**.

67 (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-section (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members of debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub- section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances –

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation :

Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures in made to fifty persons or more:

……..……."

34. I note that section 67 of the Companies Act provides for rule of construction for treating an issue of shares or debentures as public issue. From the language of section 67 it is very clear that construction of public issue under sub-sections (1) and (2) thereof is subject to provisions of section 67(3). Section 67(3) exempts an offer or invitation from the purview of the construction laid down in section 67(1) and 67(2), if such offer or invitation can properly be regarded, in all the circumstances -

i. as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or
ii. otherwise as being a domestic concern of the persons making and receiving the offer or invitation.

35. I note that the first proviso to section 67(3) states that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures in made to fifty persons or more. Thus, in terms of the first proviso to section 67(3), any offer or invitation to fifty or more persons to subscribe for shares or debentures is a public issue even if a case satisfies the conditions under section 67(3) (a) or (b). In other words, an offer or invitation to 50 or more persons is a public issue even if it is shown that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation or that it is of a "domestic concern" of those making and receiving the offer or invitation. In this regard it is to be also kept in mind that the first proviso was inserted in section 67(3) vide the Companies (Amendment) Act, 2000, with effect from December 13, 2000, in order to curb the companies from offering shares and debentures to a wider group of people by disguising it as "domestic concern". In my view, the intention of the Legislature, as envisaged in the said Amendment Act is that any mobilization of funds from a group of investors, fifty or more in number, should be classified as a 'public issue'. I further note that the Hon'ble Supreme Court in the above judgement and order in Sahara Case has settled all the doubts relating to interpretation of section 67 of the Companies Act and has held as under -

> *"…..Even those issues which satisfy Sections 67(3)(a) and (b) would be treated as an issue to the public if it is issued to fifty or more persons, as per the proviso to Section 67(3) and as per Section 73(1), an application for listing becomes mandatory and a legal requirement. Reading of the proviso to Section 67(3) and Section 73(1) conjointly indicates that any public company which intends to issue shares or debentures to fifty persons or more is legally obliged to make an application for listing its securities on a recognized stock exchange."*

36. In view of the provisions of section 67(3) and aforesaid observations of the Hon'ble Supreme Court, I find that once the number of allottees exceeds 49, it becomes irrelevant whether the

allottees were friends, relatives, associates or members of an identified group or society as claimed in this case. I, therefore, reject all the contentions of Noticees in this regard and find that the issue of OFCDs by VAIL in this case was a public issue.

37. In terms of section 56(1) of the Companies Act, every prospectus should state the matters/reports specified in Schedule II of the Companies Act. In terms of section 56(3) of the Companies Act, it is mandatory for the company to issue the application forms for shares or debentures accompanied by a memorandum containing the salient features of the prospectus which complies with the Companies Act and Form 2A prescribed under rule 4CC of the Companies (Central Government's) General Rules and Forms, 1956. In this case, the application forms circulated by VAIL, were not accompanied by such memorandum and thus VAIL had violated the provisions of section 56(3) of the Companies Act.

38. I further note that in terms of Schedule II of the Companies Act, while authorising the prospectus by putting their signatures thereon, the directors of the company are required to make following declaration in the prospectus at its end:-

> ***"Declaration:*** *That all the relevant provisions of the Companies Act, 1956, and the guidelines issued by the Government or the guidelines issued by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992, as the case may be, have been complied with and no statement made in prospectus is contrary to the provisions of the Companies Act, 1956 or the Securities and Exchange Board of India Act, 1992 or rules made thereunder or guidelines issued, as the case may be."*

39. In this case, at the end of RHPs of VAIL, its directors, Mr.Raja Bhadra, Mr. Rana Bhadra and Mr. Rabindra Nath Dey made declaration as under:-

> ***"DECLARATION***
>
> *All the relevant provisions of the Companies Act, 1956 and the guidelines issued by the Government have been complied with and no statement made in the Prospectus is contrary to the provisions of the Companies Act, 1956 and rules there under."*

40. It is pertinent to mention that while giving the declaration in RHPs the directors of VAIL omitted the declaration with regard to compliance with SEBI Act and regulations/guidelines made thereunder. Further, at various places in the RHPs the mandatory requirements with regard to disclosures, listing of OFCDs, etc. prescribed under the Companies Act and DIP Guidelines read with ICDR Regulations were declared as *'not applicable'*. Since every prospectus must comply with these requirements, such declarations, in my view, are void by virtue of provisions of section 56(2)

of the Companies Act which provides that any condition to waive compliance with any of the requirements of section 56 shall be void. I, therefore, find that the declaration by directors of VAIL in its RHPs and other deviations and waivers therein with regard to disclosure requirements of Schedule II of the Companies Act and DIP Guidelines, etc. were void.

41. It is trite to say that SEBI Act is a special legislation to deal with the matters relating, *inter alia*, to the protection of interests of investors in securities. DIP Guidelines that were issued under section 11(1) and the ICDR Regulations framed for the purposes of section 11(1) and section 11A lay down various disclosure and other related requirements for public issues in furtherance of the objective and duties of SEBI enshrined under the SEBI Act. It is also to be kept in mind that these statutory requirements and obligations are intended to protect the interests of the investors in securities and to ensure transparency and integrity in the securities market. Accordingly, a company making a public issue of securities is obligated to comply with these requirements in addition to the requirements prescribed under the Companies Act. In this case, admittedly, the company has not complied with any requirements of DIP Guidelines that were applicable at the time of filing of its RHPs for public issue of its OFCDs and the corresponding provisions of ICDR Regulations. I, therefore, find that apart from non-compliance of provisions of section 56 read with Schedule II of the Companies Act, the VAIL failed to comply with requirements relating to public issue and listing of securities contained in clauses 2.1.1., 2.1.4., 2.1.5, 2.2, 2.5, 2.8, 4.11, 4.14, 5.3.1, 5.6.2, 6.0 to 6.15, 8.8.1, 10.0 to 10.2, 10.4, 10.6 and 10.9 of the DIP Guidelines read with regulations 4(2), 5(1), 5(7), 6, 7, 20(1), 25, 26, 36, 37, 46 and 57 and regulation 111 of the ICDR Regulations as alleged in the SCN. The requirements of the relevant provisions are described in the following Table:-

Sr. No.	Relevant provisions	Requirements
1.	Clause 2.1.1 of the DIP Guidelines read with regulation 6 and 111 of the ICDR Regulations.	To file draft offer document with SEBI;
2.	Clause 2.1.4 of the DIP Guidelines read with regulation 4(2), 7 and regulation 111 of the ICDR Regulations.	To make application for listing of securities to a stock exchange
3.	Clause 2.1.5 of the DIP Guidelines read with regulation 4(2) and regulation 111 of the ICDR Regulations.	To issue securities in demat mode
4.	Clause 2.2 of the DIP Guidelines read with regulation 25, 26 and regulation 111 of the ICDR Regulations.	To comply with the eligibility criteria before making an initial public offer.

5.	Clause 2.5 of the DIP Guidelines read with regulation 20 and regulation 111 of the ICDR Regulations.	To obtain a credit rating for the issuance of debt and convertible instruments.
6.	Clause 2.8 of the DIP Guidelines read with regulation 4(2), 7 and regulation 111 of the ICDR Regulations.	To make firm arrangements of finance through verifiable modes
7.	Clause 4.11 of the DIP Guidelines read with regulation 36 and 111 of the ICDR Regulations.	To ensure lock-in of minimum promoters' contribution
8.	Clause 4.14 of the DIP Guidelines read with regulation 37 and 111 of the ICDR Regulations.	To ensure lock-in of pre-issue capital
9.	Clause 5.3.1 of the DIP Guidelines read with regulation 5(1) and 111 of the ICDR Regulations.	To enter into a Memorandum of Understanding with a merchant banker specifying their mutual rights, liabilities and obligations relating to the issue and to file the same with SEBI.
10.	Clause 5.6.2 of the DIP Guidelines read with regulation 61 and regulation 111 of the ICDR Regulations.	To ensure that the offer document / RHP is made public.
11.	Clauses 6.0 to 6.15 of the DIP Guidelines read with regulation 57 and 111 of the ICDR Regulations.	To ensure that the offer document /RHP contains the details specified in that regard
12.	Clause 8.8.1 of the DIP Guidelines read with regulation 46 and 111 of the ICDR Regulations.	To close the issue within a maximum of 10 working days.
13.	Clause 10.0 to 10.2, of the DIP Guidelines read with regulation 20(1) and 111 of the ICDR Regulations.	To comply with specific requirements prescribed for convertible debt instruments
14.	Clause 10.4 of the DIP Guidelines	To comply with the requirements with regard to transfer of requisite amount to the debenture redemption reserve.
15.	Clause 10.6 of the DIP Guidelines read with regulation 20 and regulation 111 of the ICDR Regulations.	To specifically state the assets on which security shall be created and the ranking of the charges.
16.	Clause 10.9 of the DIP Guidelines	To make additional disclosures in respect of debentures.

42. As per section 73(1) of the Act, it is mandatory for a company issuing shares or debentures through prospectus, to apply, before issue of prospectus, to one or more recognized stock exchange for listing of shares or debentures. Further, as per section 73(4) of the Companies Act, any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any of the requirements of section 73 shall be void. In this case, in the RHPs and in the *"terms and conditions"* in the application forms for OFCDs it was mentioned that VAIL did not intend to list its OFCDs on any recognized stock exchange. In view of the above mandatory provisions of section 73, such terms in RHPs and applications with regard to the OFCDs issued by VAIL were void *ab initio* and they do not absolve the company from compliance of these mandatory provisions. I, therefore, find that in this case, the company has contravened the provisions of section 73 of the Act since it did not apply for listing of its OFCDs on any recognized stock exchange.

43. In my view, the Hon'ble Supreme Court in the *Sahara Order* has settled all the doubts with regard to the interpretation of section 55A, 67 and 73 of the Companies Act and the powers and jurisdiciton of SEBI. While doing so Hon'ble Supreme Court has not laid down any new law rather it has interpreted the existing provisions of law. I, therefore, reject the contentions of the Noticees that prior to the judgment of the Hon'ble Supreme Court in the Sahara matter the Central Government had the power in respect of issuance of OFCDs as in this case.

44. In this case, the Noticees were aware that the issuance of OFCDs by VAIL to 49,562 allotees was a deemed public issue by virtue of the provisions of section 67 of the Companies Act. I further note that after the RHPs of VAIL were filed with RoC, West Bengal, the RoC, West Bengal had referred the matter to SEBI pointing out that VAIl had raised money by way of issue of debentures from a large number of persons, without complying with various provisions of law and had requested SEBI to take appropriate action against VAIL for violating SEBI Regulations/Guidelines. In my view, the requirements of special laws such as SEBI Act and ICDR Regulations are binding on any company making public issue of OFCDs and it need not be necessarily advised by RoC as contended by the Noticees. I, therefore, do not find any merit in the contentions of the Noticees in this regard.

45. It is also alleged in the SCN that VAIL has contravened section 117B of the Companies Act which provides that no company shall issue a prospectus or a letter of offer to the public for subscription of its debentures, unless it has, before such issue, appointed one or more debenture trustees for such debentures and the company has, on the face of the prospectus or the letter of offer, stated that the debenture trustee or trustees have given their consent to the company to be so appointed. I note that in the RHPs of VAIL, at the place of name and address of the debenture trustee it was disclosed as *"not applicable"*. Further, admittedly, VAIL appointed certain individuals

namely, Mr. Nikhil Kumar Chakraborty, Mr. Papas Kumar Basu, and Mr. Rajat Bera as debenture trustees and executed a Debenture Trust Deed on July 30, 2009 i.e. after the RHPs were filed with RoC and the issue was opened. According to the Noticees the delay in creating charge in favour of debenture trustees was technical and that the interests of the investors were fully secured. In my view, the provisions of section 117B of the Companies Act are mandatory and appointment of debenture trustee is a pre-requisite of issuing a prospectus/RHP. In this case, VAIL failed to appoint a debenture trustee with regard to issuance of its OFCDs and contravened provisions of the said section.

46. In terms of section 12(1) of SEBI Act, no trustee of trust deed who may be associated with securities market shall buy, sell or deal in securities except under, and in accordance with, the conditions of a certificate of registration obtained from SEBI in accordance with the Regulations made under the SEBI Act. Further, as per regulation 7 of SEBI (Debenture Trustees) Regulations, 1993 ("Debenture Trustees Regulations"), no person should act as a Debenture Trustee unless he is either:

    (a) a scheduled bank carrying on commercial activity; or
    (b) a public financial institution within the meaning of section 4A of the Companies Act or
    (c) an insurance company; or
    (d) a body corporate.

47. I find that in the present case, VAIL appointed unregistered debenture trustees after the date of filing of RHPs and after opening of the issue in violation of section 117B of the Companies Act and section 12(1) of the SEBI Act. Further, VAIL had appointed three individuals as debenture trustees for its OFCDs in contravention of provisions of regulation 7 of the Debenture Trustee Regulations.

48. I note that Mr. Raja Bhadra, Mr. Rana Bhadra and Mr. Rabindra Nath Dey, the directors of VAIL had authorised the issue of OFCDs and had given their consent for issuance of OFCDs issued by VAIL. They had signed the RHPs and Declaration therein. In my view, they are also *"officers in default"* as defined under section 5 of the Companies Act. I, therefore, find that they are also responsible for the acts and omissions of VAIL in this case. Subsequent, resignation of Mr. Raja Bhadra and Mr. Rana Bhadra as claimed is of no help to them.

49. I note that in terms of section 73(2) of the Companies Act, where the permission (to deal such shares or debentures on a stock exchange) has not been applied under sub-section (1), the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall,

on and from the expiry of the eight days, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money. Since, VAIL failed to make applications for listing of its OFCDs on any recognized stock exchange, the Noticees are liable to refund the amounts collected from subscribers of its OFCDs issued to them pursuant to its RHPs, along with interest at the rate of 15% per annum.

50. The Noticees have submitted that while compounding the offences under the Companies Act the Central Government had directed VAIL to redeem the OFCDs and refund the amount collected from the subscribers with interest @15% p.a. within a period of fifteen months from the date of the order dated May 31, 2012. The Noticees have claimed that VAIL has completed the refund of monies to the subscribes pursuant to the said order. VAIL also submitted a copy of the certificate of a Chartered Accountant to that effect. In this regard, the RoC, West Bengal, Central Government have expressed their inability to comment on the veracity of the claim of VAIL. I note that even after conclusion of the hearing in the present proceedings when the Noticees made such claim, SEBI has received complaints from investors complaining about non-receipt of amounts due on OFCDs of VAIL. I, therefore, am unable to accept the claim of VAIL that it has already refunded all monies to the subscribers along with interest @ 15% as directed by the Central Government vide order dated May 31, 2012.

51. In view of the foregoing, I, in exercise of the powers conferred upon me under sections 11, 11(4), 11A and 11B read with section 19 of the SEBI Act and regulation 107 of the ICDR Regulations hereby issue the following directions:

(a) Vibgyor Allied Infrastructure Limited (earlier known as Vibgyor Properties Limited) and its promoter and ex-director, Mr. Raja Bhadra, ex-director Mr. Rana Bhadra and director, Mr. Rabindra Nath Dey, shall within three months from the date of this order, jointly and severally refund the money collected pursuant to the Red Herring Prospectuses dated June 09, 2009 and May 27, 2009, to the subscribers of Optionally Fully Convertible Debentures with interest at the rate of 15% per annum from the date of receipt of money till the date of such refund or the redemption value promised in the RHPs and accrued till the date of refund, whichever is higher.
(b) Such refund shall be made only in cash through a Demand Draft or Pay Order.
(c) Vibgyor Allied Infrastructure Limited shall issue a public notice, in all editions of two National Dailies (one English and one Hindi) with wide circulation, detailing the modalities for refund, including details of contact persons including names, addresses and contact details, within fifteen days of this order coming into effect.
(d) Within seven days of completion of refund as directed hereinabove, Vibgyor Allied Infrastructure Limited shall file a certificate of such completion with SEBI from two independent peer reviewed

Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India (ICAI).

(e) Vibgyor Allied Infrastructure Limited, Mr. Raja Bhadra, Mr. Rana Bhadra and Mr. Rabindra Nath Dey are directed not to, directly or indirectly, access the capital market by issuing prospectus, any offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner till the expiry of three years from the date of completion of refund as directed hereinabove.

(f) Mr. Raja Bhadra, Mr. Rana Bhadra and Mr. Rabindra Nath Dey are further restrained from associating themselves, with any listed public company and any public company which intends to raise money from the public, till the expiry of three years from the date of completion of refund as directed hereinabove.

52. The above directions are without prejudice to the right of SEBI to take any other appropriate action for the violations found in this case or to initiate any action in case of failure to comply with the above directions, in accordance with the provisions of applicable laws.

53. The order shall come into force with immediate effect.

54. A copy of the order shall be served upon the Noticees to ensure compliance with the above directions.

Date: February 20th, 2014 **RAJEEV KUMAR AGARWAL**

Place: Mumbai **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA