SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

UNDER SECTION 11(1) AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH SECTION 4 (b) AND 29A OF FORWARD CONTRACTS (REGULATION) ACT,1952, IN THE MATTER OF NATIONAL MULTI COMMODITY EXCHANGE OF INDIA LIMITED (NOW KNOWN AS INDIAN COMMODITY EXCHANGE LIMITED)

In respect of:

Noticee no.	NAME	PAN
1	Neptune Overseas Limited	AAACN5163C
2	Mr. Kailash Gupta	ACVPG5303R

(The above-mentioned entities are individually referred to by their corresponding names/numbers and collectively referred to as "Noticees")

1. The genesis of the present proceeding lies in a complaint dated November 28, 2010, received by the erstwhile Forwards Market Commission (hereinafter referred to as the "**FMC**") now merged with SEBI, pertaining to abuse of position and commission of various irregularities in the affairs of, including irregularities in trading activities on the platform of National Multi Commodity Exchange (hereinafter referred to as "**NMCE**[1]") being allegedly committed by Neptune Overseas Ltd. (hereinafter referred to as "***NOL/Noticee no. 1***"), the anchor promoter of NMCE, through certain employees of NMCE, to benefit NOL.

[1] *NMCE has been merged with Indian Commodity Exchange Limited, however, for the present proceedings, both the names have been used interchangeably.*

2. Apart from the said complaint, the report of the Auditors appointed by FMC to conduct the Audit of NMCE for the years 2006-07 and 2007-08 had also pointed out certain misconduct and irregularities in managing the affairs of NMCE. In this respect, NMCE had not only allegedly failed to timely furnish its explanations on the qualifications/observations of the Auditors, but the replies filed belatedly were also found to be evasive and appeared to be an attempt to cover up the irregularities noticed to have been committed during the audit.

3. Accordingly, based on the Auditor's findings and the aforesaid complaint, an inquiry was initiated by FMC and in pursuance of the said inquiry, an inspection of books of accounts and records of NMCE was conducted by FMC in the exercise of its power conferred under Section 8(2), 8(4) of the Forward Contracts (Regulation) Act, 1952, now repealed (hereinafter referred to as "**FCRA**") read with the Government of India's Notification S.O. No.1162 dated May 04, 1960. Further, during the course of said inquiry, FMC had also recorded the statements of the concerned officers of NCME as well as those of other persons/firms/companies who had dealings with NMCE.

4. As the inquiry conducted by FMC revealed, certain acts on the part of *Noticee no. 2* herein, Mr. Kailash Ramkishan Gupta (the MD and Executive Vice Chairman of NMCE at relevant times and MD and Chairman of Neptune Overseas Limited) were found to be *prima facie* in violation of various laws hence, a show cause notice dated June 21, 2011 (hereinafter referred to as the "**SCN**") came to be issued by FMC to Mr. Kailash Ramkishan Gupta, as the sole *Noticee* at that stage. The said SCN culminated into passing of the final order dated July 23, 2011 by FMC, under which numerous directions were passed by FMC. The said directions are not required to be discussed here as the order dated July 23, 2011 no longer remains in force, reasons of which have been explained at the appropriate places in the latter part of the present order.

5. However, the charges that were made in the aforesaid SCN issued by FMC are the subject matter of the present proceedings. Before throwing light on those relevant charges levelled in the said SCN issued by FMC, it is deemed

appropriate here to first introduce the entities around whom such charges revolve:

i. National Multi Commodity Exchange/NMCE is an association that was recognized under Section 6 of the Forward Contracts (Regulation) Act, 1952 and was registered with the FMC under Section 14B of the FCRA. Neptune Overseas Limited/NOL (*Noticee no.1*) was the anchor promoter of the NMCE. As of now, NMCE has been merged with Indian Commodities Exchange (ICEX).

ii. Mr. Kailash Gupta (*Noticee no. 2*) was the MD/Executive Vice Chairman of the NMCE for different periods and was also Chairman & MD of *Noticee no. 1*.

iii. Arrow Total Solution LLC (hereinafter referred to as "**ATS LLC**") and Arrow Total Solutions Private Ltd. (hereinafter referred to as "**ATSPL**"), are the companies promoted by Mr. Amit Kailash Gupta (son of Mr. Kailash Gupta), Mrs. Anjana Gupta (wife of Mr. Kailash Gupta) and Ms. Poonam Gupta (daughter of Mr. Kailash Gupta). All the aforesaid three family members of Mr. Kailash Gupta were Directors of ATSPL till September 15, 2007. ATS LLC is based out of USA while ATSPL has been incorporated in India.

6. I shall now advert to deal in brief, with the relevant facts of the case and the charges levelled against the *Noticees* in the SCN:

i. The original shareholders and Directors of the company ATSPL were the family members of *Noticee no. 2*.

ii. Subsequently the shareholding of ATSPL was transferred to four individuals viz., Mr. Samar Hemant Kumar Dave holding shares jointly with Mrs. Prakashba Chudasama, and Ms. Preetika Godiwala jointly holding shares with Mrs. Ushaben Goswami. The said transfer of shares was executed without any kind of consideration, however, Mr. Preetika Godiwala had received INR 8.35 Lakh and Mr. Samar Dave had received INR 4.25 Lakh from NMCE during the year 2009-10.

iii. While Mr. Samar is/was a friend of Mr. Amit Gupta (son of *Noticee no. 2*) and was gainfully employed in USA since 1999, Ms. Preetika is the wife of Mr. Bhavit Godiwala, who (Mr. Bhavit) was earlier working with one company namely, CMC Limited. He (Mr. Bhavit) was one of the architects of the Exchange trading platform software as an employee of CMC Limited. Further, the joint holders viz., Mrs. Prakashba Chudasama and Mrs. Ushaben Goswami were wives of employees of NMCE. Mr. Dave and Mrs. Preetika were also made Shareholder-Directors of ATSPL.

iv. In their statements, the aforesaid persons have admitted that they are not aware of the management of funds of ATSPL. Despite transfer of shareholding of NMCE from the family members of *Noticee no. 2*, the effective control of ATSPL as well as control and management of its bank accounts and business remained with the family members of *Noticee no. 2* only.

v. Mr. Vijay Mohan Mehrisihi was appointed as an Independent Director on ATSPL by *Noticee no. 2*. Mr. Mehrisihi was also appointed as a consultant for NMCE, and large amounts of money were paid to him as consultancy fees.

vi. The two companies named above viz., ATSLLC and ATSPL were engaged as the Software Vendor of the NMCE by *Noticee no. 2* in his capacity as MD of the NMCE. The appointment of the said two companies as software vendors was done without following the due process pertaining to such appointments like obtaining appropriate approvals from the Board of Director/Committee (before appointment or after the appointment), defining the scope of work, floating tenders, disclosure of the relationship of the MD with the vendors etc.

vii. The agreements executed between NMCE and ATSPL, copies of which were submitted during the inquiry by FMC, were apparently created to give retrospective effects by incorporating back dates in those agreements so as to regularise ex-post facto, the work claimed to have been carried out by ATSPL. The employees of NMCE were coerced to prepare the

backdated agreements so as to regularise the payments already made to ATSPL.

viii. *Noticee no. 2*, in the capacity of the MD of NMCE, has caused payments to be made to ATSPL amounting to INR 29.47 Crore from the period of Financial Year 2002-2003 to September 30, 2010, against software development, without any authority or approval. The funds were used towards market making activity for NMCE which was not a permitted activity at the relevant time, and also for purchase of shares of NMCE by *Noticee no. 1*.

ix. The aforesaid payments were made to ATSPL from the Margin Account of the NMCE, which was viewed to be in breach of the risk management system of the NMCE as a Commodities Exchange.

x. Another company namely, Mantissa Infotech (P) Limited ("Mantissa") was carrying out the testing of the software at NMCE. It has been noticed that it was Mantissa, which was providing the software services to NMCE, however, funds were siphoned off from the accounts of NMCE in the name of payments to ATSPL against the purported software development/support.

xi. ATSPL did not have any service tax number/VAT No. and the money received from NMCE by ATSPL was shown under the head "Loans and Advances" in the books of ATSPL. ATSPL did not have any other client or adequate manpower to develop software. The registered address of ATSPL was visited by the inquiry team of FMC, however, the said company could not be located at its disclosed registered address.

xii. *Noticee no. 2* directly and through his family members, was controlling the affairs of the company ATSPL, even after the transfer of shareholding from his family members to others as indicated above and even after the resignation of the family members of *Noticee no. 2* as Directors of ATSPL.

xiii. It is seen that huge amounts of payments were made to various entities (in the range of 4 Lakh to 7.46 Crore) from the bank account of ATSPL, and

some of such entities were Members of NMCE. Further, out of the funds received by ATSPL from NMCE, an amount of INR 4.80 Crore (approx.) was noticed to have been transferred to *Noticee no. 1*. The said fund transfer *prima facie* seems to be towards the purchase of shares of NMCE by one Mr. Anil Singhania for an amount of INR 3.63 Crore.

xiv. *Noticee no. 2*, by using his position as MD of the NMCE, has in various instances, caused allotment of 29,32,680 shares of NMCE to *Noticee no. 1* (Neptune Overseas Limited), by un-authorizedly /fraudulently transferring the funds of NMCE to *Noticee no. 1*, both by way of transactions through a running account and also by transferring funds via ATSPL. The allotment of shares to *Noticee no. 1* was not backed by receipt of cash consideration, and effectively, funds of NMCE itself were used by *Noticee no. 2* to acquire shares of NMCE in the name of *Noticee no. 1*.

xv. An amount of INR 2.47 Crore has been paid to M/s Kushal Enterprises, a member of NMCE and proprietorship firm of Mrs. Meena Gupta, wife of the brother of *Noticee no. 2*. For the said transaction, a debit entry has been made in the ledger of ATSLLC in the books of NMCE and payment has been shown to have been made on behalf of ATSPL to M/s Kushal Enterprises.

xvi. *Noticee no. 2*, in his capacity of MD of NMCE, had engaged a large number of consultants, without following any due process of identification of work, the scope of work or competitive bidding, etc. No approval from the Board of NMCE was obtained nor the Board was kept informed about the engagement of the consultants and the services availed of by NMCE.

xvii. Out of the total 144 consultants, approval has been found only for 11 consultants and the total money paid to 133 consultants (144-11) is INR 4.07 Crore. Some of the purported consultants were *prima facie* observed to be the personal adviser, friends, and well-wishers of *Noticee no. 2*. Further, two of such consultants viz., Mr. Kalpen Shah and Mr. V.M. Mehrishi, have been noticed to have aided and abetted *Noticee no. 2* for certain violations as allegedly committed by *Noticee no. 2*.

xviii. *Noticee no. 2* by misusing his position as MD of NMCE, had utilised the funds of NMCE towards various personal expenses of his family members. The said expenses broadly include expenditure on foreign/local travel undertaken by the daughters/sons of the *Noticee no.2*, interior work of flats, purchases of electronic items like LCD TV, A.C., mobile phone etc. Further, three cars (03) that were purchased out of the funds of NMCE (amounting to INR 20.93 Lakh) were registered in the individual name of *Noticee no. 2* and two cars out of them were being used by the family members of *Noticee no.2*. The expenses towards driver's salary, fuel etc., of such cars were being paid/borne by NMCE. Further, another car (Skoda) which was registered in the name of NMCE, was also being used by Mr. Nanak Gupta, another son of *Noticee no. 2*, even though Mr. Nanak had no formal connection with NMCE in any official manner.

xix. *Noticee no. 2*, while acting as MD and later on as an Executive Vice Chairman of NMCE had been seen subverting the corporate governance norms by following a consistent approach of bypassing the institutional structure. *Noticee no. 2* had mistreated the Executives of NMCE when they failed to adhere to his directives. *Noticee no. 2* had involved his family members (daughters and sons) in his discussions about establishment issues of NMCE, even though all such family members were not even employed/engaged with NMCE.

xx. Ms. Poonam Gupta, in the wake of the inquiry being conducted by FMC, had without any authority attempted to enter/trespass into the premises of NMCE so as to make a systematic attempt to sabotage the IT and software systems of NMCE during the midnight of February 21-22, 2011. In the said attempt, she was helped by other individuals including her husband, Mr. Kaushik Gaurav Verma and few other persons including one professional hacker. The said act on the part of Mr. Poonam Gupta is further seen to have corroboration from the messages she sent to Mr. Neeraj Gupta, VP, IT where she has revealed her motive to sabotage the ongoing inquiry of FMC and to disable the IT system of NMCE by

deleting inconvenient transaction trails. *Noticee no. 2,* while seeking forgiveness for the act of Ms. Poonam, confessed in the Board meeting of NMCE held on February 26, 2011 that the said act on the part of Ms. Poonam was indeed an attempt to hack the IT systems. Though *Noticee no. 2* may or may not be directly involved in the said act of the group of aforesaid individuals, yet he has been observed to be guilty of abetment of the said crime or being the closest co-conspirator.

7. Based on the aforesaid chain of events, the SCN alleges the following against *Noticee no. 2*:

i. Violation of Section 405 of the Indian Penal Code, 1860 (**IPC**), as *Noticee no. 2* committed criminal breach of trust against NMCE, its Board of Directors & shareholders by abusing his fiduciary duty as MD of NMCE;

ii. Violation of Section 403 of the IPC as *Noticee no. 2* dishonestly misappropriated the property of NMCE by registering 3 cars in his own name out of the funds of NMCE;

iii. Violation of Section 418 and 420 of the IPC as *Noticee no. 2* cheated the Board of Directors of NMCE and its shareholders and committed fraud on them by: not disclosing his/his family's interest in ATSPL; exceeding his authority as MD by appointing ATSLLC and ATSPL as software vendors without following due processes; by causing wrongful gain to himself and his family members (who were the major shareholders' of ATSLLC and ATSPL) by making unauthorised payments to the tune of INR 29.47 Crore; and by causing wrongful gain to the extent of INR 2.47 Crore out of the funds of NMCE, to M/s Kushal Enterprises, a firm owned by his brother's wife.

iv. *Noticee no. 2* has caused falsification of accounts of NMCE by creating fictitious records for authorisation of payments to ATSPL as well for falsely claiming reimbursement of INR 100.26 Lakh (INR 1 Crore approximately) from NMCE in favour of NOL in the name of pre-operative expenses incurred by NOL on behalf of NMCE, with a view to

mislead FMC to believe that all payments were duly authorized by the competent authority. *Noticee no. 2* has caused allotment of 29,32,280 shares of NMCE to NOL with the fraudulent transfer of NMCE's funds to NOL through a running account and also via ATSPL, which led to acquisition of such shares by NOL with the funds of NMCE.

v. *Noticee no. 2* has knowingly made a wrong declaration by filing false statement with the Registrar of Companies, to the effect that allotment of shares of NMCE in favour of NOL was made against payment of cash, thereby attracting Section 75 of the Companies Act, 1956;

vi. *Noticee no. 2* has got wrongful payments made to ATSPL in INR and/or has got wrong corresponding entry recorded in the Books of Accounts of NMCE as payments made to ATS LLC, thereby attracting the provisions of Foreign Exchange Management Act, 1999;

vii. *Noticee no. 2* by knowingly furnishing 5 backdated agreements to FMC pertaining to the software development thereby has committed an offence under Section 20 (a) (i) of the Forward Contracts (Regulation) Act, 1952 read with Section 177 of the IPC;

viii. *Noticee no. 2* by failing to furnish the records and information as requisitioned by FMC during its inquiry has committed an offence under Section 20 (a) (ii) of the FCRA read with Section 175 and 176 of IPC;

ix. *Noticee no. 2* got funds transferred from the Margin account of NMCE to various entities directly or indirectly and such acts/omissions were in violation of the provisions of the Bye-laws of NMCE and also of the directions issued by FMC. By such an act, *Noticee no. 2* endangered the risk management system of NMCE and also failed to perform his duties as the Custodian of the Members' funds; and

x. *Noticee no. 2* by engaging in trading in rubber in physical market through *Noticee no. 1* (where he was the Chairman and MD), has violated the condition of demutualization, based on which NMCE was granted recognition.

8. Before moving on further, it is imperative to first lay down the chain of events, by virtue of which the present proceedings have arisen. Accordingly, shorn of unnecessary details, the date wise events that have taken place in the present matter since the issuance of the aforesaid SCN, are outlined herein below:

i. **June 21, 2011:** The Show Cause Notice was issued to Mr. Kailash Gupta, who at the relevant time was Vice Chairman of NMCE and Chairman & MD of Neptune Overseas Limited;

ii. **July 07, 2011:** Neptune Overseas Limited (NOL), vide Special Civil Application no. 8377 of 2011 filed before the Hon'ble Gujarat High Court, challenged the SCN and sought various reliefs from the Hon'ble High Court, including: *The commencement and continuation of the enquiry under Section 8(2) read with section 8(3) of the FCR Act may be declared to be ab initio void and the same may be declared to be held in an invalid exercise of the power and the entire proceedings held in this enquiry up till now including the show cause notice dated 21.06.2011 received on 22.06.2011 (Annexure 45) may be declared to be illegal, the same may not be allowed to continue further and the concerned respondents be restrained from taking any action on that basis against the petitioner or his Chairman cum Managing Director Kailash R. Gupta.*

iii. **July 08, 2011:** In the aforesaid matter, the Hon'ble High Court, vide its order dated July 08, 2011, rejected the challenge made by the petitioner on grounds of jurisdiction by observing *inter alia* that: *In the present case, as already stated hereinabove, it does not prima-facie appear from the provisions of the FCR Act that the Commission does not have jurisdiction to issue the show cause notice. As the Charges against the petitioner are of a very serious nature, the Court does not think it appropriate to exercise discretion by grant of interim relief, before the Commission has had an opportunity to examine the explanation rendered by the petitioner pursuant to the show cause notice, and before any formal order has been passed thereupon.*

The Hon'ble High Court, vide its aforesaid order, while dismissing the

petition, observed that it is open for the petitioner (Neptune Overseas Limited) to appear before FMC as directed under the SCN.

iv. **July 15, 2011:** By way of Letters Patent Appeal (LPA) no. 1039/2011, the aforesaid order dated July 08, 2011 passed by the Hon'ble Single Judge was challenged before the Division Bench of the Hon'ble Gujarat High Court.

v. **July 18, 2011:** Interim order was passed by the Division Bench of the Hon'ble Gujarat High Court wherein it was observed *inter alia* as: *Post the matter on 17th August 2011. Pendency of the case shall not stand in the way of the appellant raising the question of jurisdiction of the authority to issue show cause notice. In such a case, the competent authority will consider the same. If any adverse decision is taken, the same shall be subject to decision of this appeal.*

vi. **July 23, 2011:** Final order was passed by FMC, wherein various directions were issued.

vii. **July 29, 2011:** Vide order dated July 29, 2011, the Hon'ble High Court allowed the amendment to the prayer portion of the main LPA (as filed on July 15, 2011), by way of which the aforesaid order dated July 23, 2011 was also sought to be quashed.

viii. **February 09, 2012:** The Hon'ble Gujarat High Court disposed of the LPA and passed the following directions:

(i) The impugned order dated 23rd of July, 2011 passed by the respondent No.1 - Commission is quashed and set aside. The respondent No. 1 shall take a decision in accordance with law after issuing show cause notice and after hearing necessary parties. The respondent No.1 Commission shall issue show cause notice to the parties, inviting replies/objections and also after considering the objections and after affording opportunity of hearing to all necessary parties and thereafter pass an order/take decision preferably with in a period of four months from today. It is expected of that all the concerned parties would cooperate for expeditious conclusion of hearing.

(ii) Since, the appeal is disposed of today, therefore, we deem it expedient to direct the respondent No. 1- Commission to appoint some independent person other than Appellant No.2 – Shri Kailash Gupta and Shri Anil Mishra as the Managing

Director and Chief Executive Officer of respondent No.3 within a week from today and for a period of one week, Mr. Anil Mishra would function as the Managing Director and CEO of the respondent No.3- NMCE.

(iii) Before parting, we make it clear that we have not gone into the merits of the present appeal. We have decided this appeal only on the ground of the principle of natural justice. We also make it clear that the appellant No.2 shall not take part in the function of the respondent No.3 - NMCE till the disposal of the matter by respondent No.1.

ix. **February 22, 2012:** Vide SLP no. 10225-10227 of 2012 filed before the Hon'ble Supreme Court of India the aforesaid order dated February 09, 2012 was challenged by FMC.

x. **March 22, 2012:** Vide its interim order, the Hon'ble Supreme Court of India directed that till further orders, the operation of the order dated February 09, 2012 passed by the Hon'ble Gujarat High Court would be stayed.

xi. **September 28, 2015:** FMC was merged with SEBI.

xii. **March 07, 2018:** The Hon'ble Supreme Court disposed of the aforesaid petition by recording that: "…*In our opinion, it would be more appropriate if Respondent Nos.1 and 2 are granted permission to file a statutory appeal before the Securities Appellate Tribunal (SAT) challenging the order dated 23rd July, 2011.*

Thirty days' time is granted to the respondents to file an appeal. If the appeal is filed by the respondents within a period of thirty days from today, the Securities Appellate Tribunal will hear the appeal on merits.

In the meanwhile, the interim order passed by this Court on 22nd March, 2012 will continue to the effect that any proceedings, decision or action taken in pursuance of the order dated 23rd July, 2011 passed by the Forward Markets Commission (now SEBI) shall abide by the final result of the appeal.

In view of the above, the impugned judgments and orders are set aside…".

xiii. **October 18, 2019:** The appeal filed before the Hon'ble SAT in pursuance of the aforesaid order dated March 07, 2018 of the Hon'ble Supreme

Court of India was disposed of by the Hon'ble SAT. Vide its order dated October 18, 2019, the Hon'ble SAT remanded the matter back to SEBI (since FMC merged with SEBI, as aforesaid) by observing as:

"…19. In the light of the aforesaid, we are of the opinion that no reasonable opportunity was given by the respondent no. 1 to the appellant no. 2 for the purpose of filing objection / reply to the show cause notice.

20. Further, the request on behalf of the appellant no. 2 to permit his advocate to place submissions on the issue of jurisdiction was not unreasonable and should not have been rejected. The finding that the appellant was avoiding to show cause on one pretext or the other is a finding based on surmises and conjectures. As per sequence of events stated aforesaid, it is clear that there has been no unreasonable request on the part of the appellant in seeking time to file their written submissions and for placing their arguments. In our opinion the rejection of the request of the appellant on July 20, 2011 for an adjournment, was violative of the principles of natural justice. Consequently, the impugned order against the appellant no. 2 cannot be sustained and is quashed.

21. Since the impugned order has been quashed on account of violation of principles of natural justice it is not necessary for this Tribunal to go into the question of jurisdiction, namely, whether the FMC had jurisdiction to issue a show cause notice under the FCR Act. 22. In the result, the appeal is allowed. The impugned order is quashed. The matter is remitted to respondent no. 1 and, if they are so advised, the respondent no. 1 can proceed afresh only after issuing the show cause notice to appellant no 1 and respondent no. 2.…"

xiv. **December 02, 2019:** Aggrieved by the aforesaid order dated October 18, 2019, separate Civil Appeals were filed by the Indian Commodity Exchange (in which the NMCE has got merged) as well as by SEBI before the Hon'ble Supreme Court of India. Thereafter, the operation of the aforesaid order of the Hon'ble SAT was stayed by the Hon'ble Supreme Court of India

xv. **November 27, 2020**: Subsequently, vide a common judgment and order dated November 27, 2020, the Hon'ble Supreme Court of India has

disposed of the Appeals filed by Indian Commodities Exchange ("ICEX") and SEBI, and passed the following directions:

i. No fresh show cause notice is required to be served on Respondent No.1 herein and the show cause notice dated 21.6.2011 would be treated as a show cause notice to both Respondent Nos.1 and 2 herein

ii. The documents already asked for by Respondent No.1 and 2 herein and not supplied should be supplied. In order to obtain clarity on this issue, we direct that a list of documents sought for by either respondents be supplied to the SEBI within two weeks from the date of this order and those documents are to be supplied by SEBI within two weeks thereafter.

iii. Respondent Nos.1 and 2 herein are granted opportunity to file their reply to the show cause notice without any further delay within a period of four weeks after receiving aforementioned documents.

iv. The SEBI would thereafter proceed to give an opportunity for personal hearing both to Respondent Nos.1 and 2 herein and these proceedings are to go on, on a day-to-day basis and no request for adjournment will be entertained in this behalf from either respondents.

v. The SEBI would take a final view on the subject matter thereafter.

9. Thus, based on the aforesaid directions of the Hon'ble Supreme Court, the matter has now come before SEBI the successor of the FMC, on a clean slate so as to pass *de novo* order in the matter, in pursuance of the original show cause notice dated June 21, 2011.

10. After disposal of the petitions by the Hon'ble Supreme Court, as aforesaid, I find from the records that certain communications have been exchanged between *Noticee no. 2* and SEBI with respect to supply of the documents. I can see that in his letter dated December 07, 2020, *Noticee no. 2* has requested to provide as many as 16 documents. In response to the aforesaid letter, SEBI, vide its letter dated January 07, 2021, informed *Noticee no. 2* that all those 16 documents, being sought by him, are not available in the files pertaining to the matter as available in the records at the disposal with SEBI.

11. Subsequently, *Noticee no. 2*, vide his letter dated January 11, 2021, re-agitated his request to supply those documents, although the list of documents was reduced to 11 in number. In view of the persistent requests from *Noticee no. 2*, copies of certain documents, after obtaining the same from ICEX (formerly NMCE), were provided to *Noticee no. 2* vide letters dated February 09, 2021 and March 04, 2021.

12. Thereafter, vide their letter dated April 05, 2021 the *Noticees* have filed a common written reply to the SCN. In the said reply also, *Noticees* have strongly demanded that certain documents, which were collected by the FMC during the investigation/ inquiry conducted by it and copies of which have not been provided to them yet, should be furnished to them first. The said documents as sought by the *Noticees* include: Bills raised to ATSPL (para 3.2.4(e) of SCN), Statement given on 09.04.2011 by Mr. S. S. Vyas, Agenda and minutes of all FMC meetings held from December 14, 2010 till July 08, 2011, Bank account statements of NMCE with Yes Bank, Mumbai, IndusInd Bank, Mumbai, Central Bank of India, Ahmedabad, complete Minutes of meeting of Board of Directors of NMCE held on May 23, 2002 etc. Before making any observation on the request of the *Notices* for the above mentioned documents, it would be pertinent to talk about the list of documents that have been relied upon by FMC for issuance of the SCN which is the subject matter of adjudication in the present proceedings:

Table no. 1

<table>
<tr><th>Sr. No</th><th>Details of Documents relied upon in the SCN</th></tr>
<tr><td>1.</td><td>Complaint dated 14/12/2010 (e-mail)</td></tr>
<tr><td>2.</td><td>Auditor's Report (M/S V S Shetty) in respect of NMCE for the financial years 2006-2007, 2007-08.</td></tr>
<tr><td>3.</td><td>Statements of the following persons:
<table>
<tr><td>Sr. No.</td><td>Date of Statement</td><td>Name of the Official</td></tr>
<tr><td>i.</td><td>24.12.2010</td><td>Ms Poonam Verma (nee Gupta)</td></tr>
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		ii.	24.12.2010 03.06.2011	Ms Sarita Baxi	
		iii.	24.12.2010	Shri Dinesh Shukla	
		iv.	24.12.2010 17.06.2011	Shri Rajendrasinh Chudasama	
		v.	24.12.2010 28.01.2011 29.04.2011	Shri Neeraj Gupta	
		vi.	24.12.2010	Shri Kaushik Pandya	
		vii.	24.12.2010	Shri Tarun Gupta	
		viii.	24.12.2010	Shri Suneil Jain Shri Hitesh Rathod	
		ix.	27.01.2011	Shri Vijay Mohan Mehrishi	
		x.	27.01.2011 04.03.2011 06.04.2011	Shri Kailash Gupta	
		xi.	07.03.2011	Ms Preetika Godiwala	
		xii.	14.03.2011 Through e-mail	Shri Samar Dave	
		xiii.	28.04.2011	Shri Anil Mishra	
		xiv.	03.06.2011	Shri Nisarg Shah	
		xv.	03.06.2011	Shri Bharat Shah	
		xvi.	03.06.2011	Mrs Prakashba Chudasama	
		xvii.	03.06.2011	Mrs Ushaben Goswami	
		xviii.	03.06.2011	Shri Anand Shah	
		xix.	13.06.2011	Shri Kalpen Shah	

4.	Bank Statement of Margin Account of NMCE (A/C N0.00060340004245) with HDFC Bank, Navrangpura Br.
5.	Bank Statement with Vijaya Bank, Relief Road Branch a. Account No. 730100300002872 of M/s Neptune Overseas Ltd b. CA-3876 of M/s ATSPL
6.	Bank Statement of Account No.00062640000427 of M/s ATSPL with HDFC Bank, Stock Exchange Branch, Ahmedabad.
7.	Letter No. ROC/D- inspection/2010/196 dated 22.02.2011 of Registrar of Companies, Ahmedabad
8.	Documents downloaded from public domain (www, mca.gov .in)
9.	HDFC Bank statement in respect of accounts mentioned in para 3.5 (e) of the SCN.
10.	Copies of 5 sets of pre-dated Original Agreements submitted by Shri Neeraj Gupta during the Statement on 28.04.2011: a. two agreements between NMCE and ATSLLC (one not signed by ATSLLC) b. three agreements between NMCE and ATSPL and Mantissa Infotech P Ltd.
11.	Copies of 5 pre-dated substituted Agreements submitted by Shri Kailash Gupta vide his statement dated 27.01.2011 and by Shri Neeraj Gupta vide his statement dated 28.01.2011 as detailed below: a. Two Agreements between NMCE, ATSLLC and ATSPL; b. Three Agreements between NMCE and ATSPL
12.	Details of Payment made to ATSPL year wise, submitted by Ms Santa Baxi of NMCE during her statement on 24.12.2010.
13.	Letters numbers as detailed below, received from NMCE: a. NMCE/F&A/1100 dated 31.12.2010 b. NMCE/SEC/1225 dated 28.01.2011 c. NMCE/FMC/2010-11/1325dated 16.02.2011 d. NMCE/FMC/2010-11/1359 dated 26.02.2011 e. NMCE/FMC/2010-11/1381 dated 01.03.011 f. NMCE/SEC/1502 dated 23.03.011 g. NMCE/SEC/98 dated 18.04.011 h. NMCE/SEC/106 dated 20.04.2011 i. NMCE/SEC/170 dated 03.05.2011 j. NMCE/SEC/192 dated 10.05.11 k. NMCE/SEC/213 dated 13.05.11

	l. NMCE/FMC/2010-11/223 dated 16.05.2011 m. NMCE/2011-12/225 dated 16.05.2011 n. NMCE/2011-12/269 dated 31.05.2011 o. NMCE/SEC/338 dated 15.06.11
14.	Summary statement of Projects, details of works contract with Mantissa and payments made by NMCE to Mantissa Infotech P Ltd submitted by Shri Neeraj Gupta during his statement on 28.01.2011 and vide his e-mail dated 02.05.2011
15.	Letter dated 09.06.2011 received from M/s Mantissa Infotech P Ltd.
16.	Copies of 5 Annual Report of ATSPL for the years 2006-07 to 2009-10.
17.	Copies of Journal Register of ATSPL for the years 2006-07 to 2009-10.
18.	Copies of Ledger Accounts of various parties in the books of ATSPL for the period 01.04.2001 to 01.02.2011 (4 parts)
19.	Ledger account of M/s ATS LLC., USA in the books of NMCE for the period 01.04.2000 to 15.06.2011
20.	Ledger account of M/s ATSPL in the books of NMCE for the period 01.04.2000 to 15.06.2011.
21.	Copy of e-mail dated 17.06.2011 of Shri Neeraj Gupta.
22.	Copy of e-mail dated 18.06.2011 of Ms Sarita Baxi. .
23.	Letters from Principal Asset Management (PNB) dated a. 29.04.2011 and b. 06.05.2011
24.	Copy of the Fax message dated 17.06.2011 received from Shri Anil Maloo of NMCE.
25.	Copy of the Fax message dated 17.06.2011 received from Shri Narayan Rai of NMCE.
26.	Information retrieved from the web site of ATSLLC (http://www.arrowts.com)
27.	Copy of cheque bearing no. 302958 dated 30.05.2006 for Rs.2.47 crores issued from NMCE Margin account favouring M/s Kushal Enterprises.
28.	Certified copy of the minutes of First Meeting of Board of Directors of M/s Online Commodity Exchange of India Ltd held on 15.02.2002 submitted by NMCE.
29.	Copy of 1st Annual Report of NMCE for the period 2002-2003 submitted by Shri Kailash Gupta during his statement on 06.04.2011.

30.	Complete List of Cars of NMCE as on 31.12.2010 and the invoice copies in respect of purchase of 3 cars in the name of Shri Kailash Gupta.
31.	Copies of e-mails between Shri Kailash Gupta and various parties which are relied upon in the Show Cause Notice, (total 24 pages) submitted by Shri Neeraj Gupta vide his letter dated 01.06.2011.
32.	E-mails received from NMCE in respect of trespass into the Exchange premises at midnight and attempted sabotage of the IT system and NMCE Letter no. FMC/224/2011-12 dated 16.05.2011.
33.	Minutes of meeting of the Board of Directors of NMCE dated 26.02.2011 forwarded vide letter NMCE/51_Board/2010-11/3 dated 10.03.2011.
34.	Documents submitted by Shri Dinesh Shukla vide his statement dated 24.12.2010 pertaining to physical trading in Rubber and other commodities by Neptune Overseas Ltd. through M/s Kushal Enterprise and other entities as per the list attached to the statement.
35.	Letter from HDFC dated 26.02.2011 forwarding account details of ATS (Pvt.) Ltd.

13. There is no dispute that copies of all the above listed documents based on which the SCNs were issued and most of which have been submitted to FMC either by NMCE, its Bankers or its employees or even by *Noticee no.2* himself, are already available with the *Noticees*. With respect to the documents sought by the *Noticees* vide its letter dated April 05, 2021 as mentioned at paragraph no. 12 above, I observe from the aforesaid list that none of the said documents has been relied upon by the FMC so as to make any insinuation/allegations in the SCN against the *Noticees,* hence strictly speaking, there is no requirement to furnish those documents to the *Noticees* which have not been relied upon in the SCN. Nevertheless, I find that copy of one of the aforesaid documents viz., Minutes of meeting of Board of Directors of NMCE held on May 23, 2002 has been furnished to the *Noticees* vide SEBI's aforesaid letter dated March 04, 2021. Further, the copies of the bills raised to ATSPL have also been furnished to the *Noticee* after obtaining the same from Mr. Anand Shah of Mantissa Infotech Pvt. Ltd.. I may also add here that providing copies of only those documents that have been relied upon in the proceedings has been held to be sufficient

compliances of principles of natural justice *[Reliance Commodities Ltd vs. National Commodity & Derivatives Exchange Ltd. (Date of decision: July 23, 2019)]*. In this case, as the copies of all the documents relied upon in the SCN have already been furnished to the *Noticees* and are undeniably already available with the *Noticees*, the argument of the *Noticees* that all the documents collected by the FMC during its investigation/inquiry need to be furnished to them is an unrestrained demand that holds no water and deserves to be rejected without discussing the details of such documents being demanded by the *Noticees*.

14. It is also noted that the *Noticees* have placed reliance on the order of the Hon'ble Supreme Court of India passed in the matter of *Price Waterhouse Vs. SEBI (2011 SCC Online SAT 58)*, so as to support their demand for the aforesaid documents. In this regard, I observe that the decision of the Hon'ble Apex Court in the aforesaid matter was only limited to the facts of the said case and therefore the same cannot be used by the *Noticees* in the present matter so as to seek copies of all the documents, as aforesaid irrespective of the fact as to those documents have been ever relied upon by FMC while issuing the SCN to them. Moreover, when one considers the nature of various specific documents that have been requisitioned by the *Noticees*, the *Noticees* appear to be asking for those documents more with a motive to make a roving inquiry into the manner of inquiry/investigation conducted by FMC rather than to use them for defending themselves against the allegations made in the SCNs which have been so made relying upon a completely different set of documents. The *Noticees'* attempt to make a roving inquiry becomes self-evident from its requisition for the minutes of meetings of FMC, which by no stretch of arguments, can be termed to be the documents "relied upon" in the SCN to make insinuations against the *Noticees*. It may be noted that the concept of fairness and compliance of principles of natural justice requires that nothing should be used against a person as an evidence which has not been brought to his notice. If the relevant material is not disclosed to a Noticee, there would be *prima facie* gross unfairness as the entity concerned would not get the opportunity to rebut that evidence or prepare its defence properly. Thus, an authority is required to supply the documents that it relies

upon while serving the show cause notice to an entity which I find in the instant case, has been duly supplied to the *Noticees* and as the documents available with the *Noticees* are the ones that have been relied upon in the SCNs they can be considered as sufficient enough for the purpose of filing an efficacious reply to the SCN in their defence.

15. In this respect, I observe that the Hon'ble Supreme Court in the matter of *Natwar Singh vs. Director of Enforcement (2010) 13 SCC 255* has held that even the principles of natural justice do not require supply of documents upon which no reliance has been placed by the authority to set the law in motion and has further held that the concept of fairness is not a one-way street and that the principles of natural justice are not intended to operate as a roadblock to obstruct statutory inquiries. In this regard, the Hon'ble Supreme Court has held as under:

> *"31. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. A notice is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the notice enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute."*

16. Under the circumstances in my view, the request of the *Noticees* for those documents which have not been relied upon in the SCN does not seem to be a *bonafide* request and deserves to be rejected for the reasons outlined above.

17. *Noticee no. 1* (Neptune Overseas Limited) and *Noticee no. 2* (Mr. Kailash Gupta), in their common written reply submitted vide letter dated April 05, 2021

have made various assertions, apart from making a request to provide the afore-discussed documents. The submissions so made in their reply, are summarized herein below:

1) There was no reason for initiation of inquiry by FMC and the same represents an abuse of power. The initiation of inquiry and issuance of SCN is contrary to the provisions of Sections 8(2) and 8(4) of FCRA.
2) In terms of Section 8 (2) of FCRA, an authorization by the Central Government for initiation of inquiry was required to be obtained by FMC which has not been done in the present case. In another case of initiation of inquiry against Cotton Association of India, sanction/approval was sought by FMC and the same was granted by the Central Government. Further, FMC has not produced any approval from Secretary, FMC or Deputy Director, FMC, in terms of the Government of India Notification S.O. no. 1162 dated May 04, 1960, by which power of Central Government to make an inquiry has been delegated to aforesaid two officials of FMC.
3) The requirement for approval from Central Government is a "jurisdictional fact", in the absence of which the authority cannot act. The jurisdiction cannot be conferred upon the authority by erroneously assuming the existence of such jurisdictional fact. The assumption of jurisdiction by FMC is illegal and *ultra vires* of the FCRA. Reliance has been placed on the judgment of Hon'ble Supreme Court passed in the matter of *Arun Kumar Vs. Union of India [(2007) 1 SCC 732]*.
4) Further, if the power delegated vide aforesaid notification has been exercised, the evidence of an approval so granted by Secretary or Deputy Director, FMC for initiating inquiry has not been provided to the *Noticees*. Such an approval ought to have been obtained in writing as the mandate under the Section 8 is sacrosanct. Such an approval would have shown that the person granting such approval is *prima facie* satisfied that the proposed inquiry is justified.

5) The powers under Section 8 are exercisable to conduct an inquiry, inspection etc., only against the recognized association and its trading members. Such a power is not exercisable on the shareholders of a recognized association. Further, the term "member" as used in Section 8 of FCRA also can be related to the trading members and not to the shareholders of the recognized association.

6) The role of FMC is to oversee the Forward Market operations so as to identify and prosecute the violators of illegal trading in forward contracts or illegal options. The issue of corporate governance is under the jurisdiction of the Registrar of Companies and not of FMC, which has digressed into the company law issues.

7) The inquiry undertaken by FMC does not pertain to any payment default, clearing, and settlement related activity, or fraudulent activities connected with the Forward Market trading activities.

8) Further, FMC has no jurisdiction under FCRA to initiate an inquiry into the allotment/ transfer of shares of a recognized association or a shareholder of such recognized association. Any such inquiry falls within the purview of the Registrar of Companies/Regional Director, as specified under the Companies Act, 1956. Moreover, there is no illegality in the allotment of shares of the NMCE made to the *Noticees*.

9) The period for which the investigation was undertaken by FMC pertained to 2001 to 2011. Whereas the requirement under Section 8(4) of the FCRA to maintain and preserve Books of Accounts and other documents was only for three years. Therefore, the inquiry ought to have been restricted to a period of three years only. By virtue of the said fact, the *Noticees* have not been in a position to defend their cases appropriately.

10) The justification to initiate action has been given by referring to the Audit conducted for the years 2006-07 and 2007-08 and an unsigned complaint received by FMC. The inquiry was initiated without verifying the *bonafide* and the credibility of the complainant.

11) The passage of more than 20 years since the actions and the fact that the records of NMCE are not accessible to the *Noticees* have impacted their

ability to defend their case. Some of the relevant records have been taken out by the employees of NMCE during the shifting of its office. *Noticees* apprehend that there is a deliberate attempt to deprive them of the relevant records.

12) On the issue of delay, certain judgments like *State of Punjab v. Chaman Lal, (1995) 2 SCC 570; State of A.P. v. N. Radhakishan, (1998) 4 SCC 154;* and *HB Stockholdings Ltd. v. SEBI, [2013] SAT 44* have been cited.

13) In the light of the principles of natural justice enunciated in the aforesaid judgment, the *Noticees* have in their explanation referred to the events spanning beginning from 1998-2000 (When *Noticee no. 1* incurred expenses for and on behalf of NMCE as pre-operating expenses) till the year 2020, when the Hon'ble Supreme Court observed that fresh SCN is not required to be issued to *Noticee no. 1*.

14) Without having access to all the documents, the *Noticees* cannot be expected to prove their innocence. The management of NMCE was hand in glove with FMC to prove the charges levelled in the SCN.

15) If the *Noticees* are held guilty of the violations of the charges levelled in the SCN, the other shareholders of NMCE, as well as NMCE, should also be held guilty.

16) *Noticee no. 2* was the Managing Director of *Noticee no. 1* and since the year 1990, *Noticee no.1* has been engaged in the trading, import, and export of commodities. *Noticee no. 2*, as a core promoter, had conceptualized the setting up of the online commodity exchange. *Noticee no. 2* was also the President of Ahmedabad Seeds Merchant Association, an association recognized under the FCRA.

17) During the period of 1997-98, India had signed the World Trade Organization (WTO) Treaty to liberalize the market. On the insistence of FMC, *Noticee no. 2*, as a representative of the Ahmedabad Seeds Merchant Association, had attended the training program in USA. Apart from the said visit, *Noticee no. 2*, along with the other individuals, travelled to many countries and attended many workshops to study the global practices in commodities.

18) In order to set up NMCE as an online commodity exchange, *Noticee no. 2* had to incur significant expenditure. Further, *Noticee no. 1* has incurred expenses like fees paid to TCS, SBI Capital, UTI Securities for their guidance and advice. Such expenses can be duly verified from the relevant bank account statements. Furthermore, expenses were also incurred towards travel, hotel stay, conveyance, support staff, stationery, telephone, expenses, etc. Though *Noticee no. 2* devoted his full time to set up NMCE, he did not charge any salary for the same.

19) Under the guidance of *Noticee no. 2*, an application was made by *Noticee no. 1* for recognition to set up an online Commodity Exchange in the year 1999. The said application was allowed around July, 2001 and accordingly, *Noticee no. 1* incorporated a company under the name Online Commodity Exchange India Limited (renamed afterward as NMCE).

20) *Noticee no. 2* was recognized as one of the first Director as well as Managing Director of the NMCE, in its first Board meeting. The routine powers were delegated by the Board of Directors to *Noticee no. 2* acting as Managing Director of NMCE. It was also resolved by the Board of Directors of NMCE that the registered office of the Company shall be situated in the premises owned by *Noticee no. 1*.

21) In order to comply with the criteria laid down for grant of approval/recognition of the online commodity exchange, a joint venture of *Noticee no. 1* and Central Warehousing Corporation (CWC) was set up and a shareholders' agreement dated May 22, 2003 was executed. The NMCE became operational in November, 2002, however, the financial contribution from CWC was received only in July, 2003.

22) In terms of the aforesaid shareholders' agreement, *Noticee no. 1* would have the right to appoint the Managing Director of NMCE and further, the shareholding of CWC would not be more than 26% and the shareholding of *Noticee no. 1* would not fall below 25%. The rest of the shares of NMCE were acquired by public sector entities like NAFED, Gujarat Agro Industries Corporation etc.

23) By virtue of the shareholding, CWC had the potential to block any special resolution.

24) *Noticee no.1* had incurred pre-incorporation and pre-operative expenses on behalf of NMCE to the tune of INR 100.26 Lakh (1 Crore approx.). The said expenditure was duly reflected in the Annual Reports of NMCE for the financial year 2001-2002 till 2003-2004 and the said reports were approved by the Board of Directors of NMCE, which also included nominee of FMC and nominee directors of CWC etc.

25) The Board of Directors of NMCE comprised of 10-12 Directors and the Board meetings were attended by at least 7-8 Directors. *Noticee no. 2* was enjoying only one vote in the deliberation of the Board of Directors and none of his family members were Directors on the Board of NMCE. The same shows that *Noticee no. 2* did not have any control over the Board of NMCE.

26) During the first year of its operations, NMCE had a paid-up capital of INR 1.05 Crore, total funds of INR 3.77 Crore (blocked in fixed assets) and it faced a loss of INR 21 Lakh. Till 2003, *Noticee no. 1* had transferred INR 4 Crore (approx.) towards the salary of different employees of NMCE. All the amounts were duly reflected in the books of NMCE.

27) A software was required to be implemented for the purpose of online trading and it was decided to take the Derivative Trading and Settlement System (DTSS). Such a software was available with CMC Limited, which was installed at NMCE during August 2002.

28) One Mr. Bhavit Godiwala, an employee of CMC Limited, was the Designer of the said software and he was also instrumental in the implementation of the online trading platform at NMCE. He had left CMC during the year 2005.

29) After some time, due to certain disputes that emerged between CMC and NMCE, relating to some technical issues, CMC terminated the provision of maintenance services to NMCE and also refused to share the source code of the software with NMCE.

30) As software maintenance support was critical to the core operations of NMCE, it became essential for NMCE to appoint another software vendor for maintaining the systems. During such time, Arrow Total Solutions LLC ("ATS LLC") had provided support in maintaining the software, through its local associate namely Arrow Total Solutions Private Limited ("ATSPL"), during the period of 2002-2005. As the aforesaid person Mr. Godiwala, got associated with ATSPL as a consultant since 2006, NMCE appointed ATSPL as its software vendor.

31) At the instance of NMCE during 2006, ATSPL started developing an independent software (CFTS), with its own source codes to provide a new platform for trading activities of NMCE. For the services rendered by ATSPL during 2006-2010, a total amount of INR 29.47 Crore has been paid by NMCE.

32) The SCN has been premised on the fact of wife and daughter of *Noticee no. 2* being Directors of ATSPL. However, both the said persons have not taken any remuneration or dividend from ATSPL and have also resigned from the Board of ATSPL during September, 2007. Further, out of the total consideration of INR 29.47 Crore paid to ATSPL, as much as INR 22 Crore was paid during the period of 2008--2010, which is subsequent to the resignation of the family members of *Noticee no. 2*.

33) The aforesaid decision of appointing ATSPL as software vendor was approved by the Board Committee (Technology) of NMCE and the said meeting was attended by many of the Board members. Further, the Audit Committee of NMCE, which also included FMC nominees, had approved the capitalization of the cost of software purchased from ATSPL.

34) During the meeting of Audit Committee of NMCE held on September 07, 2010, it was noted that the capitalized addition to software development during the year, was INR 20.58 Crore, which includes capital work in-progress of INR 2.97 Crore capitalized during the year. It was also acknowledged by the Committee that in the year 2008-2009, the first agreement was entered into with ATSPL to facilitate the development of new peripheral software based on market requirements and also to

introduce additional features in the existing CTCL software. Copy of minutes of the said meeting has also been filed. In an appeal filed by NMCE before Commissioner of Income Tax Appeals, it has stated that ATSPL has provided the source code of the highly technical software which is used for running the stock exchange (Copy of appeal memo has been filed). By doing so, NMCE has accepted the cost of the software and has also confirmed the process of acquisition. In view of the same, it cannot be alleged that funds have been siphoned off by not following the due process for purchase of the said software. FMC cannot challenge the appointment of ATSPL as the software vendor, as it does not have any jurisdiction over such issues.

35) Further, ATSPL has also provided its services in procurement and development of installation of Price Ticker boards for various mandis/ markets in the country under Price Dissemination project launched by FMC, by virtue of which a savings of INR 3.13 Crore was made by NMCE. Copy of Supplementary Note No. 21 to the NMCE Board agenda for the Board meeting held on 23 May 2011 has been filed in support thereof.

36) The provision for market making on non-sensitive commodities was introduced by NMCE in its Bye-Laws, which were approved by FMC.

37) The Auditors appointed by FMC for the year 2006-07 and 2007-08 did not point out any irregularities, as have been alleged. Further, neither any query was raised by the nominee of FMC nor any inquiry was initiated by FMC at the stage of submitting of the said reports.

38) *Noticees* did not have any opportunity to cross examine the persons whose statements were recorded by FMC, therefore, the said statements not being in accordance with the provisions of the Indian Evidence Act, 1972, should be rejected in the present proceedings. Further, the reference made to the private correspondence between *Noticee no. 2* and his family member has invaded his privacy.

39) *Noticee no. 2* has furnished all the documents that were in his custody, to FMC and since February 26, 2012, he has not been part of the management of NMCE.

40) No irregularities have been independently observed by NMCE against *Noticee no. 2*.

41) FMC has no jurisdiction to investigate the affairs of ATSPL and the investigation conducted by FMC into the affairs of ATSPL is illegal.

42) NMCE being a private sector entity, is not required to follow any specific procedures while awarding contracts. FMC does not have powers to micromanage the exchange (NMCE), which is the sole prerogative of its Board of Directors and its management including the Managing Director.

43) None of the agreements, as referred in the SCN were backdated or replaced during the tenure of *Noticee no. 2* in management of NMCE. Further, NMCE has capitalized the cost of the software developed and supplied by ATSPL and it (NMCE) has also claimed depreciation on the said software and taken a stand before the Income Tax department that the amount paid for the software should be taken as the cost of acquisition of the software.

44) No questions can be raised by FMC regarding the software as NMCE has not found any irregularity in its purchase or appointment of ATSPL or towards the payments made to ATSPL.

45) It is denied that no payments have been made to ATSPL after the appointment of Mr. Anil Mishra, as has been alleged. An amount of INR 20 Crore has been paid by NMCE to ATSPL. All the office notes for approving such payments have bene signed by Mr. Anil Mishra and cheques amounting to INR 1.33 Crore have also been signed by Mr. Mishra himself.

46) After payment is made by NMCE to ATSPL, the manner of utilization of such money is not of concern of NMCE. There has been a far-fetched attempt to link the *Noticees* to payments made by ATSPL to M/s Kushal Enterprises, as FMC has not been able to establish that the *Noticees* were controlling the bank accounts of ATSPL.

47) ATSPL is a separate legal entity and is managed by its own Board of Directors. There is no allegation that *Noticee no. 2* was part of the management of ATSPL. Even in the correspondence relied upon by FMC so as to make allegations against *Noticee no. 2* with respect to ATSPL, only software related issues have been discussed. FMC has only relied upon the statement recorded from two persons viz., Ms. Preetika Godiwala and Mr. Samar Dave, and has not verified the said statements with material on record and the opportunity of cross examination of the said persons was also not provided to the *Noticees*.

48) Unless a case of fraud in trading activities is established, FMC has no jurisdiction to interfere in the management of an exchange. Further, FMC has no jurisdiction over the affairs of ATSPL.

49) The allegation that the software provided by ATSPL is developed by Mantissa Infotech Private Limited (Mantissa) is wrong as it did not have the skill set to develop the said software. Mantissa had only provided programmers to NMCE on need basis, for the purposes of developing/testing dot net applications installed at NMCE

50) Mantissa was only a body shopper for programmers who worked on dot net technology, which (dot net technology) is a very small portion of the overall trading software development effort.

51) Further, NMCE has taken a stand before Income Tax Department that the software being highly technical, the cost paid to the programmers cannot be considered as the cost of acquisition.

52) There has been no embezzlement of funds from the accounts of NMCE by paying to ATSPL. The appointment of ATSPL as a software vendor was considered by the Board Committee (Technology) of NMCE, wherein members of the Board had taken a unanimous decision to appoint ATSPL as the software vendor. No complaints with respect to functioning of the software have ever been raised by NMCE or its members.

53) NMCE is using the software till date and the payments made to ATSPL by NMCE were against the services towards the software.

54) By its letter dated December 27, 2010, FMC had illegally directed NMCE to stop making payments to all consultants of NMCE and also to ATSPL.

55) The allegation of appointment of ATSPL as software vendor without following any tender process is baseless as there is no such requirement. Another commodities exchange has taken software from its promoter entity itself, for which no action has been taken by FMC. Even in emergent situations, Government bodies can procure goods/services through single tender.

56) Had there been any loss to NMCE from the purchase of the software from ATSPL, it would have written off the value of the said software in its Balance Sheet. In terms of the Balance Sheet and Profit and Loss Account for the F.Y. 2012-13, the software was being treated as an Asset and depreciation was claimed on it. A copy of annual accounts, and Financial Notes have been filed in this regard.

57) Further, NMCE has not made provisioning for the alleged loss accrued to it from the purchase of the software. No concern has been raised by the Board of the NMCE and its shareholders with regard to the value of the software purchased from ATSPL or any benefit accrued to *Noticee no. 2*.

58) The aforesaid books of accounts were approved by the Board of NMCE which included the nominee Director of FMC, and no questions with respect to such software purchase were ever raised by any Board member. The work of ATSPL/ATSLLC was always supervised by a committee of Board of Directors of NMCE.

59) The auditor appointed by the Ahmedabad Crime Branch, Gujarat Police in its report dated 27 May 2013 has noted that the only payment made by NMCE to ATSPL through cheques signed by *Noticee no. 2* was to the tune of INR 2.87 Crore on 25 January 2007. Further, rest of the payments to ATSPL by NMCE was processed through different directors (while Mr. Anil Mishra was CEO of NMCE), including payment of INR 1.33 Crore made through cheques signed by Mr. Anil Mishra.

60) It has also been noted by the Auditor that the entire decision making was a collective decision of the entire management of NMCE. As noted in the

supplementary report dated 22 June 2013 filed by the said Auditor, the entire management including the CEO, CFO & IT managers of NMCE were aware of the financial transactions but their roles have not been investigated.

61) The Auditor's report also recorded that even though the amounts were paid by ATSPL to *Noticee no.1* for the purpose of purchase of NMCE's shares, the money has once again come back to NMCE in form of turnover charges.

62) As out of total amount of INR 29.90 Crore allegedly siphoned off from NMCE to make payments to ATSPL, payments of as much as INR 20 Crore were processed when Mr. Anil Mishra was in charge of NMCE. There is no allegation that the said Mr. Mishra had no option but to do *Noticee no. 2's* bidding.

63) Mr. Mishra would not have sanctioned the payments to ATSPL (amounting to INR 1.33 Crore) by signing the cheques if he was not satisfied about justification for such payments. It is also relevant to mention here that Mr. Mishra is the complainant in most of the complaints filed against the *Noticees*.

64) FMC, as a regulator, cannot term the cost of a software to be unreasonable, more so when no such concern has been raised by the Directors or shareholders of NMCE. If the cost of software of NMCE is compared with similar products of other commodities exchanges, it can be noted that the cost paid by NMCE was less than the average cost of software purchased by other commodities exchanges.

65) It is wrong to allege that the software was purchased by ATSPL from Mantissa at far lower prices than the price paid by NMCE to ATSPL.

66) As the payments made to ATSPL have been approved by the Board and shareholders (including public sector entities like CWC), the same amounts to approving/ratifying the appointment of software vendor as well. Reliance has been placed on the judgment of the Hon'ble Supreme Court, passed in the matter of *Maharashtra State Mining Corporation vs. Sunil (date of decision April 24, 2006)* to support the argument that ratification of a

previous action would relate back and have the effect of the previous action having been done with approval as and when it was previously done.

67) As it was not possible for NMCE to recruit expensive Corporate Executives, Consultants were appointed on need basis. Such Consultants were professionally experienced and independent persons. It was within the power of *Noticee no. 2*, as MD of NMCE, to appoint such Consultants after adequate due diligence, proper procedure and in consultation with the Board of Directors of NMCE. *Noticee no. 2,* was authorized in the first meeting of Board of directors of NMCE held on February 15, 2002 to appoint Consultants, professional agencies etc.

68) The issue of appointment or alleged excess payments to such Consultants was never raised by the Board of Directors of NMCE or the shareholders and FMC has no jurisdiction to raise such issues. The payments made to such Consultants was commensurate with the value of the services rendered by the respective persons.

69) The amount paid to such Consultants (INR 5.54 Crore, as alleged in the SCN), is far less than the money required to be spent on payment of salaries to permanent employees for need based jobs.

70) Many such Consultants had attended the Board meetings of NMCE also. All the remunerations made to such Consultants were reflected in the Audited accounts of NMCE. Consultants do no follow a procedure to render advice in written form and the advices were rendered by such Consultants during meetings.

71) The allegation that Consultants were appointed solely by *Noticee no. 2* is based on the statement given by Mr. Anil Mishra, which is not backed by any evidence and such statement is a motivated statement. The Board of Directors of NMCE comprised of Independent Directors and nominee Directors appointed by FMC, who would not have remained silent in case of any glaring lapse.

72) The statement of Mr. Anil Mishra has not been verified by FMC from the records of NMCE nor the minutes of meetings of the Board of Directors

have been verified by the FMC. Moreover, Mr. Mishra would not have any personal knowledge of the factual positon as he had joined NMCE only in year 2008 and the allegations against *Noticee no. 2* pertains to the years 2001 to 2007.

73) FMC has not named Ms. Sweta Mishra, daughter of Mr. Anil Mishra, who was also appointed on a retainer basis by NMCE for a month at remuneration of INR 2 Lakh.

74) Mr. V.M. Mehrishi, who after his superannuation from Gujarat Agro Industries Corporation, was appointed as Consultant during the period of May 29, 2005 to December 01, 2010 and a total sum of INR 5 Lakh was paid to him. Similarly, Mr. Nishikant Choubey, was engaged as a Consultant after he retired from the Central Warehousing Corporation, and was paid a total sum of INR 36.46 Lakh. Employing any other person with such vast experience would have resulted in huge cost to the NMCE.

75) As *Noticee no. 2* is not having access to the records of the NMCE, it is not possible to submit any evidence or record of service rendered by such consultants to NMCE and management of NMCE will suppress such information from *Noticee no. 2*.

76) NMCE had entered into 5 agreements with ATSPL. The said agreements have been termed as backdated and fabricated merely on the statement of Mr. Neeraj Gupta and no independent inquiry has been conducted by FMC.

77) FMC has wrongly termed ATSPL also as a Consultant, however, it is only a software vendor. Such a statement has been made by FMC to support its allegation that software was developed by Mantissa and ATSPL was merely a vehicle to escalate the cost of acquisition of software.

78) As ATSPL is the Indian arm of AST LLC, payments made to ATSPL in furtherance of its liability cannot be termed to be illegal, as alleged. Further, as ATSPL is an Indian company, there has been no outflow of foreign exchange from India. No irregularity with respect to payments made to ATSPL was found by the Auditors appointed by FMC in the years 2006 and 2009.

79) FMC has no power to lift the corporate veil of ATSPL, as it has no jurisdiction over it. As all allegations are based on the inquiry of ATSPL, the present proceedings deserve to be dropped.

80) ATSPL had done all its filings before Income Tax and it also had adequate manpower and infrastructure to develop software system for NMCE. Such a similar ground has been taken by NMCE in its appeal before Income Tax Authority.

81) With respect to the payments made to ATSPL from the margin account of NMCE, the same is only an inadvertent error. Said error did not cause any loss and even the Auditors have not raised any question on this transaction. Day to day surplus funds from margin account were required to be invested in/redeemed from short term mutual fund scheme held with Principal Mutual Fund. Similarly, surplus funds from Capital account and Expenditure account were also invested in short term mutual funds. During such process, payments were made to ATSPL directly from the margin account instead of routing such payment through Capital account and Expenditure account.

82) The entities listed under para 5.3 (xv) (d) of the SCN (to whom funds have been transferred from ATSPL) are trading members of NMCE. The amounts paid by ATSPL to such trading members reverted to NMCE as transaction charges, therefore, no loss has been caused to NMCE.

83) The allegation pertaining to purchase of shares of NMCE by *Noticee no. 1* is baseless and without evidence. The transaction of INR 4.80 Crore from ATSPL to NOL was for commodity stock in CWC warehouse on behalf of NMCE clearing house.

84) FMC has not furnished copy of ledger, bank book, office note of NMCE etc., related to transactions shown in the chart under para 6.1.2(a) of the SCN.

85) With respect to the allegations that the minutes of the meeting of Standing Committee of NMCE held on April 10, 2002 are unsigned, *Noticee no. 2* cannot comment as he has no access to such minutes of meetings. Inspection of such documents, as sought by *Noticee no. 2* were

initially denied by NMCE and was given only on the directions passed by Registrar of Companies.

86) Further, the duty to get the minutes of meeting signed is of the Company Secretary and not of the MD.

87) The allegation that temporary finance was given to *Noticee no. 2* by allotting shares before receiving the share application money is wrong. The copy of cheques, as have been referred to in the SCN have not been furnished to the *Noticees*.

88) For the purpose of opening a bank account, NMCE was required to submit the Business Commencement Certificate with the bank. As the said certificate was issued by RoC only on April 05, 2002, the bank account of NMCE was opened only after the said date, and subsequent to which, the cheques given by *Noticee no. 1* to NMCE for the shares could be deposited.

89) The SCN has alleged that in the meeting of Board of Directors of NMCE held on January 19, 2004, wherein the allotment of 19,74,900 shares to NOL was resolved, only one Director (Mr. Shankarlal Guru), apart from *Noticee no. 2* were present, and *Noticee no. 2* was an interested party, therefore, the quorum in the said meeting was not complete. However, FMC has not recorded the statement of Mr. Shankarlal Guru to verify whether the said meeting took place and to ascertain as to who all other persons were present in the said meeting. All meetings were conducted with the assistance of Company Secretary of NMCE. Further, allotment of shares against full consideration is not a business item under the provisions of Companies Act, which require any interested Director to abstain from attending such meeting.

90) The unsigned minutes have been furnished to FMC at the behest of Mr. Mishra.

91) No irregularity has been found in allotment of shares by the Auditors of NMCE.

92) It is wrong to allege that NMCE never received the share application money of INR 1.97 Crore (approx.) from *Noticee no. 1*.

93) The accounts of NMCE have been audited and approved by the Board of Directors since the year 2004 and no objection has been raised with respect to the said accounts. There has been no objection from the shareholder, CWC etc., regarding the running account between *Noticee no. 2* and NMCE, which is alleged to be an unauthorized account.

94) It is denied that *Noticee no. 2* without following the directives of the Board of Directors of NMCE for getting the statement of the pre-incorporation expenses audited, unilaterally credited an amount of INR 1 Crore (approx.) in favour of *Noticee no. 1* in the books of NMCE towards the pre-operative expenses and it is also denied that pre-operative expenses incurred by *Noticee no. 1* on behalf of NMCE are bogus.

95) The *Noticees* can provide the bank account statements to show the various expenses incurred by the *Noticee no.1*, however, due to passage of long time of 17 years, the bills and other supporting documents for such expenses can't be furnished and mere absence of such documents ought not lead to an inference that those expenses are fictitious.

96) Based on the audited accounts of NMCE, it can be presumed that the Auditors would have verified all figures and the supporting documents. As no such objection has ever been raised, FMC/NMCE cannot raise such objections towards the pre-operative expenses.

97) It is denied that *Noticee no. 2* has given false information to the NMCE Board. It is also denied that the minutes of Standing Committee were not placed before the NMCE Board. The SCN has alleged that the minutes of the Standing Committee of the Board for its meeting held on January 19, 2004 have not been signed. The members of the Standing Committee also included some of the Directors of NMCE, and such Directors have attended all the meetings of NMCE. If the minutes for the aforesaid meeting are fabricated, such Directors being reputed professionals, would have raised objections in the Board meeting and also would have denied that they had approved the allotment of shares to NOL (*Noticee no. 1*) as part of the Standing Committee. In the absence of any such objections, the mere fact of non-signatures of the minutes can only be termed as a

technical lacuna, which could not raise doubt on the legality of the allotment.

98) FMC does not have authority to raise question on the issue of allotment of shares. The inquiry initiated by FMC and the directions issued consequently have been passed with an intent to take away NMCE from *Noticee no. 2*. No action has been taken by FMC against MCX due to the fact that shares were allotted to FTIL for the value of INR 15 Crore, by way of adjustment against the contribution of FTIL in form of Software installation for MCX.

99) The allegation that consideration against allotment of shares of NMCE to *Noticee no. 1* on October 14, 2006 was done without receiving the consideration is first of all a wrong allegation as the SCN itself mentions that a cheque dated May 05, 2006 was received by NMCE, which was deposited after the allotment. Therefore, the only allegation that remains is that first allotment of shares was done and thereafter the cheque was processed, which clearly remains a procedural infraction. The Auditor for the year 2006-07 has satisfied itself for all the transactions between NMCE and the *Noticee no.1*. FMC cannot raise allegations on the indoor management of NMCE.

100) The share allotment has been duly reflected in the Annual Returns and Accounts of NMCE, and have been duly verified by the Auditors of NMCE as well as Auditors of FMC. Even assuming without admitting that the allotment was irregular, by virtue of adoption of the audited accounts, the allotment has been subsequently ratified and confirmed by the Directors and shareholders of NMCE. No objection has ever been raised by any Director, shareholder etc.

101) The SCN has alleged that as the debit balance was standing in the running account of *Noticee no. 1*, the payment that was made towards the allotment of shares ought to have adjusted towards the same and by not doing so, NMCE has financed the allotment of shares to *Noticee no.1*. The said balance was on account of *Noticee no.1* having purchased stocks of commodities in CWC for and on behalf of the clearing house of NMCE to

facilitate entry and exit of speculators and investors in commodities and for convergence of settlement prices with the physical spot market in commodities. Based on the oral directions of FMC and after the FMC's Auditor M/s M.B. Agarwal submitted its report, the said accounts were closed and settled by liquidating the commodity stock for clearing house in CWC warehouses.

102) Similarly, for the allotment of shares made on December 30, 2006, NMCE had received two cheques on November 25, 2006, i.e., prior to the allotment. However, the said cheques were deposited in the bank accounts on December 19, 2006 and January 25, 2007. The clearing/depositing of cheque after allotment can only be termed to be a procedural issue.

103) FMC has combined three different separate running accounts to reflect a debit balance standing in the ledger account of *Noticee no. 1*. Such clubbing is not allowed as per Mercantile Practice as all the accounts are meant for different purposes.

104) With respect to the allegation of purchasing 3 cars in the name of *Noticee no.2* out of the funds of NMCE, it is submitted that the said vehicles have been duly reflected in the books of accounts and balance sheet of NMCE.

105) NMCE was using 9 vehicles (7 cars and 2 two wheelers) which belonged to *Noticee no. 1* till the year 2007. As the said vehicles were worn out, new cars were purchased by NMCE to replace these vehicles and the said three cars were registered in the name of *Noticee no. 2*. No undue benefits have been derived by *Noticee no. 2* from the said registration.

106) *De facto* and *de jure,* these 3 vehicles were being owned by NMCE and were also being used for the business purpose of NMCE itself. Registration of motor vehicles in the names of Directors is common practice to save registration expenses, which cost lesser amounts for individuals than for the corporate entities.

107) The day-to- day management and governance in NMCE had always been transparent and on the lines of the norms followed by any other company. All the allegations regarding subversion of corporate governance norms by

Noticee no. 2 and mistreatment of the executives of NMCE by *Noticee no. 2* are false.

108) As the shareholders and the Board of Directors had complete faith in the conduct of *Noticee no. 2* acting as MD of NMCE, no objections were raised by them with regard to any of his conduct.

109) The SCN has referred to an email dated January 03, 2009, which was addressed by *Noticee no. 2* to his family members. Personal correspondence should not have been used by the regulator to level false allegations.

110) The said email was addressed by *Noticee no. 2* to highlight the issue that Mr. Neeraj Gupta was not able to carry out his duties assigned to him and further that a replacement of Mr. Neeraj would be required as he has resigned.

111) FMC has relied upon the aforesaid email to allege that ATSPL was the company controlled by *Noticee no. 2*. However, the FMC has ignored the context/background of such email, which can be seen from the complete chain of e-mails, copy of which have been produced in support now.

112) As Mr. Neeraj is the nephew of *Noticee no. 2*, therefore, nothing wrong can be alleged if his resignation is discussed by *Noticee no. 2* with his (*Noticee no. 2*'s) children.

113) The allegation that transfer of shares of ATSPL to Mr. Preetika Godiwala and Mr. Samar Dave was a *benami* transaction is denied and it is also denied that the family of *Noticee no. 2* continued to control the affairs of ATSPL even after transfer of shares. ATSPL was promoted by Mr. Amit Gupta, son of *Noticee no. 2*, who contributed by utilizing his expertise in sourcing, selecting and negotiating technology from various vendors globally as a help to NMCE.

114) The selection of a vast number of diverse technology skills was entrusted by *Noticee no. 2* to ATSPL, due to which NMCE was able to procure DTSS and its servers for an amount of INR 2 Crore instead of INR 17 crores budgeted initially.

115) Mr. Neeraj Gupta was initially providing certain advice to NMCE on consultancy basis, for a consideration of INR 20,000 per month in the

name of Netlink Consultant Services. Subsequently, he started giving his services to NMCE as its full time employee.

116) The allegations made in the SCN based on the emails dated May 31, 2010, July 03, 2010 and December 10-11, 2010 are made on surmises and conjectures. From the said emails, it can be seen that *Noticee no. 2* was ideating to improve the software provided by ATSPL, and he was well within his rights as MD of the NMCE while issuing instructions to ATPSL, the vendor providing the software.

117) Mr. Preetika Godiwala and Mr. Samar Dave acquired shares of NMCE as both saw value in commodity exchange space.

118) There is nothing in the emails dated March 25-27, 2010 and May 30, 2010 which can support the allegation that ATSPL was incapable of managing to recruit appropriate personnel for developing software for NMCE. Only the details of the software provided by ATSPL to NMCE were discussed in those emails.

119) With respect to the allegation pertaining to market making, it is submitted that market making was permitted as per the Bye-laws of the exchange and such Bye-laws were duly approved by the FMC. This approval was obtained from FMC to launch futures trading in oilseeds, oils and oil cakes after the Central Government granted recognition to NMCE.

120) The amounts paid by ATSPL to *Noticee no. 1* or other trading members have come back to NMCE in the form of turnover charges, and the said fact is also recorded in the Pipara report. Therefore, it cannot be alleged that loss was caused to NMCE due to such transactions. No support for the allegations can be found in the aforesaid emails dated March 25-27, 2010 and May 30, 2010.

121) ATSPL had developed the software required for NMCE and payments were made by NMCE. It is denied that desperate efforts were made to create some technical capability in ATSPL because Mr. Anand Shah of Mantissa, the real developer / maintainer of software for NMCE and Mr. Neeraj Gupta, VP-IT, NMCE were raising uncomfortable questions. It is also denied that Mantissa is the real developer of the software. Mr. Anand

Shah and Mr. Neeraj Gupta were Diploma holders and were not capable of using Java independently.

122) The governance in NMCE had always been carried out in accordance with the prevalent rules of corporate governance and it is denied that *Noticee no. 2* and his family members had made any attempt to subvert the corporate governance norms. The other allegations of terrorizing/threatening employees of NMCE are also denied.

123) The SCN has made a false allegation of siphoning of INR 2.47 Crore, which was the amount paid towards software development. Such payments were made in accordance with the agreements executed between the parties. It is denied that such agreements were back dated/fabricated or *Noticee no. 2* coerced the executive of NMCE to prepare duplicate set of agreements. In terms of the Pipara Report, the payments made by NMCE to ATSPL were within the knowledge of the Board of Directors of NMCE.

124) NMCE was a professionally managed organization with a Board comprising of nominee and independent directors, therefore, the allegation of family members of *Noticee no. 2* interfering in the corporate governance, operational/policy issue of NMCE are false on its face.

125) With respect to the allegation that Ms. Poonam Gupta, daughter of *Noticee no. 2*, with the help of certain other individuals, organized an unauthorized entry into the premises of NMCE to systematically attempt at sabotaging the IT and software systems, it is submitted that no loss was caused to NMCE nor there has been any data compromise due to the said alleged action. Moreover, the *Noticees* cannot be held liable for actions of other persons.

126) The charges levelled in the SCN regarding the commission of criminal offences by *Noticee no. 2* are baseless and do not carry the necessary ingredients of the relevant provisions of Indian Penal Code, 1860.

127) The allegations with respect to payments made to ATSPL and wrong corresponding book entries recorded in the books of accounts of NMCE are denied.

128) It is denied that a fraud has been committed on the Board of Directors and shareholders of NMCE by not disclosing the interest of *Noticee no. 2* and his family members while appointing ATSLLC and ATSPL. The family interest of *Noticee no. 2* in ATSPL was only till 2007 only and the majority of the work related to software development took place after that and considering the disclosures made by NMCE during the FMC audit for the financial years 2006-007 and 2007-08, no question of non-disclosure arises.

129) It is also denied that the provisions of the Companies Act, 1956 were violated by allotting shares of NMCE to *Noticee no. 1* (NOL).

130) The charges levelled with respect to allotment of shares to *Noticee no. 1* by way of a running account are contradicted by the stand of FMC, since on the one hand, FMC has contended that the accounts have been falsified and on the other hand FMC states that reimbursements have been made.

131) It is denied that *Noticee no. 2* got the funds transferred from the Margin Account bearing no. 00060340004245 held by NMCE with HDFC Bank, Ahmedabad branch, to various entities. It is denied that the funds of the members were ever utilized by the *Noticees*.

132) The charges of violation of Section 20 (a) (i) of FCRA are denied.

133) It is denied that *Noticee no. 2 as an MD* and CEO of NMCE, has engaged in the trade of rubber in physical market through *Noticee no. 1*. It is also denied that any act of the *Noticees* was in violation of the condition of demutualization on the basis of which NMCE was granted recognition as a normal Commodity Exchange.

134) After the incorporation of NMCE, *Noticee no. 1,* with a view to promote the development of, and to facilitate convergence of Rubber futures contract prices with the prices in ready (spot) delivery contracts, and with an object to protect the interests of hedgers, speculators and the investors, as well as to train them, had to purchase, sell and store Rubber in ready market against warehouse receipts issued by Central Warehousing Corporation. In the year 2009, the Rubber Board permitted NMCE to use

its license to trade in rubber for the promotion of NMCE in North India. *Noticee no. 1* has not benefitted from the said activity.

135) The SCN has raised numerous allegations, however, there is no complaint or grievance from any member of the Exchange, members of the general public or any other person against the *Noticees*.

18. After the aforesaid written reply dated April 05, 2021 was filed by the *Noticees*, an opportunity of personal hearing was accorded to them on May 05, 2021. On the said date, *Noticee no. 2* along with certain common Authorised Representatives for both the *Noticees* appeared before me through Video Conferencing mode. The Authorised Representatives for the *Noticees*, on the said day, made oral arguments, which were broadly on the lines of the written reply filed earlier. During the course of the arguments, the Authorised Representatives also agitated the issues of non-supply of documents demanded by the *Noticees* and need for cross-examination of various individuals, whose statements were recorded by the FMC during its inquiry and which have been referred to as well as relied upon while imputing the allegations in the SCN issued by the FMC. As the presentation of arguments from the *Noticees* could not be completed on the said day, in compliance of the directives of the Hon'ble Supreme Court to conduct day to day hearing, the proceedings were listed for personal hearing on the very next day, and on the said day (May 06, 2021), the rest of the arguments on behalf of the *Noticees* were presented before me and the personal hearing was concluded.

19. Subsequently, the *Noticees* have filed a common post hearing written submission vide letter dated May 19, 2021. While most of the contentions raised in the said written submission are identical to those already made in the earlier written reply dated April 05, 2021 the contents of which have already been highlighted in the preceding paragraphs, the following additional points have also been raised by the *Noticees* in the aforesaid post hearing written submission:

1) The judgment of Hon'ble Kerala High Court passed in the matter of *First Commodities Exchange of India & Ors. Vs. Union of India and Ors. (2015 SCC*

On Line Ker 3808), as was cited during the proceedings before the Hon'ble SAT, has been based on a mis-appreciation of the express text of the Government Notification. It has been submitted that the conclusion of the Hon'ble High Court is not correct to the extent that powers of the Central Government have been delegated to the FMC, whereas, such powers are infact delegated to the Delegatees named in the notification.

2) The requirement of the Government notification read with the Section 8 (2) of FCRA needs to be interpreted on the principles laid down by the Hon'ble Supreme Court in the matter of *LIC of India Vs Retired LIC Officers Association [(2008) 3 SCC 321]*.
3) FMC could have initiated the inquiry only by obtaining specific written permission from the Secretary, FMC, Bombay or the Deputy Director, FMC, Bombay, who could have granted the permission to conduct the inquiry. As no such specific permission was sought/granted, therefore the inquiry conducted by FMC is bad in law and all actions taken pursuant to this inquiry stand vitiated.
4) There is no provision in FCRA which authorizes FMC to empower any external agency to conduct an audit of the books of accounts and other documents of any recognized association. The only relatable provision seems to be the Section 8 (2) (c) of the FCRA and even the said provision does not empower FMC to audit/inspect the books of accounts without specific order from the Central Government. The said power under Section 8 (2) (c) has not been delegated to any person including the Deputy Director and Secretary.
5) As no permission has been obtained to conduct the inspection/audit, all findings given in the audit report dated July 29, 2009 would be bad in law. Consequently, the inquiry and the SCN which were initiated pursuant to the said audit/inspection, should be dropped.
6) Apart from the aforesaid, the reliance placed by the Hon'ble High Court on the Rule 7 (2) (b) of the Forward Contracts (Regulation) Rules, 1954 (hereinafter referred to as "**FCRR**") read with Form F, is also misplaced. The power under Rule 7 (2) of FCRR read with Form F to issue directions

are general powers given to FMC, meant to enable FMC to issue general directions so that the recognised association (s) conduct their activities inter alia in accordance with the objects of the Act, respective constitutional documents and bye laws. This power cannot be treated as empowering FMC to issue directions under Section 8 (2) (b) of the FCRA.

7) Further, the facts of the First Commodities Exchange of India (supra) are distinguishable from the present case. Furthermore, in the said case, FMC had called for information from the concerned exchange exercising its powers under Section 8(2)(a) of the FCRA, however, in the present case, action that has been impugned by the Noticees is the power exercised by FMC under Section 8 (2) (b).
8) The Section 8 (2) (b) requires that after completion of an inquiry, FMC must submit a report to the Central Government. FMC cannot act contrary to the said requirement and it cannot issue whatever direction under the assumed authority of Rule 7(2)(b) of the Rules read with Form F.
9) The aforesaid requirement of submitting a report shows that an inquiry is conducted only in exceptional matters and after submitting the report, the Central Government would decide the actions required to be taken.
10) The issuance of directions by FMC pursuant to an inquiry is impermissible.
11) The aforesaid judgment of the Hon'ble Kerala High Court is not applicable in the present case as NMCE is a demutualized exchange and not a body of trading members.
12) SEBI must conduct the present proceedings by duly considering the provisions of Section 8 (2) (b) and 8 (2) (c) of the FCRA.
13) During the personal hearing, though it was agreed by the *Noticees* to consider to curtail the request to cross-examine only 4-5 persons out of the 18 persons (whose statements have been recorded and relied upon by FMC), such an act would be against the interest of the *Noticees* and the cross-examination of all the 18 persons need to be granted by SEBI. All employees of NMCE who had given statement to the FMC, were under

pressure from Mr. Anil Mishra and FMC had elicited those answers from non-employees of NMCE, which would support the case of FMC. Reliance of several judgements like *B. Ramalinga Raju vs Securities and Exchange Board of India (2017 SCC OnLine SAT 183)* etc., have been placed so as to support the request of cross-examination.

20. In connection with the aforesaid contention of the *Noticees* pertaining to cross-examination of various persons, I must clarify here at the outset that during the course of personal hearing held on May 05, 2021, the attention of the *Noticees* was drawn to the fact that the present matter is around 11 years old and further that the statement of as many as 18 persons (total 19 individuals, including *Noticee no. 2*) was recorded by the FMC. It was pointed out to the *Noticees* that SEBI is the successor of the FMC and to trace out all such 18 individuals for cross-examination on the basis of their last known addresses from the old records that have been received by SEBI from FMC in the year 2015 at this stage, could turn out to be a challenging task which may consume much time and may not be fruitful. Therefore, it was suggested to the *Noticees* that they may first consider to review their demand for cross-examining all the 18 individuals and instead, in the interest of time may decide to cross-examine a selected set of 3-4 crucial individuals, so that SEBI can make all out efforts to locate those individuals and successfully arrange cross-examination of those individuals within a short span of time.

21. The *Noticees*/Authorised Representatives, during the course of the said hearing agreed to the aforesaid suggestion and sought some time to decide on the names of the individuals who would be required to be cross-examined by them on a priority basis. However subsequently, vide their letter dated May 10, 2021, the demand to cross-examine all the individuals was again made by stating that any such reduction in number of individuals for cross examination would be against the rights of the *Noticees*. In the said letter, the *Noticees* have also explained the chain of events that took place after issuance of the SCN dated June 21, 2011 and subsequent passing of the order dated July 23, 2011 by the FMC, in order to justify their request of cross examination of all the 18 individuals.

22. In view of the aforesaid submissions made by the *Noticees* seeking cross examination all the 18 witnesses whose statements were recorded by the FMC, the addresses of all such 18 individual witnesses were obtained from ICEX (former NMCE) and the said individuals were intimated about their cross-examination (through Video-conferencing mode) to be conducted by the *Noticees*. It is noted that the copies of such communications addressed to the aforesaid witnesses were also marked to the *Noticees*. Further, as the contact details/addresses of the said individuals were provided to SEBI by ICEX and SEBI had no other way to find out their latest addresses, for better co-ordination, the *Noticees* were also requested to provide the latest contact details of such individuals, (if they have the same with them) so that the request of the *Noticees* for cross examination of all the 18 witnesses can be successfully met.

23. As noted earlier, FMC had recorded the statement of as many as 19 individuals, out of which one individual was *Noticee no. 2* himself. Out of the rest of the 18 individuals, one person namely Ms. Prakashba Chudasama has been reported to have expired. Further, during the process of cross examination, the Counsel for the *Noticees* expressed that they want to give up their right of cross examination in respect of Mr. Kalpen Shah, Mr. Tarun Gupta and Ms. Ushaben Goswami. Additionally, the letters addressed to two individuals viz., Mr. Suneil Jain and Mr. V.M. Mehrishi returned undelivered. After excluding the above individuals, cross-examination of the rest of the 12 individuals was successfully arranged and have been duly conducted by the *Noticees* on a day to day basis, successively on 5 working days, details of which are as under:

Table no. 2

Sr. No.	Date of cross-examination	Name of the witnesses
1.	June 04, 2021	i) Mr. Rajendrasinh Chudasama, former AVP Clearing and Settlement, NMCE
2.	June 07,	i) Ms. Sarita Baxi, former Associate Vice President

	2021	Finance, NMCE; and ii) Mr. Anil Mishra, former Managing Director and CEO of NMCE
3.	June 08, 2021	i) Mr. Neeraj Gupta, former Vice President, NMCE; ii) Mr. Samar Dave; and iii) Mr. Dinesh Shukla, former Vice President.
4.	June 09, 2021	i) Mr. Nisarg Shah, Former Senior Manager, NMCE; ii) Mr. Anand Shah, Executive Director, Mantissa Infotech Pvt. Ltd.; and iii) Mr. Bharat Shah
5.	June 10, 2021	i) Ms. Poonam Verma, Former Vice President, Business Development, NMCE; i) Ms Preetika Godiwala; and ii) Mr. Kaushik Pandya, Former Associate Vice President, HR and Administration, NMCE

24. After completing cross-examination of all the individual witnesses they wanted to cross-examine, the *Noticees*, vide their letters dated June 19, 2021 and June 20, 2021, have further made additional submissions in which, apart from reiterating some of the submissions already made by them in the earlier communications, the *Noticees* have raised certain new points for the first time during the present proceedings which are summarized hereunder:

1) The scope of the word "affairs" in Section 8 (2) (b) of the FCRA cannot be expanded to confer any additional powers to FMC. Inquiry can be conducted only for purpose of exercising powers already given in the Act and not beyond. For investigation and prosecution of criminal offences

under Section 20 and 21 of the FCRA, the powers have been entrusted to the police authorities.

2) FMC cannot conduct inquiry on issues squarely falling within the purview of the Companies Act.
3) In the SCN, FMC has raised allegations against both the *Noticees*, therefore, the FMC's case that both the *Noticees* are one and the same is factually incorrect.
4) FMC has failed to examine all the persons who were Directors on the Board of NMCE during the relevant period. FMC ought to have sought explanation from all the present and past Directors of NMCE in respect of all transactions that have been alleged in the SCN.
5) From the statements recorded from Mr. Chudasama and Mr. Anil Mishra under the cross-examination, it is evident that the entire inquiry was a stratagem orchestrated with the help of FMC to eject *Noticee no. 2* from NMCE, so as to give Mr. Anil Mishra the control and management of NMCE.
6) In terms of the cross-examination, it is clear that Mr. Kathua and Mr. Anil Mishra persuaded and coerced the witnesses so as to obtain the required statements which were used against the *Noticees*.
7) Mr. Rajendra Singh Chudasama has in his answer to the question no. 72 of the cross-examination, confirmed that his answers in his statement recorded on June 17, 2011, which implicated the *Noticees*, was given as it was a question of his job. The same indicates that the management of NMCE had pressured Mr. Rajendra to give earlier statement date June 17, 2011with the intention to falsely indict the *Noticees*.
8) Further, the hike in the salaries of the Mr. Rajendra Singh Chudasama and Mr. Neeraj Gupta, after they have given their statements to the FMC also indicate towards disproportionate rewards for making such statements.
9) *Noticee no. 2* did not seek any managerial remuneration from the NMCE.
10) Mr. Anil Mishra feared for loss of his job. The salary of Mr. Mishra was reduced from INR 1.00 Crore to INR 52 Lakh. After the ouster of *Noticee no. 2* from the management of NMCE, Mr. Mishra was able to hold on to

his job and also got an increase in his salary. Though NMCE had surplus reserves and the salary of Mr. Mishra also continued to increase, however, he never proposed to the Board of NMCE to issue Bonus shares or declare dividend. Mr. Mishra also proposed the merger of NMCE with ICEX, and Mr. Mishra was paid handsome consultation fee by ICEX.

11) The contract of Mr. Mishra was only for a period of 3 years, however, as he effected the removal of *Noticee no. 2* from the management of NMCE with the help of FMC, he continued with NMCE (now ICEX) for another 9 years.

12) With respect to the allotment of shares of NMCE to NOL on January 19, 2004, Mr. Nisarg Shah was confronted with certain documents like his statement recorded before Directorate of Enforcement, ledger account of *Noticee no. 1* in the books of NMCE etc.

13) From the said ledger account, it can be noticed that three running accounts were maintained. The first running account is the main account containing the entire transactional history between *Noticee no. 1* and NMCE. The second ledger account titled as "Neptune Overseas Limited (Other)", pertains to the pre-incorporation expenses incurred by *Noticee no. 1* on items other than capital expenses. The third ledger account titled as "Neptune Overseas Limited L&A", was in respect of the amounts paid by NMCE to *Noticee no. 1* for purchase of commodities to be stored in CWC warehouse for the purpose of promotion of delivery based final settlement system at NMCE.

14) As mentioned in first ledger account, between July 24, 2002 and September 23, 2002, *Noticee no. 1* had transferred an amount of INR 1.89 Crore to NMCE. For the financial year 2002-203, all expenses incurred by NMCE were out of the said amount of INR 1.89 Crore. The said amount was extended by *Noticee no. 1* to NMCE as a loan so as to enable NMCE to make payments for capital equipment etc. At that time, NMCE had only received capital contribution of INR 50,00,000 from *Noticee no. 1* and INR 50,00,000 from NAFED; and the contribution of CWC was yet to be received. NMCE was in need of funds at that time.

15) As on April 01, 2003, an amount of INR 99.70 Lakh (approx.) was brought forward from the second ledger account to the first ledger account. The said amount was the balance of the pre-incorporation expenses incurred by *Noticee no. 1* for and on behalf of NMCE. The details of such pre-incorporation expenses incurred by *Noticee no. 1* are set out in the stand alone ledger of pre-operative expenses in the books of NMCE.

16) As on the date of allotment of NMCE shares to *Noticee no. 1* on January 19, 2004, the ledger account of *Noticee no. 1* in the books of account of NMCE had sufficient amounts standing to the credit of *Noticee no. 1*, which was adjusted against allotment of shares in favour of *Noticee no. 1* and instead of repaying *Noticee no. 1* in cash, NMCE had allotted shares to *Noticee no. 1*.

17) The accounts of NMCE have been audited since its incorporation and the statutory auditors have not raised any objection with respect to the expenses incurred by *Noticee no. 1* and the said accounts were approved by the Board of FMC, which included the nominee Director of FMC. Further, no objections have been raised by the authorities like the Income Tax Department and Registrar of Companies, with respect to the aforesaid expenses.

18) During the cross-examination, Mr. Bharat S. Shah has *inter alia* stated that M/s G. K. Choksi & Co. were the statutory auditors of NMCE for the financial years 2002-03 and 2003-04. However, FMC has not recorded the statement of any person from the said audit firm and the statement of Mr. Bharat S. Shah (partner of M/s Shah and Dalal, Chartered Accountants) was recorded by FMC. The said Chartered Accountant firm, M/s Shah and Dalal, were the statutory auditors of NMCE for the years 2005-06 onwards.

19) As FMC has not recorded statement of the statutory auditors that had verified the pre-incorporation expenses incurred by the *Noticee no.1* and the allotment of share made on January 19, 2004, the allegations made by FMC cannot stand.

20) In terms of the records accessible by the *Noticees*, out of the amount of 89.70 Lakh towards the pre-incorporation expenses, only an amount of INR 72.89 Lakh was allowed by the then Statutory Auditor of NMCE. Copies of working sheets of the Statutory Auditor have been filed in support. The same shows that the Statutory Auditor had applied its independent mind by allowing the expenses it deemed proper and reasonable.

21) FMC has no locus or authority to verify any running account and make out a case with respect to the allotment of shares made on October 14, 2006 and October 30, 2006. Under the Companies Act, it is for the proposed allottee, i.e., NMCE, to agree on how payments is to be made for allotments to be made.

22) For the allotment of shares made on April 10, 2002; May 23, 2002; October 14, 2006 and December 30, 2006, it was agreed that the allotments of shares are to be made against cash consideration. FMC cannot interfere with the agreement between the parties to bring the charge that the allotments made on aforesaid 4 occasions were prior to the deposit of cheques or that the allotment should have taken into account the credit/debit balance of *Noticee no. 1* in the books of NMCE. There is no allegation that no amount was received against the allotment of shares.

23) The amount of fees paid to the Consultants were reflected in the audited financial statements of NMCE, which were approved by the Board of Directors and therefore, the appointment of Consultants came to be approved by the Board of Directors. None of the member of the Board or the shareholder(s) ever raised any objection on the appointment of the Consultants nor any objection towards the quantum of compensation paid to such Consultants was ever raised.

24) The daughter of Mr. Anil Mishra, namely Ms. Shweta Mishra was also appointed as a Consultant with NMCE, on the suggestion made by Mr. Mishra.

25) During the cross-examination, Mr. Anil Mishra has deliberately feigned ignorance of any approval of the Board of Directors of NMCE for the appointment of Ms. Shweta Mishra as a Consultant.

26) In the cross-examination, Mr. Mishra has stated that Ms. Shweta Mishra did attend Board Meetings, which indicate the knowledge and approval of the Board for her appointment as a Consultant. As *Noticee no. 2* was authorized to appoint Consultants and decide their remuneration, no approval of the Board of Directors was taken. Mr. Mishra did not raise any grievance for appointment of her daughter as a Consultant but he had raised issues on the appointment of other Consultants without Board approval.

27) The amount of INR 1.07 Lakh (approx.) paid to Ms. Shweta Mishra as Consultancy fees for two months was exorbitant as she was only a Commerce graduate (B.Com) at that time.

28) Though FMC had raised an issue of appointment of Consultants by charging that such Consultants were not qualified for the roles and fees paid to them were exorbitant, however, FMC did not raise any objection on appointment of Ms. Shweta Mishra, her relation with Mr. Anil Mishra, her competence and the fee paid to her.

29) FMC had fixed the threshold of amount of Consultancy fee of INR 2.00 Lakh so as to ensure that name of Ms. Shweta Mishra is not highlighted during the inquiry. FMC had acted in collusion with Mr. Anil Mishra to indict *Noticee no. 2* on false grounds and further, the appointments of certain Consultants were tainted by showing connection with *Noticee no. 2*. The same shows a biased approach of FMC.

30) The fact that the Consultants were attending Board Meetings, as and when required, has been admitted/accepted by Mr. Bharat S. Shah in his cross-examination.

31) The Consultants were reporting to the top management and Board of NMCE and not just to *Noticee no. 2*.

32) The Board of Directors of NMCE was appreciative of the value put in by the Consultant. The said fact is recorded in the Annual Report of NMCE

for the financial year 2009-2010 under the Section "Management Discussions and Analysis", as:

"*Further business and other processes are also reviewed by professional consultants on a regular basis. These consultants oversee Internal Controls both from the adequacy and compliance of the laid down business processes and from compliance with regulatory requirements. Shortcomings are identified and rectified. Significant observations made by these consultants and the status on implementation of recommended remedial measures, are regularly presented to and reviewed by the Audit Committee of the Board."*

33) Further, the relevant extract of the cross-examination of Mr. Bharat S. Shah reads as:

"Q.32 Could you express your professional judgement on the meaning of management representation contained at page 31 of the Annual Report of NMCE for the Financial Year 2009-10?

Ans. In my professional judgement, the management representation comprises of these professionals engaged by the company who report to the top management team including audit committee and Board of Directors."

34) The aforesaid statement of Mr. Bharat S. Shah shows that the Consultants reported to the top management and Audit Committee and Board of Directors of NMCE and the allegations that *Noticee no. 2* individually took all decisions, is a false allegation. The statement of Mr. Anil Mishra that Ms. Shweta Mishra had attended Board meetings shows that the Consultants were answerable to the Board of NMCE.

35) Mr. Bharat S. Shah has also confirmed during the cross-examination that the financials of NMCE were prepared by its management; that NMCE had an audit committee that discussed the major financial transactions including related party transactions, compliances, issues of internal control and other issues arising from the account, and the said committee would hold discussions with the internal auditor, Consultant and statutory auditor, then recommend to the Board of Directors to approve the annual accounts.

36) As no objections with respect to the appointments of Consultants were ever raised by the Audit committee, the FMC and even the management of

FMC cannot later question the appointment of Consultants or the fees paid to them.

37) Mr. Rajendra Singh Chudasama during his cross-examination has stated that Mr. Anil Mishra first suggested that NMCE indulge in market making. Further, Mr. Rajendra Singh has also confirmed that Mr. Neeraj Gupta and Mr. Narayan Rai also had a role in market making.

38) In his entire deposition, Mr. Rajendra Singh has not named the *Noticees* being involved in market making. The same belies the allegation of FMC that *Noticee no. 2* was involved in market making.

39) The fact that no inquiry has been initiated against Mr. Anil Mishra by FMC shows the bias of FMC. FMC chose to ignore the statement of Mr. Rajendra Singh recorded on June 17, 2011 and without conducting any further inquiry, issued the SCN dated June 21, 2011.

40) Mr. Rajendra Singh Chudasama has admitted during the cross-examination that he had given the answers in his statement dated June 17, 2011 (after *Noticee no. 2* was ousted from the management of NMCE) that implicated *Noticee no. 2* as it was a matter of saving his job. The same shows that the said statement dated June 17, 2011 was given under duress subjected by Mr. Anil Mishra, the then Managing Director of NMCE. Therefore, statement of Mr. Rajendra Singh Chudasama should not be relied on to the extent that it indicts the *Noticees*.

41) The allegation made by Mr. Anil Mishra that he was made to function under duress by *Noticee no. 2* is unbelievable as he was the Managing Director/CEO of NMCE.

42) In his statement dated June 17, 2011, it has been admitted by Mr. Rajendra Singh Chudasama that NMCE was benefitted from market making and not *Noticee no. 1*.

43) Mr. Rajendra Singh Chudasama has also admitted during the cross-examination that *Noticee no. 1* did not benefit from the rubber trade as such trades were done for spreading awareness. The same shows that the allegations made by FMC are false and baseless.

44) The SCN alleges that ATSPL is not having any clientele other than NMCE and does not have any office, manpower, equipment etc. However, from the statements made by Mr. Samar Hemantkumar Dave and Ms. Preetika Godiwala, it is clear that ATSPL appointed well qualified engineers to carry out IT related works and provided consultancy services.

45) Mr. Neeraj Gupta has admitted during the cross-examination that CMC Limited had stopped providing its services to NMCE. Further, in another relevant statement made by Mr. Neeraj Gupta, the following has been stated:

"Q.35 Would it be correct to say that after CMC Ltd. stopped rendering services and refused to share the source code of the software, the functioning of the online trading platform at NMCE was hampered?

Ans. There was a risk, which emerged on account of sudden withdrawal of support by CMC Ltd. without providing the source code and since there were many bugs pending to be fixed by CMC, which could lead to serious technical glitch at anytime."

46) In the statement of Mr. Neeraj Gupta, as recorded before the FMC on January 28, 2011, the following has been *inter alia* recorded:

"Q.9 Kindly provide detailed procedure for selection of ATS?
Ans. There was no formal procedure followed for the selection of ATS because it was a very urgent situation. CMC did not provide any source code at the time of withdrawal and therefore no large software companies were willing to undertake the maintenance and enhancement of the existing software. One former employee of CMC, who was the system architect of the existing software, was associated with ATS. This influenced the decision for nomination of ATS for meeting the urgent and immediate requirement to save the Exchange's Electronic Platform."

47) Mr. Neeraj has sought to retract the aforesaid admission (as made in the statement recorded before FMC) by falsely stating that the aforesaid answer (to Q no. 9) was given under the directions of *Noticee no. 2*. Such a retraction is false as Mr. Neeraj, during his cross-examination, in his answer to the question no. 35, has admitted that without the source code there was a risk due to bugs, which could lead to serious glitch at any time. The same shows that there was an emergent need to appoint an IT

company to provide maintenance and support for the system developed by CMC Limited.

48) Mr. Neeraj has also admitted during the cross-examination that Mr. Amit Gupta, the then Director of ATSPL, was involved from the beginning in the IT set up of NMCE. The same justifies the decision of NMCE to appoint ATSPL to provide assistance to NMCE.

49) The statements made by Mr. Neeraj Gupta during the cross-examination (in answers to Q. no. 26 to 28 and Q. no. 35) are in line with the statement made by him (in answer to Q. no. 9) in his statement recorded before the FMC and the attempt by him to retract the admission made before FMC (in answer to Q. no. 9) is only an attempt to falsely implicate *Noticee no. 2*.

50) Ms. Preetika Godiwala, during her cross-examination, has stated the following:

"Q.14 Could you please explain in detail about the software that was developed by ATSPL for NMCE?
Ans. Since the software at NMCE was an old technology, new product was being developed at ATSPL with new technology like Java so that NMCE would have a product of the latest technology for their trading platform. The idea was to sell the product in the future to other exchanges as well.

Q.15 Can you describe in detail all the works that ATSPL has done for NMCE?
Ans. Some maintenance work and product development work was done."

51) Further, Mr. Anand Shah has stated during his cross-examination that the appointment of Mantissa was need based and was done to develop small applications.

52) Mr. Samar Dave has admitted in the cross-examination that whilst he was working on the IT system of NMCE, he worked on the CFTS system and prepared the source code. Further, Mr. Neeraj Gupta has also stated that the source code is important and is prepared before the software is prepared. The same would indicate that the developer of the software prepares the source code.

53) From the deposition of the Mr. Samar Dave, it is clear that ATSPL had developed highly technical software and technology. NMCE, in its appeal filed before the Commissioner of Income Tax Appeals, has stated that the software developed by ATSPL was used by NMCE which is highly technical and complex system and has lots of add-ons and additional utilities. It has also been contended by NMCE in the said appeal that ATSPL has provided the source code of the said software.

54) Ms. Preetika Godiwala has also stated during her cross-examination that the software developed by ATSPL was intended to benefit NMCE.

55) Even the Board of NMCE has appreciated the work carried out by ATSPL, as has been recorded in the responsibilities statement of the Board of NMCE in the Annual Report of NMCE for the F.Y. 2009-2010.

56) None of the witnesses whose statements were recorded by the FMC has stated that the software developed for NMCE was ineffective. The deposition of the witnesses would indicate that ATSPL had developed software for NMCE, against which payments were made by NMCE.

57) The amounts paid by NMCE to ATSPL have been capitalised by the board of NMCE and depreciation has been claimed thereon.

58) ATSPL is an entity which was professionally managed and had its own Board of Directors. Further, in terms of the respective depositions of Mr. Samar Dave and Ms. Preetika Godiwala, ATSPL had its own employees and consultants. It is also clear from the depositions that ATSPL had a team of engineers that developed software for NMCE.

59) Mr. Amit Gupta, the founder of ATSPL, had been advising NMCE since the time of its inception.

60) Mr. Samar Dave has stated during his cross-examination that the software and technology developed by ATSPL was highly technical and interesting. If ATSPL was a defunct company, as alleged by the FMC, Mr. Samar Dave and Ms. Preetika Godiwala would not have become the shareholders of ATSPL.

61) In the statement dated April 28, 2011, recorded before FMC, Mr. Anil Kumar Mishra had made certain allegations of impropriety in the

appointment and payments made to ATSPL / ATSLLC. It has been falsely alleged by Mr. Mishra that the payments to ATSPL were made without following due process and at the behest of *Noticee no. 2*. No allegation has been raised by Mr. Mishra to the effect that ATSPL has not developed the software for NMCE or that there were any functional problems in the software. It has also been admitted by Mr. Mishra during the cross-examination that he did not inform anyone about the purported violations as allegedly committed by *Noticee no. 2* while appointing ATSLP/ATSLLC.

62) If the allegation made by Mr. Anil Mishra in his statement made before FMC is true, Mr. Mishra is guilty of dereliction of duty as he did not inform anyone about the said purported violations, for which no inquiry has been initiated by FMC against Mr. Mishra.

63) The allegation that Mr. Mishra was under duress has been made to absolve himself of any vicarious liability and no instance of duress has been cited by Mr. Mishra.

64) Mr. Rajendra Singh Chudasama has during his statement recorded before FMC as well as during the cross-examination has stated that Mr. Anil Mishra had suggested the NMCE to engage in market making and has also stated that Mr. Anil Mishra was engaged in market making. Despite such statements, no action has been taken by the FMC against Mr. Anil Mishra. The same shows a biased and *malafide* approach of the FMC.

65) The statement of Mr. Rajendra Singh Chudasama was recorded by the FCM on June 17, 2011 and he continued to be in employment of NMCE (now ICEX) till June, 2020. The cross-examination of Mr. Rajendra has been conducted on June 04, 2021, i.e., after he had resigned from NMCE (now ICEX). The association of *Noticee no. 2* with NMCE was only till March, 2011.

66) Mr. Neeraj Gupta, Mr. Anand Shah, Mr. Samar Dave and Ms. Preetika Godiwala have confirmed their respective qualifications during the cross-examination. The qualifications of Mr. Neeraj Gupta and Mr. Anand Shah are comparatively much inferior to those of Mr. Samar Dave, Ms. Preetika

Godiwala and Mr. Amit Gupta. Therefore, for Mr. Neeraj and Mr. Mr. Anand to impliedly contend that the entire IT system of NMCE was developed and maintained by them is belied from their respective qualifications and experiences.

67) Ms. Poonam Verma has in her cross-examination deposed on the potential of NMCE as a commodity exchange.

68) In response to the allegation that on account of payment made by NMCE to ATSPL from its margin account, the interest of trading members was compromised, it has been submitted that *Noticee no. 2* had not authorized any payment to be made from the margin account for any purpose including for making payment to ATSPL. *Noticee no. 2* being the MD was having minimal involvement in such administrative tasks of the process of making payments to the vendors. Moreover, the payment had not resulted in any compromise or had any adverse impact on the interest of the trading members as reflected in the financial statements of NMCE for the year 2009-10 which state that NMCE had sufficient liquid assets to pay off all its liabilities to its trading members, including towards trading margins.

69) As can be noted from the Schedule D of the Annual Report of NMCE for the F.Y. 2009-10, the additions to the "Computer Software" amounts to INR 20.58 Crore (approx.). Further, the total liabilities towards members, as noted in Schedule C as on March 31, 2009 was only INR 17.89 Crore (approx.), whereas the investment of NMCE (as reflected in Schedule E) was INR 36.64 Crore (approx.).

70) The total liabilities towards members as on March 31, 2010 was INR 24.12 Crore and the investment of NMCE as on March 31, 2010 was INR 29.63 Crore, even after the additions to the "Computer Software" amounting to INR 20.58 Crore.

71) The same shows that if the trading member (s) of NMCE had sought refund/return of their margin deposits, NMCE had the liquid resources to make refunds. Therefore, the payments to ATSPL, even from the margin account did not compromise or impact the interests of the trading members of NMCE as the liquid assets available with NMCE far exceeded

the liabilities towards the trading members. The said fact has been verified by Ms. Sarita Baxi in her cross-examination (answer to Q no. 25)

72) The balance in the Margin account lying invested in Principal PNB Mutual Fund was more than sufficient to cover all liabilities of NMCE to trading members.

Consideration

25. I have perused the SCN which has quite exhaustively dealt with various facts, events, circumstances and charged the *Noticees* with various kinds of insinuations based on many oral and documentary evidences. As for the *Noticees*, from the series of written submissions made by them which have been dealt with in the preceding paragraphs at length and which were also covered by their Authorized representatives in their oral submissions before me during the personal hearings, I note that faced with those grave charges in the SCNs, they have tried to defend their case by making all possible contentions, counter arguments and explanations some of which are repetitive and overlapping in nature as well. As a quasi-judicial authority, to deal with all the issues raised in the SCNs in a systematic manner, I would endeavor to discuss all the major contentions and arguments advanced by the *Noticees* to rebut the allegations levelled against them in the SCNs under different heads, so as to save the order from overburdening with verbosity.

Jurisdiction of FMC/SEBI

26. In their submissions the *Noticees* have vehemently assailed the very jurisdiction of FMC to conduct the inquiry under reference by contesting FMC's actions on various legal and procedural grounds as follows:

i) That the inquiry initiated by the FMC and the consequent action of issuance of SCN is not supported by the approval of the Central Government to initiate such an inquiry. It has been submitted that the mandate under Section 8 is sacrosanct and unless the Central Government has authorized in writing to initiate an inquiry, no such inquiry can be initiated by FMC. Such a requirement of obtaining the approval from

Central Government by FMC is evident from the letter dated May 10, 2011 issued by the Central Government granting in principle approval to hold an inquiry against the Cotton Association of India under Section 8 (2).

ii) That FMC has not produced any approval either by the Secretary or Deputy Director (FMC) to initiate any inquiry in terms of the Government of India Notification S.O. no. 1162 dated May 04, 1960.

iii) That in any case, FMC does not have jurisdiction to initiate inquiry or issue SCN to a shareholder of a recognised association as its powers are limited to be exerted upon the recognised associations and trading members of the recognised associations only.

iv) That there is a time limit of three years prescribed for keeping and maintaining the records, therefore, inquiry cannot go beyond that period.

v) That there is no allegation pertaining to forward trades, therefore the SCN should be dropped.

27. I observe that the aforesaid arguments of the *Noticees* revolve around the powers of FMC as entrusted upon it under the FCRA. Before dissecting the said arguments, it is imperative to first have a look at the exact provisions, which would be helpful in deciding the aforesaid contention:

Forward Contract (Regulation) Act, 1952

3. Establishment and constitution of the Forward Markets Commission.-- (1) The Central Government may, by notification in the official Gazette, establish a Commission to be called the Forward Markets Commission for the purpose of exercising such functions and discharging such duties as may be assigned to the Commission by or under this Act.

4. Functions of the Commission.- The functions of the Commission shall be:

….

(b) to keep forward markets under observation and to take such action in relation to them as it may consider necessary, in exercise of the powers assigned to it by or under this Act;

8. Power of Central Government to call for periodical returns or direct inquiries to be made. –

(1) Every recognised association and every member thereof shall furnish to the Central Government such periodical returns relating to its affairs of its members, or his affairs, as the case may be, as may be prescribed.

(2) Without prejudice to the provisions contained in sub-section (1) where the Central Government considers it expedient so to do, it may by order in writing, ---

(a) call upon a recognised association to or a member thereof furnish in writing such information or explanation relating to its affairs or the affairs of any of its members or his affairs, as the case may be as the Central Government may require, or

(b) appoint one or more persons to make an enquiry in relation to the affairs of such association or the affairs or any of its members and submit a report of the result of such inquiry to the Central Government within such time as may be specified in the order or, in the alternative, direct the inquiry to be made, and the report to be submitted, by the governing body of such association acting jointly with one or more representative of the Central Government; and

(c) direct the Commission to inspect the accounts and other documents of any recognised association or of any of its members and submit its report thereon to the Central Government.

(3) Where an inquiry in relation to the affairs of a recognised association or the affairs of any of its members has been undertaken under sub-section (2) –

(a) every director, manager, secretary or other officer of such association;

(b) every member of such association;

(c) if the member of the association is a firm, every partner, manager, secretary or other officer of the firm; and

(d) every other person or body of persons who has had dealings in the course of business with any of the persons mentioned in clause (a), (b) and (c), shall be bound to produce before the authority making the inquiry, all such books, accounts, correspondence and other documents in his custody or power relating to, or having a bearing on the subject matter of, such inquiry and also to furnish the authority with any such statement or information relating thereto as may be required of him, within such time as may be specified.

(4) Every recognised association and every member thereof shall maintain such books of accounts and other documents as the Commission may specify and the books of account and other documents so specified shall be preserved for a period not exceeding three years as the Commission may specify and shall be subject to inspection at all reasonable times by the Commission.

*(*Underlines supplied)

28. It is noted that the FMC was established under Section 3 (1) of the FCRA to regulate the commodity futures market. Section 4 of the FCRA stipulates various functions that were entrusted to the FMC. In terms of Section 4 (b), any other duties or powers can be exercised by FMC, as may be assigned to it by or under the FCRA. Further, the Section 4A empowered the FMC, while performing its functions, to have the powers of a civil court like summoning and enforcing attendance, receiving evidence etc., and all the proceedings before the FMC are deemed to be judicial proceedings within the meaning of Section 193 and 228 of the Indian Penal Code, 1860.

29. Next comes the Section 8, by virtue of which, Central Government may prescribe the periodical returns that all recognised associations and its members needs to furnish. Further, the Central Government, by an order in writing, can call upon a recognised association or a member to furnish in writing such information or explanation, that may be required by it and it (Central Government) may also appoint someone to make an inquiry in relation to the affairs of an association or its member(s). In this respect, all the Directors, managers etc., of a recognised association and members as well as every other person who had dealings in course of business with the recognised association or its members, are bound to produce all such books, accounts, documents etc., and also furnish the statement, as may be required.

30. The FCRA also provides for delegation of power by Central Government. The relevant provision, i.e., Section 26 of FCRA reads as:

26. Power to delegate *—The Central Government may, by notification in the Official Gazette, direct that any power exercisable by it under this Act may, in such circumstances and subject to such conditions, if any, as may be specified, be exercised by such officer or authority,*

including any State Government or officers or authorities thereof as may be specified in the direction.

31. In pursuance of the said Section 26 of SCRA, a notification dated May 04, 1960 was issued by the Central Government, which in supersession of the earlier notifications, *inter alia*, stipulated that the power under Section 8 (1), 8 (2) (a) and 8 (2) (b) shall be exercisable also by the Secretary/ Deputy Director of Forward Markets Commission. The plain reading of the said notification indicates that the Central Government, has delegated its powers to the aforesaid officials and such powers include the power to call for periodical returns [Section 8 (1)]; to call upon a recognised association or a member to furnish explanation in writing relating to its affairs [Section 8 (2) (a)]; and to appoint one or more persons to make an enquiry in relation to the affairs of the recognised association or its members [Section 8 (2) (b)].

32. Now, in terms of the contention of the *Noticees*, the provisions of law mandate that in order to conduct an enquiry, there has to be a written authorization under Section 8 of the Act, by the Central Government to the FMC for the purpose. In absence of such authorization, the *Noticees* have contended that the action of FMC to conduct enquiry is void *ab intio*. It has also been contended that even for the exercise of the powers under the aforesaid Notification dated May 04, 1960, there has to be an approval required to be granted by the Secretary or Deputy Director of FMC, to the officers of FMC to conduct the said enquiry. Ancillary to the said arguments, it has also been contended by the *Noticees* that the said power under Section 8 is limited to the recognised associations and the members thereto. It has been contended that as the *Noticees* are not falling under either of the aforesaid categories, no power to conduct enquiry against them can be exercised by FMC. It has also been contended that since the main reason of issuance of SCN in this case is the dealings/transactions executed between NMCE and ATSPL/ATS LLC, the proceedings in this case deserve to be dropped as the said entities are neither recognised association nor members of such recognised association. At this

juncture it will be relevant to reproduce the text of the aforesaid Notification dated May 04, 1960 as under:

"New Delhi, the 4th May, 1960.

S.0.1162. - In exercise of the powers conferred by section 26 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952), and in supersession of notifications of the Government of India in the Ministry of Commerce and Industry S.R.O. 2618 dated the 30th July, 1954@ S.R.O. 1509 dated the 12th July, 1955 and S.O. +2462 dated the 24th November, 1958, the Central Government here by directs that the powers exercisable by it under each of the Sections of the said Act mentioned in the Schedule appended here to, shall be exercisable also by the following officers, namely:-

1. Secretary, Forward Markets Commission, Bombay

2. Deputy Director, Forward Markets Commission, Bombay

Schedule

Section 6(2) (a)	*Power to direct associations that there shall be no limitation on the number of members or that there shall be such limitation on that number of members as may be specified.*
Section 6(3)	*Power to approve amendments to rules of recognised association.*
Section 8(1)	*Power to prescribe periodical returns to be furnished by every recognised association and every member thereof relating to its affairs or the affairs of its members or his affairs as the case may be.*
Section 8(2)(a)	*Power to call upon a recognised association to furnish explanation relating to its affairs or the affairs of any of its members.*

**Rescind vide S.0.1162 dated the 4th May, 1960 (See below)*

@ See Page 129.

See above

{As modified vide subsequent notifications S.0.795 dated the 5th April, 1961 {see page 131} and S.0.1363 dated the 13th June, 1961 {see page 132}

Section 8(2) (b)	*Power to appoint persons to make an enquiry into the affairs of an association or any of its members.*
Section 10	*Power to direct rules to be made or amended or to make rules.*
Section 11	*Power to approve Bye-laws of recognised associations.*
Section 12	*Power to make or amend Bye-laws of recognised associations.*
Section 14	*Power to suspend business of recognised associations.*
Section 14C read with Section 8(1)	*Power to prescribe periodical returns to be furnished by every registered association and every member thereof relating to its affairs or the affairs of its members or his affairs, as the case may be.*

(K. V Venkatachalam)

Joint Secretary to the Government of India.

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33. I have carefully considered the aforesaid arguments made by the *Noticees* in the backdrop of the extant legal framework, as discussed above. Insofar as the

challenge to the exercise of power by FMC is concerned, I observe that Section 26 of the FCRA clearly empowers that powers to be exercisable under the FCRA can be delegated to any officer or authority, through the issuance of a notification by the Central Government, which in the present case is the Notification no. S.O. 1162 dated May 04, 1960. From the contents of the said notification it is seen that FMC "also" has been authorized to exercise the powers under Section 8 (1), 8 (2) (a) and 8 (2) (b), which evidently suggest that by using the term "also", the Central Government did not cease to hold its original power and instead has expressed its intent by delegating the powers under those sections of FCRA also to FMC. The harmonious and holistic reading of the provisions also make it amply clear that the powers delegated to the officers of FMC would continue to be exercisable by the Central Government as well. Therefore, the contention of the *Noticees* that the enquiry initiated by FMC is *dehors* the power delegated to it and all such enquiries require to have prior sanction of approval of the Central Government is not tenable.

34. At this stage, I find it appropriate to refer to a judgment of the Hon'ble Supreme Court of India in the case of *Sidhartha Sarawgi Vs. Board of Trustees for the Port of Kolkata and Others; [Special Leave Petition (Civil) No.18347/2013, date of judgment: April 16, 2014]* wherein, the Hon'ble Apex Court, while discussing the aspects of delegation of powers, have *inter alia* held as: *Delegation is the act of making or commissioning a delegate. It generally means parting of powers by the person who grants the delegation and conferring of an authority to do things which otherwise that person would have to do himself. Delegation is defined in Black's Law Dictionary as "the act of entrusting another with authority by empowering another to act as an agent or representative" … Justice Mathew in Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. v. The Assistant Commissioner of Sales Tax and Others, has succinctly discussed the concept of delegation. Paragraph 37 reads as follows: "37. … Delegation is not the complete handing over or transference of a power from one person or body of persons to another. Delegation may be defined as the entrusting, by a person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor or delegator. It is important to grasp the implications of this, for, much confusion of*

thought has unfortunately resulted from assuming that delegation involves or may involve, the complete abdication or abrogation of a power. This is precluded by the definition. Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative. The ultimate power always remains in the delegator and is never renounced.".

35. Under the circumstances, I am of the firm view that there is no ambiguity whatsoever, in the fact that in terms of the Section 26 of the FCRA, the Central Government has empowered through delegation under the aforesaid Sections viz., Section 8 (1), 8 (2) (a) and 8 (2) (b), the Secretary/Deputy Director of FMC. I may also note here that the *Noticees* have made reference to the case of Cotton Association of India (CAI), wherein as per the claim of the *Noticees*, an approval was sought by FMC from the Central Government to initiate enquiry against CAI. In this regard, as can be observed from the above cited judgment [*Sidhartha Sarawgi Vs. Board of Trustees for the Port of Kolkata and Others, (supra)]* of the Hon'ble Supreme Court, that after delegating its powers under the relevant sections of FCRA, the Central Government, being the delegator, does not have to renounce its original power conferred under Section 8 of the FCRA. Therefore, the claim of the *Noticees* that enquiry in their case should be held to be void *ab initio* in absence of specific approval from the Central Government holds no water. Furthermore, the enquiry against the *Noticees* was not a case of enquiry "against" a recognised association. Whereas in the case of CAI, as can be noted from the said letter of the Central Government, the in principle approval to the FMC was granted to conduct the enquiry "against" the association itself, that is, the CAI. Thus, the facts of the case of the *Noticees*, can be completely differentiated from the case of the CAI. Moreover, as pointed out earlier, by delegating its powers to the FMC by way of the aforesaid notification, the Central Government did not lose its power originally vested in it under the FCRA, therefore, merely because of a letter issued by the Central Government in another case, the enquiry against the *Noticees* cannot be termed as illegal or irregular.

36. The next contention of the *Noticees* is that even if it is assumed for the sake of arguments that the powers of conducting enquiry have been derived from the aforesaid notification dated May 04, 1960, there has to be an approval "in

writing" from either of the two delegates, viz., Secretary and Deputy Director FMC, so as to indicate that they have applied their mind to decide/approve for initiation of Enquiry. With regard to the said contention of the *Noticees*, I note from the records that on receipt of the complaint in the present matter, a team was deputed to enquire into the allegations made in the said complaint and such team was headed by Deputy Director, FMC, which is evident from the fact that the statements have been recorded in the presence of officials of FMC including "Deputy Director". Therefore, the enquiry that has been conducted in terms of the powers delegated to specific officials of FMC, has been in fact conducted in the present case by one of such officials himself who has been delegated to authorise conduct of inquiry in such matters. It is also of relevant to mention here that pursuant to the completion of the enquiry, the SCN to the *Noticees* was issued by the Director, FMC himself. When all the said facts are brought on record, the argument of the *Noticees* completely loses its value as the law (the Sections and notification conjointly) requires exercise of powers by the delegate and there does not emerge any requirement to provide the *Noticees* with about any kind of an order in writing by the Deputy Director of FMC authorising himself to enquire into the matter. Thus, having considering the above and on perusal of the facts and circumstances in which the SCN was issued, it is more than sufficient to show that powers have been exercised by the FMC through its competent person having due authority to conduct the inquiry, hence the grievance of the *Noticees* for not being provided with a copy of the authorization in terms of the aforesaid notification is not found to be tenable.

37. I note that the aforesaid issues of legal and procedural infirmities have been raised by the *Noticees* to uproot the initiation of enquiry itself. Based on the discussions on the issue in the previous paragraphs especially on the content and implication of the notification of the Central Government, it is clearly discernible therefrom that the power of the Commission (FMC) was always co-terminus with the power of the Central Government in terms of the provisions of Section 8 (1), 8 (2) (a) and 8 (2) (b) of FCRA and the primary legislative objective of the powers conferred under the aforesaid provisions of FCRA was undeniably aimed

at achieving a much larger objective of preservation of integrity of the market. Therefore, the attempt being made by the *Noticees* to vitiate the inquiries done by the Regulator of the commodity derivatives market by making various hyper-technical objections, or by pointing out certain hair-splitting and imaginary procedural lacunae, ostensibly to deviate the proceedings cannot be held as a valid challenge to the actions of initiating inquiry against the *Noticees* or entities associated with the *Noticees* in connection with their nexus/role and transactions with NMCE which was a regulated Commodity Exchange at the given point of time, as it was well within the powers of FMC under FCRA to cause such an inquiry in response to the complaints it received in the matter of NMCE which it did as per law. Accordingly, the preliminary objections pressed by the *Noticees* challenging the jurisdiction and authority of FMC to conduct inquiry against the *Noticees* or entities related to the *Noticees* do not survive for any further consideration.

38. Without prejudice to the aforesaid observations it may be noted that under the relevant provisions of law viz; Section 4, 8 and 26 of FCRA, there is no requirement for obtaining a mandatory prior approval from Central Government to initiate any enquiry, rather the said requirement appears to be procedural and non- mandatory in nature after the aforesaid powers were delegated by the Central Government. There are catena of judgments of the Hon'ble Supreme Court and Hon'ble High Courts espousing the fundamental proposition in law that that a mandatory enactment must be strictly obeyed or complied with the way it has been prescribed under law, while non-compliance with a directory provision if any, has been held in many cases as not affecting or being fatal to the validity of the regulatory act done or decision taken in breach thereof. In this regard, I place reliance on the following two judgments of the Hon'ble Supreme Court with regard to the requirement of compliance of mandatory vis-à-vis directory provisions of the statutes:

a) Ram Deen Maurya (Dr.) v. State of U.P., (2009) 6 SCC 735, [DB]

"*42. Having examined the Rules and the principles evolved by the Courts, let us now examine whether non-compliance with one of the facets of Rule 4(6) of the Rules would be fatal to the application filed by Dr. Madhu Tandon.*

43. To answer this issue, it is necessary to find out, whether the Rule is directory or mandatory. If it is mandatory, then it is settled rule of interpretation, it must be strictly construed and followed and an act done in breach thereof will be invalid. But if it is directory, the act will be valid although the non-compliance may give rise to some other penalty if provided by the statute. It is often said that a mandatory enactment must be obeyed or fulfilled exactly, but, a directory provision non-compliance with it, has been held in many cases as not affecting the validity of the act done in breach thereof (see Principles of Statutory Interpretation, 11th Edn. 2008 by Justice G.P. Singh).

…..

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52. While considering the non-compliance with procedural requirement, it has to be kept in view that such a requirement is designed to facilitate justice and furthers its ends and, therefore, if the consequence of non-compliance is not provided, the requirement may be held to be directory."

b) State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772, (DB) –

"*66. The question is whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.*

67. In Maxwell on the Interpretation of Statutes, 10th Edn. at p. 381, it is stated thus: "On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the

legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them."

(H) After introduction of Part IX-A - 'The Municipalities' in the Constitution of India by way of 74th Amendment w.e.f. 01-06- 1993, under Article 243ZG strict bar to interference by courts in electoral matters has been placed. The provision begins with a non-obstante clause thereby providing in mandatory terms that an election to any municipality ought not to be interfered with while exercising supervisory jurisdiction in a Writ Petition filed under Article 226/ 227 except in very exceptional cases."

39. In terms of doctrine of implied construction, it is a well-settled principle that when a power is given to an authority to do something it includes such other incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. The reason for recognising such a rule of interpretation is quite apparent from the undeniable fact that legislation is a complex process and even the best legislative exercise does not rule out the possibility of omission of minor details. An express grant of statutory powers carries with it by necessary implication, the authority to use all reasonable means to make such grant effective.

40. Considering the foregoing, I am of the firm view that in this case the statutory requirements have been adequately complied with and non-furnishing of certain details such as a written authorisation by the Secretary or Deputy Director of FMC etc., as has been insisted by the *Noticees* does not cause any prejudice to their rights as a *Noticees* nor does it at all vitiate or affect the legality of the instant proceedings, when one finds that the inquiry by FMC was conducted by and the statements were recorded in the presence of the person who was himself authorised to conduct the inquiry in terms of the above

discussed notification of delegation issued by the Central Government. I have seen and noted from the records that the officers in the rank of Deputy Director were involved in the entire process of inquiry conducted by FMC in this matter pertaining to the governance of NMCE. Hence, considering the above undisputed facts the objections raised by the *Noticees* citing various purported procedural lapses with a motive to vitiate the entire proceedings on such technical and procedural grounds alone, is devoid of merit and thus, cannot be of any assistance to the *Noticees*.

41. Similarly, the argument of the *Noticees* that if the inquiry proceedings were conducted by FMC by way of exercising the powers delegated under the aforesaid Notification, then a written approval from the aforesaid delegates (Secretary/Deputy Director of FMC) ought to have been provided to them, is also found to be a completely frivolous argument as neither the extant provisions of FCRA nor the notification issued by the Central Government required FMC to supply any such written approval to the delinquents. Further, it is no one's case that that delegation of powers *per se* under the aforesaid Notification is suffering from any kind of legal infirmities.

42. The *Noticees* have placed reliance on the judgment of the Hon'ble Supreme Court of India passed in the matter of *LIC of India Vs. Retired LIC Officers Association (supra)* to support their argument that a delegatee must exercise its powers within the four corners of the enactment. In this regard, there does not appear to be any situation noticed in the present proceedings which indicates that FMC has anytime crossed the threshold of powers delegated to it in terms of the aforesaid Notification and therefore the argument of the *Noticees* does not deserve further consideration. Further, the reliance placed by the *Noticees* on the judgment of *Arun Kumar Vs. Union of India (supra)* also does not help the case of the *Noticees* as FMC has clearly acted within the powers conferred on it under the Act read with the Notification referred to above and the inquiries conducted by FMC in the matter against the *Noticees* do not appear to be wanting in any manner for want of jurisdiction as has been claimed by the *Noticees*.

43. As discussed earlier, the aforesaid Notification issued by the Central Government in the year 1960 has delegated the powers of Central Government under Section 8 (1), 8 (2) (a), and 8 (2) (b) of FCRA. On a perusal of the provision of the sub-section (3) of Section 8, it is observed that the said provision is directly ancillary to the sub-section (2) of the Section 8, as it binds every Director, member and all other persons "having dealing" in the course of business, to provide the requisite documents, information, statements etc. Thus by the said provision, the important factor which makes one amenable to the jurisdiction of FMC is the business dealing with any of the member, its Director etc.

44. In the present case, the undisputed facts are that the NMCE is a recognized association, which was having *Noticee no. 2* as MD /Executive Vice Chairman for a large period of time since its inception as a recognized Commodity Derivatives Exchange during which time, the impugned violations have taken place. Similarly, *Noticee no. 1*, NOL, was the anchor promoter of the NMCE and *Noticee no. 2* was the only person who was managing the affairs of *Noticee no. 1* in the capacity of its Managing Director. *Noticees* have also brought on record the running account that was existing between NMCE and *Noticee no. 1*, during the relevant period of time. Further, there is also no dispute to the fact that there have been several transactions and dealings between the NMCE and ATSPL/ATS LLC details and merit of which would be discussed in the latter part of the order.

45. Under the circumstances, when the two *Noticees* as well as well as the companies ATSPL/ATS LLC have been found to have various dealings in the course of and in connection with the business of NMCE, I see no hindrance or want of power in the hands of FMC for initiating and conducting inquiry against such entities, when the extant legal framework unequivocally stipulates that the persons having dealings with the director, member etc. of a recognized association, shall co-operate by furnishing the necessary documentary evidences and also submitting the statements as may be required in the course of such enquiry.

46. Apart from the above, I may also hasten to add here that during the course of enquiry conducted by the FMC, the statement of *Noticee no. 2*, Mr. Kailash Gupta was also recorded. Therefore, after having conceded to such powers of FMC during the enquiry, *Noticee no. 2* is now estopped from agitating the issue of jurisdiction of FMC on the ground that the powers of FMC are restricted only to the activities of recognized association and the members thereof. In addition to the above, it is also noted that the *Noticees* have been contesting the issue of jurisdiction right from the inception of the proceedings, which have also been raised by them before various judicial bodies. The said contention was also agitated before the Hon'ble Supreme Court of India and the Hon'ble Supreme Court vide their order dated March 07, 2018 granted liberty to the *Noticees* to file a statutory appeal before the Securities Appellate Tribunal, an appellate body to hear appeal against orders passed by SEBI. Later on again, vide order dated November 27, 2020, the Hon'ble Supreme Court of India has remitted the same matter to SEBI *inter alia* directing SEBI to provide documents to the *Noticees* and to proceed to take a final view on the subject matter emanating from the SCN already issued by FMC based on its merit. In view of the above, the contention of the *Noticees* as far as the jurisdiction of FMC to proceed in the matter does not survives any more when the matter has been remitted by the Hon'ble Supreme Court after taking a considered view on the petition filed by the *Noticees* and after being cognizant of various contentions of the *Noticees* made in their petition including their contentions regarding FMC's jurisdiction to conduct inquiry against them.

47. Another challenge that has been made by the *Noticees* is connected to the time limit of 3 years prescribed under Section 8 (4) of FCRA for maintaining the books of accounts. It has been submitted that by virtue of the said provision, the enquiry ought to have been restricted to a period of 3 years only. I observe that the said provision is only a directory provision which mandates preservation of books etc., for a period of 3 years. The *Noticees* cannot invoke this provision to tie the hands of the Regulator to restrict its enquiry only for such period of 3 years, more so when serious and glaring events of misdemeanor comes to the

knowledge of the Regulator. It is an undisputed fact that as soon as the complaint came to the knowledge of the FMC, it immediately swung into action and after conducting a detailed enquiry, the present show cause notice came to be issued. Therefore, irrespective of the fact that the provision of Section 8 (4) of the FCRA provides for maintenance of the records for a period of three years only, there does not seem to be any statutory bar on the regulator from enquiring into and taking cognizance of any misdeeds committed at any point of time by a recognized association or by persons connected to a recognized association. No provisions under the FCRA provide that any enquiry initiated or intended to be initiated shall be confined to a period of 3 years only. Thus, the argument of the *Noticees* is found to be frivolous and grossly lacking in merit, in terms of the aforesaid discussion.

48. Incidental to the aforesaid plea taken on the ground of passage of time, the *Noticees*, while relying upon various judgments like *HB Stockholding Ltd. (supra),* have also tried to assail the proceedings on the grounds of delay. In this regard, I observe that it is an undisputed fact that the inquiry in the present matters was initially commenced from the receipt of a complaint dated November 28, 2010 by FMC and the proceedings which were initiated by issuance of the SCN after completion of the said inquiry culminated in passing of the order July 23, 2011. The said order dated July 23, 2011 was challenged by the *Noticees* and after multiple proceedings before various courts/tribunal, the SCN is now being adjudged under the directions of the Hon'ble Supreme Court of India. Under the circumstances the claim of the *Noticees* that the present proceedings are time barred is liable to be rejected for want of any merit therein. The *Noticees* have not been able to draw my attention to any other provision which can possibly confer a right on the *Noticees* to get the proceedings stalled on account of delay. Notwithstanding the same, the records before me are evident of the fact that the enquiry conducted by the FMC involved collection and collation of large amount of evidence over a considerable period of time and recording of statements from numerous persons multiple times, only after which the inquiry came to be concluded within a reasonable time of 8 months. The time that elapsed

thereafter, was broadly attributable to the litigation that emanated from the order of FMC. Considering the aforesaid, I observe that the claim of the *Noticees* on account of purported delay in proceedings is nothing but a specious claim and deserves to be rejected, more so when the *Noticees* have admittedly made respectful submissions on merits of their case and have also filed the documents in support of such submissions to defend themselves from the charges made against them in the SCN thereby vindicating the validity of the present proceedings pending before me. The aforesaid observations of mine get further strengthened by the findings of the Hon'ble SAT as recorded in the matter of *Pooja Vinay Jain Vs. SEBI (date of decision: March 17, 2020).* In the said matter, the Hon'ble SAT has held that: "*13. In the present case, the appellant neither put a plea of prejudice before the AO nor before us. It was simply stated that since the proceedings were launched by respondent SEBI after a period seven years, the same should be quashed on the ground of delay. The record would show that all the documents concerning the defense of the appellant were filed by her before the AO. Therefore, for want of any prejudice the proceedings cannot be quashed simply on the ground of delay in launching the same."*

49. It has also been argued that no transgression with respect to trading activity has been alleged, therefore, the FMC cannot exercise its jurisdiction. In this connection, I note that under Section 4 of the FCRA, wide ranging powers have been conferred on the FMC. In terms of Section 4 (b), FMC can keep Forward Market under observation and may take such actions in relation to them, "as it may consider necessary". A plain reading of the phrase "as it may consider necessary" would indicate that unfettered powers have been conferred on the FMC by the FCRA for the purpose of achieving the mandate entrusted to it under the FCRA, i.e., to keep the Forward Markets under observation. There does not appear to be any ambiguity in the legislative intent, nor any such indication has been pointed out by the *Noticees* so as to restrict the powers of FMC only to the oversight of trading activities. Further, when the larger & graver issues with respect to the functioning and governance of a recognized association like NMCE are at stake, undisputedly, they are bound to have an impact on the trading activity to be carried by such an association. Further, in terms of Section

29A of FCRA, after repeal of FCRA, any action taken or purported to have been taken under FCRA, shall be continued to be enforced by SEBI, as if FCRA had not been repealed.

50. I note that by virtue of Section 14A (1) of FCRA, an association concerned with the business relating to the forwards contracts shall carry on such business only under and in accordance with the conditions of a certificate granted under FCRA by the FMC. The exact language of the said Section reads as: *(1) No association concerned with the regulation and control of business relating to forward contracts shall after the commencement of the Forward Contracts (Regulation) Amendment Act, 1960 (62 of 1960) (hereinafter referred to as such commencement), carry on such business except under, and in accordance with, the conditions of a certificate of registration granted under this Act by the Commission.*

51. While being confronted with an issue pertaining to the powers of FMC, the Hon'ble High Court of Judicature at Allahabad in the matter of *Union of India and another Vs. The Bullion and Agricultural Produce Limited (supra),* has recorded detailed discussion while analyzing the structure of the FCRA. The relevant extract of the said judgment is reproduced herein for reference:

"…26. "Carry on" is a phrase of the widest amplitude. In Erichsen v. Last, (1881) 8 QBD 414, Jessel, M. R. said:

"There is no principle of law which decides what 'carrying on' trade is a multitude of circumstances make up what is called 'carrying on' a trade; for it is a compound fact made up of a variety of things."

27. All facets of activities involved or engaged in, in order to subserve or achieve the purpose of the business, would be within the concept of 'carrying on' the business…"

52. Similarly, the Hon'ble Kerala High Court, in the matter of *First Commodities Exchange of India and others Vs. Union of India and others [2015 1 KLT (SN 122) 103]*, while dealing with the powers of FMC conferred under the FCRA has *inter alia* held:

> *43. The periodical returns, which are contemplated under Section 8 of the Act, returns* ***relating to its affairs.*** *The word 'affairs' used in Section 8 cannot be confined to*

only trading affairs. The phrase "its affairs" is a comprehensive phrase, which includes all the affairs of the Association/Exchange including election of Directors. The word 'affair' has been defined in the Law Lexicon by P.Ramanatha Aiyar in the following words:

"Affair. Business of any kind, commercial, professional or public; something to be transacted; matter; concern."

44. As noted above, Rule 12, which prescribes the particulars to be sent in the annual report also contemplates details regarding "changes in the composition of the governing body". Thus, the statute requires submission/sending of all details to the Commission, including the changes in the governing body, if any.

45. Section 8(2) is another relevant provision, which needs to be considered while considering the issue. Under Section 8(2)(a) of the Act, 1952, the Commission is empowered to call upon a recognised Association such information or explanation relating to its affairs or the affairs of any of its members. Thus, the Commission is also empowered to call for explanation of any of its affairs. The show cause notice, Exhibit P14 dated 27.6.2011 which was issued to the petitioners on the basis of the complaint dated 7.1.2011 was, thus, well within its jurisdiction. When the regulatory body, i.e., the Commission is empowered to call for explanation regarding the affairs of the Association or of any of its members, it is obvious that after considering the explanation, directions can be issued by the Commission. Denying such power to the Commission to issue direction after calling for explanation shall not advance the object of the Act and to hold that it has no jurisdiction to issue any direction regarding the subject matter for which explanation is called for is to make the power of calling explanation futile and redundant. Section 8(2)(b) further empowers the Central Government/Commission to make an enquiry in relation to the affairs of such association or the affairs of any of its members. …..

…47. In the event, it is held that the Commission is not empowered to issue any direction even after conducting an enquiry and asking for explanation from the Association as empowered under Section 8(2) of the Act, 1952, the whole purpose and object of giving power to the Commission to call for explanation and to direct enquiry shall be defeated. When a statute grants a power to an authority, the power is granted to effectuate the purpose of the Act…"

53. It is noted that the *Noticees* in their post hearing written submissions, have attempted to factually distinguish the aforesaid case under reference decided by the Hon'ble Kerala High Court from the facts of their own case. It has been contended that the First Commodities Exchange of India (FCEI) was not a demutualized exchange whereas NMCE is a completely demutualized exchange. It has further been contested that in the case of FCEI, FMC had called for information exercising its powers under Section 8 (2) (a) whereas in the present case, the action impugned by the *Noticees* is the power exercised by FMC under Section 8 (2) (b) of the FCRA. Lastly, the *Noticees* have also expressed their disagreement with the reasoning rendered by the Hon'ble Kerala High Court.

54. I have carefully perused the arguments made by the *Noticees* in anticipation that SEBI may place reliance on the aforesaid judgment of the Hon'ble Kerala High Court and observe that the said judgment was rendered by the Hon'ble High Court after detailed deliberations on the legal framework laid down under the FCRA. The Hon'ble High Court has recorded detailed reasoning as to how the FCRA confers wide powers on FMC and the directions passed by FMC with respect to the election of Directors of FCEI was squarely covered within its power so conferred under the FCRA. The factually distinguishable factors, as pointed out by the *Noticees* between their case vis-à-vis the case of FCEI, as a matter of fact cannot dilute the very legislative framework of FCRA which confers powers on the FMC to exercise regulatory oversight over its recognized exchanges as ultimately, both FCEI as well as the *Noticees* have been granted recognition under the same provisions and thus are equally and similarly bound by the regulatory framework governing the realm of commodities future trading. I may also observe here that the reasoning given by the *Noticees* to express their disagreement with the finding of the Hon'ble High Court are totally misplaced in the present proceedings and would be of no help for them.

55. Therefore, seeking guidance from the aforesaid judgments, it can be said that the mandate entrusted on the FMC by the FCRA cannot be construed to be limited only to the trading activity of a recognized association, as has been contended by the *Noticees*. I shall now proceed to examine on merits, the show

cause notice and evaluate the submissions made by the *Noticees* in response to the said SCN.

56. After having perused the charges made in the SCN, in my view for the sake of convenience, the said charges can be divided into following broad categories:

(i) Payments made to ATSPL;

(ii) Allotment of shares to Neptune Overseas Limited;

(iii) Appointment of Consultants;

(iv) Purchase of cars and other expenses;

(v) Miscellaneous

Payments made to ATSPL:

57. As noted earlier, the SCN has *inter alia* stated that *Noticee no. 2* has caused payments of INR 29.47 Crore from NMCE to ATSPL, during the course of business of NMCE from 2002-03 till September 30, 2010. The said payments were made without proper approval/authority, and was made against fictitious software development charges while the value of the software work executed by ATSPL was only INR 66.32 Lakh. The *Noticees* have raised various objections and advanced a number of arguments to defend themselves against the said charges, which are discussed in the coming paragraphs.

58. With regards to the company Arrow Total Solutions Private Limited (ATSPL), I note that there is no dispute to the fact that the said company was founded and formed by Mr. Amit Gupta, son of *Noticee no. 2*. The entire shareholding of the said company was initially held by Mr. Amit Gupta and his mother. The Directors of ATSPL till 2006-07 were Mr. Amit Gupta, Ms. Anjana Gupta (wife of the *Noticee no. 2*) and Ms. Poonam Verma (daughter of *Noticee no. 2*). Subsequently, in the year 2007, the shareholding of ATSPL was transferred to 4 individuals in the following fashion: 5000 shares were held jointly by Mr. Preetika Godiwala & Ms. Ushaben Goswami and the rest of the 5000 shares were held jointly by Mr. Samar Dave & Ms. Prakashba Chudasama. Mr. Samar Dave

and Ms. Preetika Godiwala came to be appointed as Directors on the Board of ATSPL. Apart from the said two persons, one Mr. Vijay Mohan Mehrishi was also appointed as Independent Director on the Board of ATSPL.

Connection of shareholders/Directors:

59. From a collective reading of the statements of various persons as recorded during the present proceedings, the following facts emerge with respect to the shareholders and Directors of ATSPL:

i. The *Noticee no. 2* has acknowledged in his statement dated January 27, 2011 recorded before FMC that Mr. Samar Dave is a friend of Mr. Amit Gupta (son of *Noticee no. 2*). Further, *Noticee no. 2*, has also stated in his statement that he knows Mr. Bhavik Godiwala (husband of Ms. Preetika Godiwala), as he (Mr. Bhavik) was an employee of CMC Limited and was the architect of the project of NMCE undertaken by CMC. It has also been asserted in the said statement that Mr. Bhavik had 'joined ATSPL as a Director through his wife Mr. Preetika'

ii. Ms. Ushaben Goswami and Ms. Prakashba Chudasama, i.e., the joint shareholders with Ms. Preetika Godiwala and Ms. Samar Dave respectively, have stated in their statements that they do not know Ms. Preetika and Mr. Samar, i.e., their primary co-shareholders with whom they were jointly holding the shares of ATSPL. Ms. Ushaben Goswami is the wife of Mr. Narendra Goswami and Ms. Prakashba Chudasama (since deceased) was the wife of Mr. Rajendrasingh Chudasama, both of whom were working with NMCE at the relevant point in time. Both of them have stated in their respective statements that they have signed some papers and had become joint shareholders of ATSPL on the instructions issued by Mr. Kailash Gupta *(Noticee no. 2*), issued to their husbands. Both of them have stated that they are not aware about the nature of business of ATSPL or even the office (address) of ATSPL.

iii. Ms. Preetika Godiwala and Mr. Samar Dave did not pay any consideration towards the transfer of shares in their respective names. Mr. Vijay Mohan

Mehrishi, who was appointed as Independent Director of ATSPL, has admitted in his statement recorded before FMC on January 28, 2011 that initially he was giving his freelance consultancy service to NMCE, and during the year 2005-06, Mr. Kailash Gupta (*Noticee no. 2*) and Mr. Bhavik Godiwala had offered Directorship to him in ATSPL and he joined ATSPL in 2006 as an Independent Director.

iv. In terms of specific question put to Ms. Preetika about her shareholding in ATSPL, she had replied in her statement recorded on March 07, 2011 before the FMC that: "*I am not aware of this. For me, it was always Shri Amit Gupta's Company and we were given to understand that we are having some shares in the company.*"

v. Mr. Samar Dave has stated in his statement dated March 14, 2011 (made through email as he was in USA at that time) that he was working as a Technical Consultant for ATSPL. He has also stated that: "*I used to interact with other Technical Consultants Preetika Godiwala, Amit Gupta.*" Mr. Samar has also stated that: "*I know Amit Gupta, who normally oversees the development activities of ATSPL.*". He further stated as: "*I am not too sure about the key person. But I believe it would be Mr. Amit Gupta*".

vi. In this respect, the statement of Ms. Preetika recorded on March 07, 011 is pertinent to be reproduced, which evidently suggests the names of the person actually responsible for the affairs of ATSPL, when she stated that: "*As far as my knowledge goes, Shri Amit Gupta and Shri Kailash Gupta are the key persons taking all such decisions. According to my understanding, the promoters of ATSPL are also the promoters of NMCE and all decisions were infact taken by NMCE Management.*". When Ms. Preetika was given an option to add anything to her statement, she stated as: *"I state that ATSPL was promoted, managed and controlled by Shri Amit Gupta and his family members and that I was just a signatory to all the documents which I have signed in good faith. My involvement in the company was purely technical and providing technical support to the ongoing projects. All key financial, business and project related decisions were taken by Shri Amit Gupta or his family members, to which I am and was never a party."*

vii. Both Ms. Preetika and Mr. Samar have admitted that they have never attended any Board meeting of ATSPL, whereas Mr. Mehrishi (Independent Director) has stated in his statement dated January 27, 2011 that except for one or two occasions, he has also never attended any meeting of the Board of ATSPL and that he has met the other Board of Directors of ATSPL only once or twice. Mr. Mehrishi has stated that one Board Meeting of ATSPL took place in the office of NMCE itself. Mr. Mehrishi has also stated that he has visited the office of ATSPL only once and that he is not aware of the Auditors of ATSPL nor has he seen any Audit Report of ATSPL. Further, Mr. Mehrishi was also clueless as to who in ATSPL was managing its Finances, as he merely conjectured that the shareholders must be managing the finances of ATSPL.

viii. With respect to the management of finances of ATSPL, both Ms. Preetika and Mr. Samar have expressed their ignorance about the person who was managing the finances. While Mr. Samar admitted that he is one of the signatories of a bank account of ATSPL held with HDFC Bank, however, he was not aware of the other signatory to the said bank account.

ix. Ms. Sarita Baxi, former AVP Finance and Accounts, NMCE and Mr. Nisarg Shah, former Sr. Manager, Finance and Accounts, NMCE, have during their statements recorded before FMC on June 03, 2011 admitted that apart from the accounting work related to NMCE, they were also discharging the functions of preparation of annual accounts of Neptune Overseas Limited (*Noticee no. 1*) and ATSPL as well. While Ms. Sarita Baxi admitted to have prepared annual financial statements of accounts and other work like preparation of data for e-TDS for the financial year 2008-09 and another year prior to that; Mr. Nisarg Shah has admitted that he had finalized the financial reports of ATSPL for the financial year 2009-10. Both of them have asserted that the instructions to prepare accounts of the said companies were flowing from *Noticee no. 2* himself.

60. From the statements of various persons as highlighted above and other materials available on record, the following findings with respect to the transfer

of ownership of ATSPL to new shareholders and also on the functioning of ATSPL thereafter can be made:

i. Initially, the company ATSPL was founded by the Mr. Amit Gupta (son of Mr. Kailash Gupta, *Noticee no. 2* herein), Ms. Anjana Gupta (wife of Mr. Kailash Gupta) and Ms. Poonam Gupta (daughter of Mr. Kailash Gupta). All the aforesaid persons were directors of ATSPL till September 15, 2007 and Mr. Samar Dave and Ms. Preetika Godiwala were appointed as Directors of ATSPL w.e.f. August 31, 2007.

ii. The incoming shareholders of ATSPL were deeply connected to *Noticee no. 2*. As noted earlier, Mr. Samar Dave is a friend of Mr. Amit Gupta and admittedly, he was residing/gainfully employed in USA during the relevant time. Further, Mr. Bhavit Godiwala was also having close association with *Noticee no. 2* and Mr. Amit Gupta, as can be deciphered from the statement of Ms. Preetika Godiwala (Wife of Mr. Bhavit Godiwala), that she was appointed on the Board of ATSPL on the instructions of Mr. Amit Gupta only. Further, during her cross-examination, Ms. Preetika has stated that she was acting as a Consultant to NMCE during the end of the year 2005. It has been admitted by both of them that they have not paid any consideration for the acquisition of shares of ATSPL, whereas Ms. Preetika was unaware about her shareholding in the ATSPL.

iii. *Noticee no. 2* in his statement has asserted that it was Mr. Bhavit Godiwala, who had joined ATSPL, "through his wife (Ms. Preetika)". The association of Mr. Bhavit can't be undermined in the present case, as the Independent Director, Mr. Mehrishi has also stated that he was offered the directorship on ATSPL by *Noticee no. 2* and Mr. Bhavit. Lastly, the other persons, who were made joint shareholders with the aforesaid two persons, were totally ignorant about the company ATSPL. Both of them (Mr. Ushaben Goswami and Ms. Prakashba Chudasama) have unequivocally stated that they have signed some documents with regard to shareholding in "some company" on the instructions issued by *Noticee no. 2*.

iv. Mr. Samar Gupta has admitted that he did not know the other shareholder -Director Ms. Preetika, and he only got acquainted with her through the reference of Mr. Amit Gupta. The said statement, when seen from the lens of the charges made in the SCN, lends larger perspective to the whole sequence of events unfolding at ATSPL. It is too much of a strange

coincidence to accept that two persons, who were completely strangers to each other, came to be appointed as Directors of a company on the same day. It is also observed that that Mr. Samar and Ms. Preetika have not been able to produce an *iota* of evidence on table so as to explain as to what value they brought on table while acting as Directors of ATSPL. The said two shareholder Directors did not have even the basic knowledge about either the management of ATSPL or its employees and yet they were paid INR 4.25 Lakh (Mr. Samar Dave) and INR 8.35 Lakh (Ms. Preetika Godiwala), which seems to be a *quid pro quo* for lending their respective names to be shareholders/directors of ATSPL at the behest of the original owners of the said company.

v. I observe that even despite having availed opportunity to cross examine Mr. Samar and Ms. Preetika, the *Noticees* have not been able to elicit any responses from them that could have given some benefit of doubts to them so as to weaken the charges made in the SCN and instead the statements of the aforesaid four persons have proved to be sufficient to reinforce the charges underlying the transfer of shares in favour of those persons who were apparently brought in as mere name lending shareholders and also to act as Directors at the behest of the original promoters & directors of the company . (The *Noticees* have given up the opportunity of cross examining Mr. Ushaben Goswami while another shareholder namely Ms. Prakashba Chudasama has since expired.)

vi. The materials on record including the aforesaid statements further show that even after resigning as a Director of ATSPL and after effecting transfer of his shareholding, Mr. Amit Gupta continued to be involved in the managing the affairs of ATSPL apart from the noticeable fact that the promoters/management of NMCE were also exerting large amount of control on the functioning of ATSPL, despite the fact that the earlier shareholders/Directors belonging to the family members of *Noticee no. 2*, were officially not having any linkage like directorship, shareholding or employment, to connect them to ATSPL.

vii. It is also noteworthy that there are numerous emails on record which were exchanged between *Noticee no. 2* and his family members viz., Mr. Amit Gupta and Ms. Poonam Gupta in which *inter alia*, the affairs of NMCE, ATSPL and the signing of agreements between ATSPL and NMCE etc., have been discussed. The perusal of the said emails reveal that Mr. Amit

Gupta and Ms. Poonam Gupta were actively involved in the interface of ATSPL with NMCE, despite having transferred their shareholding in ATSPL and having resigned from the Directorship in ATSPL. In this connection, it is noted that *Noticee no. 2* has taken a strong objection to taking cognizance of the said emails on the ground that personal correspondence should not be used in the regulatory actions. I find that the said objection is completely devoid of merit as the correspondence exchanged between the family members pertain to the affairs of the regulated exchange, i.e., NMCE. As *Noticee no. 2* himself had actively engaged his family members in discussing, deliberating and managing the affairs of the Company (NMCE) where he was the Managing Director, therefore, at this stage, he is estopped to take such a plea to state that such communications being personal in nature should not be taken into cognizance.

viii. Furthermore, the two shareholder directors (viz: Mr. Samar Dave and Ms. Preetika Godiwala) as well as the Independent Director (Mr. Mehrishi) of ATSPL have candidly admitted that they were completely ignorant about the corporate functioning of ATSPL as well as management of its finances. Mr. Samar Dave, though admitted that he was an authorized signatory of one of the bank accounts of ATSPL, however, he could not name the other authorized person for the operation of the said bank account.

ix. In terms of the records provided by the HDFC Bank, the account no. 00062640000427 in the name of ATSPL was opened on July 27, 2007. The address of ATSPL in the said bank account was 4th Floor, H.K. House, Ashram Road, Behind Jivabhai Chambers, Ahmedabad, i.e., the same floor and building where NMCE was having its office. The bank records further strongly indicate that the authorized signatories to the said bank account were Ms. Poonam Gupta Verma, Ms. Anjana Gupta and Mr. Samar Dave even though the family members of *Noticee no. 2* viz., Ms. Poonam Gupta Verma and Ms. Anjana Gupta had resigned from the Board of ATSPL on September 15, 2007.

x. Thus, the records collected from the banks during the FMC inquiry indicate that the apart from Mr. Samar Dave, the other authorized signatories of ATSPL were Mr. Poonam Gupta (daughter of *Noticee no. 2*) and Ms. Anjana Gupta (wife of *Noticee no. 2*) even at the time when they

had claimed to have resigned from the Directorships of ATSPL and had also transferred their shareholding to others. I note that the *Noticees* in support of their reply have filed the copies of the Pipara Report. A perusal of the said documents will show that Pipara & Co., Chartered Accountant was appointed as Special Auditor by the Gujarat Police, to submit a report relating to the investigation carried out on the Books of Accounts & Other Records in the case of NMCE. From the said report, it is noted that HDFC Bank has confirmed vide its letter dated June 14, 2012 that Mrs. Anjana Gupta and Ms. Poonam Gupta are the authorised signatories of the bank account of ATSPL held with HDFC Bank. The said letter of HDFC clearly expose the control on the bank accounts being exerted by the family members of the *Noticee no. 2* even till the year 2012.

xi. I observe that there is nothing on record to indicate any kind of formal association in the capacity of employee, consultant etc., of Ms. Poonam Gupta and Ms. Anjana Gupta, so as to justify their association with the bank accounts of ATSPL in official capacity and in the absence of any credible evidence brought on record to dispel the charge, I find that materials on record including the evidence of Ms. Poonam Gupta and Ms. Anjana Gupta being the authorized signatories to the bank account of ATSPL clearly suggest that the *Noticee no. 2* was still exercising control over the affaires of ATSPL through his family members. Thus, in the absence of any cogent evidence to the contrary to demonstrate that any other person was operating the bank accounts, it is clear that the family members of *Noticee no. 2* were operating the bank account of ATSPL. Further, *Noticee no. 2* in his statement has also stated that the cheque book was signed by Mr. Samar Dave and was being sent to the office of NMCE, while it is also not disputed that Mr. Dave was located in USA at the relevant time.

xii. Further, it is pertinent to mention here that during the recording of statement before FMC on April 06, 2011, Noticee *no. 2* was asked as: "*Are you aware as to who are the persons operating the bank accounts of ATSPL as on date?*" and he replied as: "*I state that at present no one is operating the accounts*". The above statement itself shows the involvement of the *Noticee no. 2* in the affairs of ATSPL and his close association with it. Had *Noticee no. 2* not been playing any kind of role in the functioning of ATSPL and not been enjoying any close connection with the company, a normal response to the

aforesaid question would have been that he is not aware about the operation of the bank account, whereas by giving a specific and pointed answer to the said question with full authority suggests that the company ATSPL was practically under the command and control of *Noticee no. 2* and his immediate family members. The glaring fact of the family members of *Noticee no. 2* operating the bank account of a company with which such individuals did not have any identifiable official association clearly exposes the fact that the management and control of the affairs of the ATSPL, including the finances of the said company rested in the hands of the family members of *Noticee no. 2* only and the transfer of shares to new shareholders and appointment of new Directors was nothing but a ruse to take shelter behind the corporate veil of ATSPL. In this respect, it is observed that the *Noticee no. 2* has contested the veracity of certain statements given by several witnesses by taking a flimsy ground that they have made those statements under duress to save their skin and employment, whereas when it comes to the aforesaid statement given by *Noticee no. 2* himself, no such claim has been put forth by the *Noticee no. 2* that his statement was also against his free will and made under duress of any nature.

xiii. As stated earlier, despite being the Directors of the company, the two persons (Mr. Samar Dave and Ms. Preetika Godiwala) were not having any inkling about the administration and functioning of the company ATSPL, which they ought to have and neither of them had attended any Board meeting of ATSPL which indicates that the company ATSPL was being managed and governed by someone else. The above observation is cemented from the statement of Ms. Preetika, who has categorically stated in her statement dated March 07, 2011 recorded before FMC that all the functions of ATSPL were being managed by Mr. Amit Gupta and his family members, and her role was limited to purely technical aspects of the company. As noted above, based on their request, the *Noticees* were permitted to conduct cross examination of the persons whose statements had been recorded by FMC and were relied upon in the SCN (and the copies of which were also provided to the *Noticees*), however, no evidence contradictory to the above statement of Ms. Preetika already given by her to FMC has been brought on record so as to raise any doubt on the truthfulness of the above facts and charges made in the SCN about the

management and control of ATSPL by *Noticee no. 2* and his family members.

xiv. From the statements recorded before FMC as well as during cross-examination before me during the present proceedings and my observations as delineated above, one can undoubtedly say that the functioning of ATSPL was effectively under the control of *Noticee no. 2*, directly as well as through his family members.

xv. As can be observed from the sequence of events that unfolded with respect to ATSPL, the said company was founded by the family members of *Noticee no. 2* and then suddenly in the year of 2007, the entire shareholding of the company was transferred to four individuals without taking any monetary consideration and such four individuals were not having any common thread between them. While the primary shareholders/Directors (Mr. Samar Dave and Ms. Preetika Godiwala) appear to have some technical background, however, the individuals who were made joint shareholders with them are clearly and admittedly had no clue about the company and were evidently mere name lenders for the *Noticee no. 2*. The tagging of the said two name lending individuals, who were the wives of the employees of NMCE and the admitted absence of any connection of the said joint holders with the primary shareholders (Mr. Samar Dave and Ms. Preetika Godiwala) when seen holistically in the backdrop of the case, clearly indicates that such an act was done very thoughtfully not only to pretend to the outside world that *Noticee no. 2* and his family members are no longer associated with ATSPL but also to prevent any possible attempt on part of primary shareholders to usurp the company ATSPL. The uncanny act of the family members of *Noticee no. 2* transferring the shareholdings in ATSPL to four strangers without receiving any consideration for which no plausible explanations have been furnished, and the newly inducted Directors/shareholders not only feigning ignorance about the management of the company, but also pointing out the involvement of the *Noticee no. 2* through his family members in the affairs of ATSPL irresistibly go to the root of the matter

that ATSPL was nothing but a company that continued to function under the control and directions of *Noticee no. 2* even after the transfer of shareholding and appointment of new Directors on its board.

xvi. There are also other documentary evidences available in the records in form of emails to corroborate the control of *Noticee no. 2* over ATSPL. *Noticee no. 2* in one of his email dated December 10, 2010, has clearly expressed that the transfer of ATSPL to Mr. Samar and Ms. Preetika was result of internal planning and "management of resources" of Mr. Amit Gupta. The relevant part of the said email reads as: "*Please note that in 2005-2006, ATSPL and ATSLLC both belonged to you. It is only in 2007, ATS PL holding has been transferred to Godiwala and Dave. Hence, it was your internal planning and management of your own resources and not like ATS LLC couldn't manage its affairs properly and was forced to transfer over the obligations to ATS India. ATS LLC partnered with ATS India may also need regulatory approvals from RBI under FEMA to expand its presence in India and in this case therefore you can't transfer your obligations to yourself* …" The aforesaid email when considered even on a standalone basis in the facts of the present case, is mirroring the exact purpose of transfer of shares of ATSPL and change of Directors and is adequately showing that such an act of transferring shares and appointing unconnected persons as Directors was only a subterfuge to deceive the authorities and further to keep the control of the *Noticee no. 2* on ATSPL under wraps.

xvii. Moreover, in terms of the statements of the Finance Executives of NMCE (Ms. Sarita Baxi and Ms. Nisarg Shah) recorded on June 03, 2011, the financial statements of ATSPL were also prepared by them under the instructions of the *Noticee no. 2*, who was at the helm of affairs of NMCE during the relevant time. Therefore, starting from the transferring of shares from his close connected persons and appointment of new Directors, the control of *Noticee no. 2* can be seen to be writ large over managing the affairs of ATSPL covering every aspect of its management,

including the preparation of the financial statements by the employees of NMCE.

xviii. It is also of relevance here to discuss in brief the role of Mr. Bhavit Godiwala. Reportedly, the company CMC Limited, which had developed the software for NMCE abruptly stopped providing its support/maintenance services to NMCE during October, 2005, without any notice. It is also an undisputed position that the source code for the said software was not provided by CMC Limited to NMCE, making it a difficult task for NMCE to maintain the said software. However, Mr. Bhavit, who was originally an employee of CMC Limited and the "architect" of the said software was appointed as Director of ATSPL through his wife, Ms. Preetika Godiwala. It is noted that while addressing a mail (dated March 27, 2010) to his son Mr. Amit Gupta, *Noticee no. 2* had stated that: *"You don't know the real politics and ground reality of meanness of Neeraj that he has trouble with Poonam getting about 25000 pm more than him and why we have paid to Bhavit without his doing any job…Bhavit also gave source and trained Neeraj and Anand in migrating the DTSS from one HP machine to another HP machine.* Further, in another email dated March 26, 2010, the *Noticee no. 2* has stated as: "*I don't think anything on DTSS can be done or developed by Sohel or any one successfully unless level playing filed is provided and that was my purpose of proposing to involve ATS team in maintenance of DTSS ….Unless ATS team is given responsibility of maintenance, no one can ever learn from development alone. Still, it is up to you…*"

61. After discussing about the transfer of shareholding of ATSPL and appointment of Directors on its Board, the next issue that requires consideration is the appointment of ATSPL to act as software vendor for NMCE. The SCN states that no due process for selection of ATSPL as a vendor for NMCE was conducted. No Requests for proposal were designed nor any expression of interest were called for. No technical evaluation was done and even the capability of ATSPL to deliver the required service was not judged. It has also been charged that no approvals from the Board of NMCE or any Committee of the Board was

taken while appointing ATSPL as the software vendor. The SCN further finds that no proper work orders were issued, nor agreements were executed and the milestones were not defined nor any timelines for execution of deliverables were decided. A total payment of INR 29.47 Crore has been made to ATSPL by NMCE from 2002-03 till September 2010 allegedly under the guise of fictitious software development by ATSPL.

62. A perusal of the reply filed by the *Noticees* indicates that the charge pertaining to the appointment of ATSPL as a software vendor has been strongly contested by the *Noticees* on various grounds in the present proceedings. The *Noticees* have submitted that the appointment of ATSPL as a software vendor was considered by the Board Committee (Technology) of NMCE. It has also been submitted that the Audit Committee of NMCE, comprising of FMC nominee also, had in its meeting held on September 07, 2010, approved the capitalization of the cost of software purchased from ATSPL. In the said meeting, it was also acknowledged by the Committee that the first agreement was executed with ATSPL in the year 2008-2009.

63. As regards the claim of approval of appointment of ATSPL by the Technical Committee of Board is concerned, I observe that the said claim has been apparently put forth as an afterthought in a vague & ambiguous manner without any supporting details. The *Noticees* have not been able to provide the details of the dates when the said committee had approved the appointment of ATSPL. Even the composition of the said committee which is supposed to have approved the engagement of ATSPL has not been provided to support such a claim. Further, *Noticee no. 2* during his statement recording before FMC on January 27, 2011 has not mentioned about any such approval by the Technical Committee. Few of the relevant questions and the answers thereto made by *Noticee no. 2* before FMC officials which are relevant to the present issue are being reproduced hereunder:

"12) Did you select ATS after following the due process of

(a) defining its further IT needs?

Ans: That could not be done because of sudden withdrawal of CMC.

(b) Was the said work quantified/estimated and its value assessed?

Ans: Nothing was done and a spot decision was taken based on delivery requirements.

(c) If yes, furnish details.

Ans: No details are available.

(d) If No. why?

Ans: As per answer to 12 (a) above.

(e) ***Was the work budgeted for and the Board approval obtained thereof?***

Ans: No since it was a spot decision. (emphasis supplied)"

64. As can be seen from the above, the *Noticee no. 2* has categorically admitted that no approval from the Board of NMCE was obtained for appointing ATSPL as a software vendor. Further, in response to the subsequent questions, the *Noticee no. 2* has stated that no RFP was designed nor any bids were called for and the company ATSPL was nominated by him in the capacity of Managing Director of NMCE. It has also been acknowledged that no technical or financial evaluation of ATSPL was done before appointing it as a software vendor for NMCE nor any reference (from any other client of ATSPL) was called for before the said appointment. The *Noticee no. 2* has further stated that no payment milestones were fixed. Further, Mr. Neeraj Gupta, former VP, IT of NMCE has stated during his examination on January 28, 2011 that no other IT company was approached by NMCE when CMC Limited had withdrawn its support.

65. It has also been stated in the said statement by Mr. Neeraj Gupta that the *Noticee no. 2* did not inform the Board about awarding the contracts to ATSPL considering that it was owned by his close family members. On a specific question of choosing ATSPL over other companies for award of IT contact, it has been claimed by the *Noticee no. 2* that the same was done for convenience and better competitive price. However, to another question, it has been contradicted by him by stating that no financial evaluation and comparison of offers from other vendors was done.

66. A careful perusal of the statement of the *Noticee no. 2*, as discussed above would go on to show that no RFPs were floated nor any price bids were called from other companies. Further, the *Noticee no. 2*, who was the MD of the vendee company NMCE, did not even bother to call for any reference from any other client of the new vendor (ATSPL), who admittedly belonged to his family members. It would be also relevant here to note that Ms. Preetika Godiwala, the Shareholder-Director of ATSPL had stated in her statement dated March 07, 2011 that ATSPL was not having any website or email id. It looks so strange that a company which was aspiring to undertake a big software development project worth of more than INR 20 Crore from a big enterprise like NMCE, did not even have any email id and website. It is also noteworthy that both Ms. Preetika Godiwala and Mr. Samar Dave have stated that all the communications with NMCE used to happen telephonically. It is difficult to fathom as to how a complex project involving software development for a Commodities Exchange could be deliberated only over phone calls that too when one of the Directors (Mr. Samar Dave) was residing in USA and there was no need to exchange any communication even through e-Mails. Apparently, such a patently concocted story makes a clear case that the shareholding and directorship in ATSPL was being held by *benamidar* individuals whose claim of having offered "technical support" to ATSPL nothing but only a bogus claim bereft of merit. I find it worthy to add here that when Mr. Samar Dave was asked about the details of employees of ATSPL during the questioning by FMC, he vaguely said in his reply dated March 14, 2011 that there were 5-7 employees and was not able to provide the details of such employees and their qualification. I observe that the overall conduct of the two shareholder Directors and the responses given by them to various questions put to them during recording of their statements clearly tilt the preponderance towards them as the *benami* shareholders of ATSPL since, they have neither played any role in the corporate/administrative matters of ATSPL nor have they been able to bring on the table the details of any technical expertise that they claim to have provided to ATSPL while interacting on its behalf over phone calls with NMCE or others.

67. The aforesaid revelations about the specious claims made by the *Noticees* about the suitability of ATSPL as a vendor of NMCE coupled with the fact that no one has been able to point out to even a single client of ATSPL, either in past or during the time of providing services to NMCE or even during the inquiry of FMC to demonstrate if ATSPL indeed possessed any capabilities and potential to undertake the project of such magnitude as a vendor for NMCE. Incidental to the aforesaid observation, I also note from the statement of Mr. Nisarg Shah (former Sr. Manager, Finance and Accounts, NMCE), that ATSPL which claimed to be a well-endowed software vendor was not having a Service Tax or VAT number, as applicable to Software companies. However, when the invoices raised by Mantissa on ATSPL are perused, the same shows that it (Mantissa) reportedly being a sub-vendor of ATSPL duly possessed a Service Tax Registration vide Service Tax No: AACCM8100AST001. The apprehension about ATSPL not having a Service Tax Registration was also duly flagged in the email dated September 06, 2010 of Mr. Narayan Rai addressed to Mr. Kailash Gupta, wherein while discussing about the agreements with ATSPL, it has been stated as: "*We may find it difficult to address query by audit committee on TDS and Service Tax also tomorrow*". There has not been any dispute by the *Noticees* to the aforesaid factual statement about absence of Service Tax Registration/VAT Registration of ATSPL and the natural concern expressed by a senior employee (Mr. Narayan Rai) of NMCE, which is further suggestive of the fact that ATSPL did not have even the minimum threshold level of capabilities, resources or potentialities or competence to provide/develop any kind of software for a Commodity Exchange like NMCE or for any other entity due to which it did not deem it fit to take Service Tax/VAT registration hence, no justification can be found for such a huge amount of payment made to ATSPL by NMCE.

68. As already pointed out earlier, there are enough materials in form of emails exchanged between the *Noticee no. 2* and certain other persons, including his family members, which contain a candid admission of the fact that the *Noticee no. 2* (directly and through his family members) was exercising *de facto* control over

the operation, management and existence of ATSPL. Some of such emails are extracted hereunder for reference and reliance:

I. In an email dated May 31, 2009, Mr. Amit Gupta while addressing to the *Noticee no. 2* has *inter alia* stated that: "…*As we already discussed ATS CEO for India will be my subordinate not my superior…*"

II. In an email dated June 18, 2010 under a subject of "Pending Issues- Audit of March 2010 and others", the *Noticee no. 2* has written to Ms. Poonam Gupta, his daughter and also an employee of NMCE *inter alia* stating as: "*I am afraid of all this that in final run we should not be left with all scrap in ATS on our head and others enjoying their claims on us like Anil Ji. NMCE Board is awaiting audit report for March 2010 and this cannot be completed till some capitalization of at least Rs 3 Crs for the current quarter is properly done without involving ATS. So far, I have enough room to breathe but can not allow giving my neck beyond status quo. These things cannot be discussed with professional in management. We have to select our own moves in this corporate game of chess*". In reply to the said email, Ms. Poonam Gupta writes as: "…*what we should think is, what is to be done with ATS. Immediately we have to stop transactions there, and think of a way out to close down the entity or make it defunct. We can talk to best lawyers/best CAs/best service tax experts to solve this, and if required borrow some funds from ATS LLC to close the chapter for some time.*" (underlined supplied)

III. The *Noticee no. 2* in his email dated July 03, 2010 is seen telling Mr. Amit Gupta as: "… *As you are aware there has always been a number of other demanding issues in NMCE and I could not focus on ATS. Without my focus, it is not working. But don't worry. I think that time is not far when I may be able to focus better on ATS as well…*"

IV. Ms. Poonam, in her email dated May 03, 2010 has stated to *Noticee no. 2 inter alia* as: "*We should focus all our energies in sorting out ATS issue, and beautify NMCE enough to be sold. Present position may always keep investors away…if Bajaj can object on ATS any other investor will also do that*".

V. In response to the aforesaid email, *Noticee no. 2* while suggesting about placement of some employee, stated as: "…*Even for Harish if you think not to be in NMCE, we can park him in NOL, NAPMC or ATS and take the work related to NMCE in beginning during probation period*…"

69. From the aforesaid exchange of emails, it becomes glaring that the *Noticee no. 2*, while acting as MD of NMCE was seriously anxious about the Audit Report that was to be submitted to the Board of NMCE and also about the issues pertaining to the "scrap of ATS". The *Noticee no. 2* was the Managing Director of a corporate entity, i.e. NMCE, however, the concerns of NMCE were admittedly so messy that *Noticee no. 2* did not want to discuss those issues with the other "professionals in management" of NMCE. Seemingly terrified of the possibility of the transactions of NMCE with ATSPL being exposed, Ms. Poonam gave a knee jerk suggestion to immediately stop such transactions. The aforesaid emails would also go on to undoubtedly show that the control of ATSPL was resting within the family members of the *Noticee no. 2* only, as it is Ms. Poonam, who though had officially resigned from the Directorship and transferred her shares in ATSPL, but is seen to be making the plans for closing down ATSPL or making it "defunct". It would be worthy to mention here that apart from being daughter of the MD of NMCE, Ms. Poonam had a limited official association with NMCE as its Vice President, Business Development, which in my view do not seem to have any co-relation with the engagement of ATSPL for "software development". Under the circumstances the aforesaid suggestions from the daughter of the then MD of NMCE to her father (*Noticee no.2*) about closing down ATSPL or making it "defunct" clearly exposes the deception perpetrated by the *Noticee no.2* claiming that ATSPL had developed and supplied software to NMCE. This apart, Ms. Poonam Gupta in her e-mail dated May 03, 2010 has also acknowledged that the investors of NMCE (such as Bajaj) have started suspecting and objecting to the dealing with ATSPL after getting a whiff of the actual dealings of NMCE with ATSPL, hence, she expressed to her father (*Noticee no. 2)* to focus all energies "to sort out ATS issue".

70. From the above discussions as well as from my earlier observations with respect to transfer of shareholding of ATSPL, the only inference that can be drawn is that the *Noticee no. 2* was directly as well as through his family members, controlling the affairs of ATSPL and deceptively by way of change of shareholding and Directors ATSPL was shown as a company unconnected to the *Noticee no. 2*, probably to prevent the future scrutiny of the financial dealings that were planned to be executed between NMCE and ATSPL through which, a total amount of INR 29.47 Crore has been transferred from NMCE to ATSPL over a long period of time.

71. In order to further critically appraise the aforesaid transfer of funds, I need to lay my hands on the materials available on record, more particularly on the agreements, emails and statements given by various persons.

72. I find that there are numerous agreements available on record. One set of 5 agreements were provided by Mr. Neeraj Gupta, former Vice President, IT, NMCE during his statement recorded on April 28, 2011. Another set of 5 agreements were furnished by the *Noticee no. 2* during his statement recorded on January 27, 2011 and also by Mr. Neeraj Gupta on January 28, 2011. In order to appreciate the implications of these agreements, it is imperative to first have a glimpse of various details of such agreements that are relevant for the present proceedings which are tabulated herein below:

Table no. 4

Sr. No.	Date of agreement	Parties to the agreement	Signatories	Witnesses	Other details
	19/10/2005	NMCE and ATSLLC	Ankit Seth (for NMCE) Amit Gupta (for ATSLLC)	Raju Chudasama Mahesh Dadhich	Total consideration: INR 6.00 Crore Scope of Work: Work around software development for DTSS Enhancement of DTSS Migration of DTSS to the new server hardware Creation of Test Environment for DTSS Application Development Development/Enhancement of Website
	20/12/2006	NMCE and ATSLLC	Ankit Seth (for NMCE) **No one signed on behalf of ATSLLC**	-do-	Total consideration: INR 1.05 Crore Scope of Work: Work around software development for DTSS Warranty Services Enhancement of website Application development
	09/04/2008	NMCE and ATSPL & Mantissa Infotech Pvt. Ltd.	Kailash Gupta (for NMCE) Samar Dave (for ATSPL) Anand Shah (for	Rajendrasimh Chudasama Yogesh Shah Kiran Patel	Total consideration: INR 5.97 Crore Scope of Work: Work around software development for DTSS Application development

			Mantissa Infotech Pvt. Ltd.)		Development of Corporate website
	05/05/2009	NMCE ATSPL & Mantissa Infotech Pvt. Ltd.	Kailash Gupta (for NMCE) Samar Dave (for ATSPL)	Rajendrasimh Chudasama Yogesh Shah	Total consideration: INR 5.53 Crore Scope of Work: Application Development
	03/09/2009	NMCE ATSPL	Kailash Gupta (for NMCE) Samar Dave (for ATSPL)	Rajendrasinh Chudasama Yogesh Shah	Total consideration: INR 6.50 Crore Scope of Work: Application development
5 Agreements submitted by Kailash Gupta and Neeraj Gupta					
	19/10/2005	NMCE ATSLLC ATSPL	From the signatures, it is not clear as to who has signed the agreements and names of signatories are not written.	For the witnesses also, names are not written and only signatures have been put.	Total consideration & Scope of work: Same as mentioned in Serial no. 1 above
	20/12/2006	NMCE ATSLLC ATSPL	-do-	-do-	Total consideration & Scope of work: Same as mentioned in Serial no. 2 above
	09/04/2008	NMCE ATSPL	Neeraj Gupta (for NMCE) Samar Dave (for	Rajendrasing Chudasama Yogesh V. Shah	Total Consideration: Commission rate of 0.25% of the Merchandise purchased by NMCE through ATSPL

			ATSPL)		Scope of Work: To act as Purchasing agent as representative for the procurement of products on behalf of NMCE such as Computer software, hardware etc.
	05/05/2009	NMCE ATSPL	-do-	-do-	Same as above
	03/09/2009	NMCE ATSPL	-do-	-do-	Same as above

73. Before moving on to the aforesaid details of the agreement, one has to keep in mind the admitted fact that NMCE had paid a total amount of INR 29.47 Crore to ATSPL towards software development during the years 2006-2010. It has been contended in the written reply filed by the *Noticees* that ATSPL was appointed as a software vendor for NMCE since 2006 and on the instance of NMCE, ATSPL started developing a software namely CFTS so as to provide a new platform for trading. In this regard, as observed by me earlier, the *Noticees* have not been able to produce before me any kind of documentary support which can adduce any kind of Board level approvals accorded to NMCE to execute any of those agreements so as to justify incurring such substantial expenses for such a large software project. Infact, in terms of the findings of Pipara Report referred to earlier at para 60 (x) (as appointed by Gujarat Police), the Company Secretary of NMCE has confirmed before the said Auditors (Pipara & Co.) that none of the Agreements was approved in the Board meeting of NMCE.

74. In order to appreciate the underlying issues embedded in the above listed agreements executed between various entities like NMCE, ATSPL, Mantissa etc., the statements of various persons as well as the emails available on record would assist to show as to what led to execution of so many different agreements. The various glaring facts that emerge from the aforesaid records & statements etc., are highlighted herein below:

Statements of Mr. Neeraj Gupta, former VP IT, NMCE

75. The statements of Mr. Neeraj Gupta were recorded during the course of enquiry on three different occasions viz., December 24, 2010, January 28, 2011 and April 28, 2011. The highlights of the depositions made by Mr. Gupta in those three statements are summarised below:

I. Mr. Neeraj Gupta has stated that no Board resolutions were passed either for entering into the agreement with ATS LLC or ATSPL, or for authorising him on behalf of NMCE to sign and execute the agreements.

II. He further stated that all the agreements were signed by him under the instructions of Mr. Kailash Gupta, the then MD of NMCE (*Noticee no.2*).

III. On a specific query pertaining to the timing of execution of the agreements, Mr. Neeraj stated as: "*I state that out (of) the five agreements, the agreement no. 3, 4 and 5 were executed on 07.09.2010 whereas the 1st and 2nd Agreements were signed during January, 2011 as per the directions of Shri Kailash Gupta. I further state that the three agreements 3, 4 & 5 were directed to be executed by Shri Kailash Gupta to regularise the payments made to ATSPL and for producing the same before the Audit Committee. I further state that the 1st Agreement was directed to be executed by Shri Kailash Gupta to replace the Original Agreement which was between ATS LLC and NMCE which was executed by Shri Amit Gupta, on behalf of ATS LLC and Shri Ankit Seth, Company Secretary of NMCE on 19.10.2005 whereas the 2nd Agreement dated 20.06.2006 was signed by Shri Ankit Seth, Company Secretary of NMCE and on behalf of ATS LLC, Amit Gupta was suppose to sign but the same is not signed. I further state that the same is in the knowledge of the existing management but the Board is not aware of the same….*"

IV. Further, when Mr. Neeraj Gupta was asked to comment on the revelation that the work assigned under the agreement dated May 05, 2009 and September 03, 2009 had actually been executed prior to the dates of those agreement, he has stated that: "*I state that as stated above, the agreements were executed after the completion of the work . I further state that I would like to mention here that the agreements which I have submitted earlier was the agreement that replaced the original agreement. I am submitting original agreements. I further state that the original agreements were executed between NMCE on the one party and M/s ATSPL and M/s Mantissa Infotech P Ltd. on the other part as developer….*"

V. On being questioned as to why he gave another set of documents during his last statement, Mr. Neeraj replied as: "*I state that I was explained by Shri Kailash Gupta that the original agreements which were signed by him were required to be replaced since he was a related party and therefore if these agreements were shown to Audit Committee, the expenses may not be approved because of the related party issue. I further state that I was further convinced that the same is done in the interest of the Exchange and that I was also not given any time to think on the issue and was instructed under duress to sign just one hour before the Audit Committee Meeting. I further state that I was not knowing the exact reason for changing the agreements and making me one of the Executor on behalf of NMCE. After the inquiry of FMC commenced, I have located the original ones and submitted the copies of the same. The originals are now in my custody. I further state that I was informed that the entire funds under these agreements transfer to ATSPL have been used for the purpose of market making in the interest of the Exchange and the entire funds have already come back to the Exchange in the form of transaction charges. I further state that I was however not convinced and therefore raised alarm by informing Shri Anil Mishra, the then CEO of the Exchange about the issue so that if there are any misdeeds or evil designs in making me execute these agreements, I should not be held responsible."* (underline supplied)

VI. Mr. Neeraj also stated that as the agreements were made subsequently, there was no clause in the agreements for release of payment on completion of any specific milestones. He further stated that the payments were made to ATSPL on the instructions of Mr. Kailash Gupta and the

office note furnished to FMC were prepared subsequent to the payments, and he was directed to sign those office notes under duress.

VII. He further stated that as it was decided by the management of NMCE to capitalize the software expenses on March 31, 2010, therefore the testing of software was necessary and the same was carried out subsequent to making the payment of those software.

VIII. It has also been stated that Mantissa has been maintaining and developing the software for NMCE since last 5 years and they are fully aware of the requirements, the flow and the results. He has also stated as: "…*the services of M/s Mantissa Infotech Pvt. Ltd. were taken during February, 2004 for software maintenance in lieu of the software engineers team of the Exchange for reasons of high attrition of software professionals. Subsequently, in Oct, 2005, CMC Ltd. withdrew the support from NMCE without providing any source code. However, by that time, M/s Mantissa Infotech Pvt. Ltd. had gained fair knowledge about the DTSS system developed by CMC Ltd. I state that further one of the employee of CMC Ltd, Shri Bhavit Godiwala, who was the chief architect of the DTSS, had also by the time left CMC and therefore his services was also availed from time to time on need basis. Further, with the help of Shri Bhavit Godiwala, M/s Manitssa Infotech Pvt Ltd was able to make minor enhancements in the system and was also able to maintain the DTSS system. Further, ATSPL employed various engineers from time to time on its own payroll and also availed two to three software engineers from M/s Manitssa Infotech Pvt Ltd including the services of Shri Anand Shah of M/s Manitssa Infotech Pvt Ltd who was charging on hourly basis. Thus, the engineers of M/s Manitssa Infotech Pvt Ltd who were engaged by NMCE were carrying out Maintenance work and engineers of ATSPL, M/s Manitssa Infotech Pvt Ltd and the Shri Anand Shah of M/s Manitssa Infotech Pvt Ltd were carrying out software development work for NMCE through ATSPL. I further state that I am submitting a statement indicating the expenditure incurred by ATSPL by way of salary to the ATSPL employees from our HR Division who used to maintain that information and from the M/s Manitssa Infotech Pvt Ltd in respect of the payments made by ATSPL to them. I further state that the CFTS(Commodity Futures Trading System) is being developed by ATS LLC in which Shri Amit Gupta, Shri Samar Dave, Shri Bhavit Godiwala and few more of*

Shri Amit Gupta's were involved and I was giving them technical inputs and testing after the office hours. This project could not be implemented due performance related issues."

76. Mr. Narayan Rai, VP (Clearing and Settlement), NMCE, in his written communication addressed to FMC, has stated that he has coordinated with Mr. Anil Maloo, VP (Legal and Company Secretary), NMCE, in preparation of draft agreements which was necessitated in the wake of the requirement of documents to be presented for the purpose of Statutory Audit. He has also submitted that Mr. Kailash Gupta had informed about the need for replacement of the existing agreements to change the status of ATSPL from software vendor to a 'purchasing agent'. The said statements of Mr. Rai are also finding corroboration in the emails exchanged between Mr. Kailash Gupta, Mr. Rai and others. In an email dated August 30, 2010, Mr. Rai has stated as follows:

"*Please find enclosed two documents:*

1. *Management Note on Software requirement and to engage ATS for procuring the software for NMCE. This note enables the functionaries to sign the agreements* ***based on the recorded Management decision and gives a authenticity of the actions done by IT dept, Accounts dept in making the payments etc.***
2. *Copy of the Agreement with ATS…" [****emphasis supplied]***

77. Further, in his communication addressed to FMC, Mr. Anil Maloo, Assistant VP (Legal and Company Secretary) has confirmed that there was a need to redraft the three agreements executed between ATSPL and NMCE so as to match the advance payments already made in respect of the software that was as per his knowledge, already developed and delivered. The same was required to be shown to the Statutory Auditors and to facilitate finalisation of the annual accounts for placing them before the Audit Committee. Mr. Kalpen Shah, the Advisor was already advised by Mr. Kailash Gupta to provide soft copies of the Agreements to Mr. Maloo and further to co-ordinate with Mr. Neeraj Gupta for

the technical inputs to be incorporated in the draft agreements. He (Mr. Maloo) also confirmed that three agreements were instructed to be made back dated since they were meant to replace the existing ones and further submitted that Mr. Kailash Gupta had informed that the agreements are required to be replaced so as to change the status of ATSPL from a software vendor to a Purchasing Agent. Similar to the concerns of Mr. Narayan, Mr. Maloo has also stated that none of the employees of NMCE was in a positon to decline the instructions issued by Mr. Kailash Gupta and thus he was compelled to coordinate in the matter.

78. There are on record certain emails also, wherein the discussions about signing of agreement etc., have been made between various persons like Mr. Anil Maloo, Mr. Kailash Gupta, Mr. Amit Gupta etc. In an exchange of email dated December 07, 2010 between Mr. Amit Gupta and Mr. Anil Maloo (with cc to Mr. Kailash Gupta), Mr. Amit Gupta has been provided with two agreements for his signature and further an assertion has been made that signatures of other Directors of ATSPL would be taken thereafter. Mr. Amit Gupta has responded to the said mail with respect to structuring of the clauses of the said agreement and has also stated that: "*It is also mentioned that ALL the payment would go to ATS India, but then payments have been made to ATS LC in 2007, 2008 and 2009. Would that not be questioned? Perhaps you already have thought about that. Anyhow, let me know if we need a separate agreement between NMCE and ATS LLC to justify payments made to ATS LLC.*" To the aforesaid email, Mr. Kailash Gupta has replied and has stated *inter alia* as: "*Other payments in 2007, 2008 and 2009 are petty for other services and separate than these agreements, so it should not questioned. Don't worry.*

Please sign both the agreements as soon as possible and send right away…."

79. It is also of relevance that Mr. Rajendrasingh Chudasma, the witness to the aforesaid agreements, has in his statement recorded on December 25, 2010, *inter alia* stated that Mr. Amit Gupta has not signed any agreement in his presence and that the agreements where he has signed as a witness, were sent to him by legal or IT division and none of the agreements was signed in his presence.

80. The *Noticees* have contended that the cross examination of Mr. Rajendrasingh indicate that he was compelled to give false statements before

FMC so as to implicate the *Noticees* hence, his statement should not be taken into account. The *Noticees* have further tried to canvass that Mr. Rajendrasingh was in the employment of NMCE when his statement was recorded before FMC and at the stage of cross-examination, he had resigned from the services of NMCE (now ICEX). It has thus been attempted to portray that in order to protect his employment, Mr. Rajendrasingh has made false statements before FMC and since he is no longer associated with NMCE (at the time of conducting cross examination), he is telling the truth now. I have carefully considered the aforesaid submission of the *Noticees* and observe that the aforesaid witness is a very important witness in the present case by virtue of his proximate association with the *Noticees*. As has been stated by him in his statement recorded before FMC, Mr. Rajendrasingh had joined NMCE since its inception (2002) and prior to that he was working with the *Noticee no. 1* from 1993-1994 and since the year 2006, he was also a Director of the *Noticee no. 1*. Further, as discussed earlier, it was the wife of Mr. Rajendrasingh, namely Ms. Prakasbha Chudasama, who was made joint shareholder of ATSPL with Mr. Samar Dave, which also shows the level of confidence that the *Noticee no. 2* had reposed in Mr. Rajendrasingh. Thus, he was not only an authorised signatory of bank accounts of NMCE and but also was well cognizant about the corporate structure of ATSPL and about the authorised signatories of the bank account of ATSPL as well. He was also a witness to the agreements that were signed between NMCE and ATSPL. It may also be relevant to mention that even though his educational qualification was only B. Com, he was acting as Associate Vice President, NMCE and was looking after crucial tasks of clearing and settlements, operation of margin account, MTM settlement account etc. Thus, from his long and close association with the *Noticees* as clearly evident from the facts stated above, the said witness appears to be a close confidant of the *Noticee no. 2* so much so that his wife was also roped in by *Noticee no.2* as a joint shareholder of ATSPL

81. Insofar as the objection raised by the *Noticees* with respect to the statements recorded by Mr. Rajendrasingh before FMC is concerned, I observe that during the cross examination when the witness (Mr. Rajendrasingh) was

asked if the answers given by him in his statement recorded before FMC which implicate the *Noticees* were not given by him on his own volition but on account of instructions given to him, he has replied that it was question of his job. By relying on the said response of Mr. Rajendrasingh during the cross examination, the *Noticees* have harped upon and claimed before me that the statement of Mr. Rajendrasingh recorded before FMC must be discarded. In this connection I must observe that merely because of one short & cryptic answer given by the witness during the cross-examination stating that it was a 'question of job' without further elaborating or clarifying as to who instructed him to falsely implicate the *Noticees* or whether he had to deliberately given false statement against the *Noticees* at the behest of his employer, i.e. NMCE or any of his senior authorities out of fear of losing his job or it was a question of upholding the dignity of his job etc., such a brief response cannot be attributed too much of meaning or explanation beyond what it literally conveys and said three worded response cannot be used as a bogey so much so to discard the entire sworn statement of Mr. Rajendrasingh recorded before FMC. The *Noticees* have also contended in their submissions that it was Mr. Anil Mishra, the then MD of NMCE, who had subjected Mr. Rajendrasingh to duress to depose falsely before FMC so as to implicate the *Noticee no. 2*. When I consider such a contention in the light of the totality of the events, I observe that when the *Noticee no. 2* was ousted from the management of NMCE, many new facts came to the fore like the submissions of original agreements by Mr. Neeraj Gupta (the then VP, IT of NMCE) before FMC, when he was again examined by FMC. Further, one cannot lose sight of the discernible thread of coherence & consistency noticed in the deposition of majority of the witnesses before FMC which clearly indicated that all the deeds were done by them under the instructions of the *Noticee no. 2*, who was at the helm of the affairs of NMCE. It is also worthy to quote here from the cross examination statement of Mr. Neeraj Gupta, which would highlight as to how, only after the Board of NMCE gave assurance of protection of job, the employees of NMCE started stating the truth about the actual affairs of NMCE, during the enquiry conducted by FMC. On June 08, 2021.Mr. Neeraj has stated as follows: "…*Before 30th January 2011* wha*tever statements have been given, they have*

been given on the directions of Mr. Kailash Gupta. Only after 26th February 2011 when Mr. Kailash Gupta was removed from the post of EVC by the Board of NMCE and the employees were called by the Board of NMCE and given assurance that their jobs are protected then all the employees came forward and gave the correct statement to FMC."

82. From the aforesaid, it becomes apparently clear that there was no coercion being put on the employees to depose falsely against the *Noticee no. 2* and rather it looks like a case where the witnesses who were being unilaterally managed by *Noticee no. 2* and were working as per his instructions, went on to depose true facts before FMC when they were given a comfort that since *Noticee no. 2* was no longer having any association and control over the management and administration of NMCE there was no threat to them of any nature. Further, one may appreciate that the transactions under question in the present proceedings are not of such nature which can be falsely ascribed to have been done by someone just under the instructions or coercion from someone. Rather, the present proceedings involve corporate level high value transactions which are largely backed by documentary evidences, that can be further corroborated from the statements of various witnesses including Mr. Rajendrasingh as well as from the documents gathered in the course of the enquiry.

83. Notwithstanding the aforesaid observation, it is trite law that in those cases where the credibility of a witness is under question, the statements given by the said witness needs further scrutiny so as to separate the grains of truth as may be culled out from the evidence available on record. In this regards various dictum of courts passed on similar issues, some of which are being extracted hereunder, may serve as guiding lines in this case:

i. The Hon'ble Bombay High Court, in the matter of *The State of Maharashtra Vs. Manohar Reshmaji Bochra (2018ALLMR(Cri)773)* has *inter alia* observed as: "*…26) The oral evidence of the witnesses needs to be appreciated by keeping in mind the aforesaid circumstances. Witness may lie, but the circumstances never lie. In case like present one, the veracity of the witnesses needs to be tested on the basis of such circumstances. Even if the witnesses are not confronted with such circumstances to test*

them, such circumstances can be used to ascertain the truth and that job needs to be done by the Court…"

ii. The Hon'ble Supreme Court has in the matter of *Raja Vs. State of Karnataka [2016 (9) SCALE 627]*, while referring to certain previous decisions, *inter alia* observed that: *"…the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record…".*

iii. In another case [*Anbazhagan v. Superintendent of Police AIR 2004 SC 524],* the Hon'ble Supreme Court has held as: "*If the judge finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution and care, accept in the light of other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it.*"

84. Thus, in the light of the available jurisprudence applicable to the issue as referred to above, I observe that merely because during the cross examination, the witness has said that the statements were given by him to FMC as it was question of his job, his whole sworn testimony before FMC cannot be discarded and a correct approach would be to examine the veracity of the statements given by him and evaluate them in conjunction with other reliable material available on record, so as to assess the creditworthiness of such statements. Under the circumstances the contention of the *Noticees* to discard the entire testimony of Mr. Rajendrasingh*,* more particularly, when the witness has not denied the complete statement given by him and has merely expressed his personal concern while responding to a specific question, does not deserve to be considered as he has not denied his answers to various core issues involved under adjudication which in fact are found be corroborated by various documents available on records whereas, there is nothing on record to substantiate that his statements before FMC were given out of any fear of losing his job.

85. Going forward by the aforesaid observations and the jurisprudence about the statement of witnesses, when I notice that Mr. Rajendrasingh has stated in his deposition that none of the agreements was signed in his presence, I am bound

to find the same as a truthful statement as one of the claimed signatory to such agreements, Mr. Amit Gupta was not infact available in India during the relevant period of time and evidently, he is seen to be discussing about the signing of those agreements in various emails exchanged in the year 2010. As noted in the table presented above, all the agreements under reference belong to a period prior to the year 2010.

86. Furthermore, the discussions made in those email clearly reveal the true purpose of creating such agreements. There are discussions in the emails which show how those agreements were being created so as to justify the payments already made by NMCE (to ATSPL) and the triggering point for creating those back-dated agreements seems to be the challenge of confronting the meeting of Audit Committee of NMCE. In one of the email addressed to the *Noticee no. 2* by Mr. Narayan Rai on September 06, 2010, the text read *inter alia* as: "*Old agreements cover only 18 Cr that too with Algorithm trading and Option Trading which we cannot capitalise. At the end of the day only our own people have to help us…We may find it difficult to address query by audit committee on TDS and Service Tax also tomorrow."* The sender of the aforesaid email, Mr. Naryaan Rai has stated in his communication to FMC that Mr. Kailash Gupta (*Noticee no. 2*) had informed him about the need to change the status of ATSPL from 'Software vendor' to 'Purchasing agent' and further that he (Mr. Rai) did not have any choice but to concede to the directions of Mr. Gupta (the then MD of NMCE) because of the style of functioning of Mr. Gupta which included hiring and firing at his free will. I may also highlight here the reservations Mr. Rai had in conceding to the instructions (of *Noticee no.2*) which is underscored from the last line of his (Mr. Rai's) aforesaid email: "*May good sense prevail on all of us and He bless us all*".

87. The control of Mr. Kailash Gupta on NMCE is also clearly evident from his email dated January 03, 2009, addressed to Mr. Amit Gupta and others. In the said email, while discussing the resignation of Mr. Neeraj Gupta (VP, IT, NMCE) and discussing on appointment of certain other person (s) in his place, Mr. Kailash Gupta has stated *inter alia* as: "*This will send a right message to market which perceive NMCE as Gupta Gupta and Company*". Identical to the said admission,

Ms. Poonam Gupta in her email dated May, 03, 2010, while suggesting to beautify NMCE to sell it to some investor suggested to *Noticee no. 2* as: "*We should also look for professional faces in Business Development apart from myself and in IT apart from Neeraj, so that for the world we are not a family but a professional house*."

Statement of Samar Dave

88. I note that Mr. Samar Dave, during his statement recorded before FMC had stated that he is not aware of any formal agreements between NMCE and ATSPL. He had also stated that he was never involved in any discussions pertaining to the agreements. Contrary to the said statement, what we have on record are the copies of agreements wherein the signatures of Mr. Samar Dave have been inscribed on them on behalf of ATSPL. When the two different versions come before me: one, the statement where Mr. Samar Dave has stated on oath being unaware about the agreement; and the other version of facts in the form of those copies of agreements purportedly bearing his signature, I am bound to lay credence to the statement of Mr. Samar Dave as the same is recorded on oath in which he is stating that he is not aware about those agreements.

89. In this regard, as noted earlier, Mr. Rajendrasingh Chudasama (witness to the agreement) has already stated that none of the agreements was signed in his presence. He has further stated that one Mr. Harish Pandya, ex-employee of NMCE had signed the second set of documents on behalf of Mr. Samar Dave. I observe that there is a conciliation in the statements of Mr. Samar Dave and Mr. Rajendrasingh. While Mr. Dave stated that he did not sign the agreements, Mr. Rajendrasingh, who was having cognizance of all movements happening around the agreements, went a step forward and told the name of the person who had signed those agreements in the place of Mr. Samar Dave. It is thus clear that the signatures on the agreement supposed to be put by Mr. Samar Dave, are far from being trustworthy and rather are suggestive of forgery of signatures of Mr. Dave on those documents.

90. Apart from above glaring infirmities which strongly disputes the genuineness of the agreements, there is another piece of evidence available

before me which vitiates the very legal foundation of those agreements. A perusal of the Pipara Report referred to above at para 60 (x) reveals that the investigation officer (of Gujarat Police), while verifying the records of NMCE, has observed that authenticity of the stamp papers on which such agreements have been executed is highly questionable. For illustration, the Stamp paper no. 8549 on which an agreement dated October 19, 2005 has been executed was issued by a Stamp paper vendor namely Kantibhai S. Shah whose vendor license was already cancelled since June 28, 2004, i.e., before issuance of the said stamp paper, meaning thereby the said vendor could not have issued such stamp paper bearing no. 8549 on which the aforesaid agreement was executed. The said Pipara report further records that the stamp papers used in other agreements were also issued to the stamp paper vendors by the Government Treasury after the purported date of agreement/issuance of stamp. For example, the stamp paper no. A 615470 carries a date of November 16, 2006 and the agreement dated December 20, 2006 has been executed on it. However, the said specific stamp paper was issued on July 27, 2007 to the vendor. Such gross infirmities have been found in 9 out of 10 such agreements. By observing all these discrepancies and infirmities, the Pipara Report records that the two sets of Agreement for the same matter, are nothing but a fraud.

91. The sum and substance of the above discussions and other inferences as can be drawn from the relevant records like the agreements signed on behalf of NMCE with ATSPL, lead to the following observations: -

i. The company ATSPL was under complete control of the *Noticee no. 2*, both directly and through his family members. As held earlier, the transfer of shareholding and the appointment of Directors of ATSPL was nothing but a façade so as to prevent the scrutiny of the Board of NMCE or of the Regulator & other stakeholders and at the same time to have a free hand in making payments to ATSPL, as per the sweet will of the *Noticee no.2*. As pointed out earlier the shareholders as well as the Directors were found to be the *benamidars* of the *Noticee no. 2* who had literally no idea about the corporate, administrative and financial functioning of ATSPL. The control

over the functioning of ATSPL including the operations of the bank accounts rested with the family members of *Noticee no. 2*.

ii. The two companies, ATS LLC and ATSPL were engaged by the *Noticee no. 2*, while acting as MD of NMCE, as Software Vendors for NMCE. Prior to awarding the said contract no due process was followed. For example, no action was taken for defining scope of work; for obtaining approval from the Board or the Committee designated for such purpose; for making necessary budgetary provisions with respect to the expenses to be incurred through such assignments or for making any cost analysis. Similarly, other transparent processes normally followed by corporates such as seeking competing quotes/bids & technical/financial evaluation; appropriate documentation like issuance of work order, execution of clear and enforceable agreements by registering them; defining the milestones and timelines for deliverables from the vendor, testing of deliverables and linking the payments with the deliverables etc., were completely ignored. Moreover, the basic requirement of making a declaration/disclosure before the Audit Committee and the Board about the relationship of *Noticee no. 2* with the vendor and the said related party transactions involved in the award of such a high value contract was apparently not adhered to. The *Noticees* have contended that the payments made to ATSPL have been approved by the Board of NMCE and the shareholders and the said tantamount to ratification of award of the software development contract to ATSPL. However, I find that the said argument to be a feeble afterthought attempt so as to cover the void that is apparent from the absence of any kind of approval from the Board of Directors at the time when ATSPL was unilaterally engaged by *Noticee no.2* on behalf of NMCE.

iii. Further, on the instructions of the *Noticee no. 2*, 5 (five) backdated agreements were created and the said agreements were then replaced by another set of 5 agreements, with a pre mediated purpose of ex-post facto regularising the payments already made to ATSPL by NMCE without the

knowledge of the Audit Committee. As pointed out above, even those very stamp papers which were used for executing such agreements have been found to be fabricated as per the Pipara Report [as referred at para 60 (x) above]. Furthermore, the Office Notes backing such payments to ATSPL have also been found to be prepared in a stereo typed manner without any narration of the specific details such as the extent of assignment (software) delivered/milestone achieved, software received and testing of such software done, if any etc., which are normally required to be recorded for the satisfaction of the competent authority who sanctions the payment to the Vendor. The said Office Notes ought to have been prepared before making the payments to ATSPL, however, as stated by Mr. Anil Mishra (the then CEO of NMCE), all the Office Notes were prepared much after the payments were already made. Mr. Mishra has also stated in his statement recorded before FMC that all the payments were released on the specific instructions/orders of Mr. Kailash Gupta. Further, during his cross-examination before me on June 07, 2021, Mr. Anil Mishra voluntary added to his statement stating that all the employees of NMCE were working under severe duress of Mr. Kailash Gupta and no one was in a position to exercise his authority. This statement of Mr. Mishra has been contested by the *Noticees* by countering that a person acting in the rank of CEO/MD cannot be put under any duress. However, I find that the conduct of the *Noticee no. 2* in unilaterally controlling the affairs of NMCE has been already highlighted in great details in the foregoing paragraphs in this order and in the light of the same, the aforesaid contention of the *Noticees* deserves to be set aside for the undeniable fact that *Noticee no. 2* by virtue of being the founder, promoter and MD of NMCE having all the powers of recruitment and dismissal of manpower at his command and with active support of his family members who were also part of decision making team, was in a commanding position to make all the employees of NMCE working at all levels to act under his unilateral directives.

iv. The *Noticee no. 2* has stated that the assessment of capability of ATSPL was done on the basis of the fact that the Architect of the software of NMCE, viz., Mr. Bhavit Godiwala (former employee of CMC), was working for ATSPL as his wife Ms. Preetika Godiwala was made a shareholder-Director of ATSPL. As observed earlier, Mr. Preetika was not having any idea about her status of a joint shareholder; she has not paid any amount for acquiring the shares in her name; and was not having any kind of authority or even basic knowledge about functioning of ATSPL.

v. As admitted by Mr. Kailash Gupta in his statement, the costing of the order size placed initially by NMCE with CMC was INR 2.00 Crore for Software and INR 1.00 Crore for hardware. However, it is seen that to ATSPL, a total amount of INR 29.47 Crore was paid by NMCE over a period of time. While defending themselves in the present proceedings, the *Noticees* have also claimed that the existence of the software developed by ATSPL cannot be disputed at all as ICEX, the successor entity of NMCE is using the said software till date.

vi. After carefully considering the veracity of the aforesaid submissions and confronting the same with other materials available on record, I find that the said submissions are far from truth. I note that there is no evidence to support the statement that ICEX is still using the said software developed by ATSPL. Infact, Mr. Anil Mishra, who was working as a consultant with ICEX till March, 2020 (after merger of NMCE with ICEX), has during his cross-examination, denied to the suggestion that the software developed by ATSPL is till date installed or used by ICEX.

vii. It has also been contended by the *Noticees* that during the period of 2002-2005, ATSPL had assisted NMCE in maintaining the software facilities set up by CMC Limited and around the year 2006, ATSPL had started developing a new platform for trading activities at NMCE namely CFTS. In this connection, I observe that the submission that ATSPL had "assisted" in maintenance of software during the period of 2002-2005, remains a bald assertion without any supporting documents to substantiate

such a claim more so when Mr. Kailash Gupta himself in his statement dated January 27, 2011 (recorded before FMC) had stated that CMC Limited had suddenly withdrawn their services from October, 2005. The date of withdrawal of support by CMC (October 03, 2005) is also apparent from the email dated March 26, 2010 issued by *Noticee no. 2* to his son. The same indicates that till October 03, 2005, the creator of the software, i.e. CMC itself was providing the maintenance support services hence, there is no question of ATSPL having assisted NMCE in maintenance of the software (developed by CMC) during that period. Further, it will be a bare minimum expectation from a recognised and regulated commodity exchange that if such large amount of money (INR 29.47 Crore) was in fact paid on genuine *bonafide* grounds, the same ought to be backed by adequate documentary evidences as well as by some cogent deliverables on records of the exchange.

viii. As noted above, there are two sets of agreements pertaining to ATSPL/ATS LLC available on records but the *Noticees* have not been able to put their finger on any one of these documents so as to classify the same as "the agreement (s)" underlying for the payments made to ATSPL. It is noted from the brief description of the said agreements that the nature of involvement of ATSPL was changed from *'Software Developer"* to '*Purchasing Agent'* by virtue of which, ATSPL was under a contractual obligation to procure hardware and softwares for NMCE and charge commission as specified thereon. However, contrary to the same, the *Noticees* have not brought any details of hardware/software so purchased through ATSPL for which commission would have been paid to it. Thus, all in all, the claim of services rendered by ATSPL with respect to the software services has been found to be a hollow claim and those agreements are preponderantly found to be constituting a smokescreen created by the *Noticee no. 2* to cover up those payments made to ATSPL.

ix. I also find that the *Noticees* have vehemently argued that the appointment of ATSPL was within the knowledge of the Board of NMCE, which also

had nominees of FMC. It has also been contended that the Audit Committee of NMCE had also approved the capitalisation of the cost of the software purchased from ATSPL. In this connection, the arbitrary and opaque manner of singularly nominating ATSPL as a software vendor by the *Noticee no. 2* in his capacity as MD of NMCE has already been highlighted above. Further, it has also been highlighted that such an engagement of ATSPL did not carry any specific pre or post-facto approval or authorisation from the Board of Directors. The claim that the decision to appoint ATSPL was considered and approved by the Board Committee (Technology) is also a mere claim with no backing of any documentary evidence. As regards the claim of approval by Audit Committee to capitalise the expenditure it needs reiteration that sufficient documentary evidence in form of emails of the *Noticee no. 2* and the deposition of various persons employed with NMCE are available on record which have collectively shown that various documents including the back-dated agreements were created under the instructions of *Noticee no. 2* so as to satisfy the impending queries of the Audit Committee, which being totally unaware about the engagement of ATSPL or about the concoction of back-dated agreements/documents created by the *Noticee no. 2* through the employees of NMCE, seems to have cleared in good faith the capitalisation of the expenses incurred towards the purported software development by ATSPL. Under the circumstances the Board of NMCE, if at all it has approved the said capitalisation, was bound to be influenced by and to rely upon the approval given by the Audit Committee to capitalise those huge sum of expenditure incurred to pay to ATSPL. Therefore, once it has been already exposed that the *Noticee no. 2* had created an artifice (through the set of fictitious & backdated documents) to hoodwink the Audit Committee, the approval granted by such committee (or even by the Board) based on the documents and information which were designed only to artificially regularise the payments already made to ATSPL beforehand, cannot be at all used as a defence against the charge made in the SCN about the irregularities and misappropriation of the Exchange

Funds committed by *Noticee no. 2* with active connivance of his family members. It would be a travesty of truth to accept that the approval of the Audit Committee which was all along kept in the dark about the deal with ATSPL by the malfeasance of the *Noticee no. 2,* can be projected as the basis to drop the charges levelled against the *Noticees*.

x. The *Noticees* have also submitted that NMCE has claimed depreciation in its Income Tax Return, on the cost of the software that was capitalised by NMCE in its books. The *Noticees* have referred to the Appeal filed by NMCE before Commissioner of Income Tax Appeals and the submission made by NMCE in the said appeal stating that the cost of the software is what NMCE has paid for its acquisition and that the said software is used for running the stock exchange which has various technical and additional utilities, apart from making the submission that the said software was provided by ATSPL.

xi. Insofar as the said contention of the *Noticees* is concerned, it is to be noted that the onus to prove that the expenses claimed to have been incurred on the ledger of NMCE by making payments to ATSPL were actually for software development work rest on the *Noticees* themselves. They have to discharge the said onus by furnishing the relevant Board approvals, copies of invoices, taxes paid by ATSPL, details with respect to the competence of the ATSPL to develop such software and most importantly, the details of such software itself which was purported to have been developed and delivered by ATSPL. However, as noted earlier, the myriad submissions so made by the *Noticees* do not contain either any concrete evidence or any cogent argument with supporting documents which can lend any credence to their claim that the engagement of ATSPL to develop the said software was indeed done by following the due process of the Board or its committees or that the said software was indeed ever delivered by ATSPL. At the cost of repetition, the entire sequence of facts and circumstances under which such a huge sum of INR 29.47 Crore has been paid to ATSPL by NMCE exposes how the whole process, beginning from the

engagement of ATS LLC/ATSPL for the said software development project till the time payments were made to ATSPL by NMCE including accounting for it in the bank account of the Exchange, is replete with infirmities, irregularities and specious claims that are not supported by any documentary evidence to signify the said appointment of ATSPL as a *bonafide* engagement for software development by a Commodities Exchange. There is no evidence on record to suggest if ATSPL possessed any competence at all to make a software for NMCE or for that matter for any other company during the relevant period. The persons who are demonstrated to be having control over its affairs during the relevant period were not having even an *iota* of knowledge about its functioning or corporate structure. Surprisingly, the said software developer ATSPL was not even found on the its registered address by the inquiry team of FMC. Lastly, there is no evidence whatsoever in the records about the development or testing or delivery of any software by ATSPL against which, large amount was transferred by NMCE.

xii. Insofar as the claim made by NMCE before the Commissioner of Income Tax (Appeals) ("**CIT (Appeals)**") is concerned, I can observe that the aforesaid factual details as per the records clearly rules out any actual *bonafide* software development by ATSPL and such factual details and evidences suggest that ATSPL was paid by NMCE without having to deliver any software, hence the claim made by NMCE in the proceedings to claim depreciation on the cost of software before the CIT (Appeals) cannot be relied upon to accept the existence of a software which never existed nor was delivered by ATSPL.

xiii. I observe that although Mr. Mishra, while representing NMCE before the CIT (Appeals) had claimed that the software is technical and also has add-on utilities, however the *Noticees* have missed out the point that the proceedings before the CIT (Appeals) could not get completed and before that NMCE took the matter to the Income Tax Settlement Commission. In the said proceedings before the Settlement Commission, a host of

issues pertaining to the Income Tax liabilities of NMCE were taken before the Commission for consideration for settlement, including the purported expenditure of INR 28.80 Crore supposedly incurred towards the software developed by ATSPL, during the period of time when the *Noticee no. 2* was the MD of NMCE.

xiv. Therefore, irrespective of what claim was made by Mr. Anil Mishra before CIT with respect to the ownership and usage/utility of the software supposed to have been developed by ATSPL with a view to safeguard the pecuniary interest of NMCE, it has to be noted that such representations as made before CIT (Appeals) were never fructified in the form of any finding from the CIT (Appeals) nor the CIT (Appeals) passed any order allowing depreciation on such expenses towards software development, which infact was never developed by ATSPL.

xv. As stated above, NMCE before the completion of the proceedings before CIT (Appeals) had filed an application before the Settlement Commission pertaining to various years and different issues of taxation, including the issue of allowing the depreciation on the expenditure incurred by NMCE on the software development by transferring large amount of money to ATSPL. However, based on the facts and material, involved in the case, the Settlement Commission in their considered view have come to a factual finding that payment of INR 28.80 Crore to ATSPL by NMCE in the name of software development was nothing but siphoning off funds by Mr. Kailash Gupta (*Noticee no.2)* by way of embezzlement of funds of NMCE. Besides, it is also observed from the said order of Settlement Commission that even though the said amount of INR 28.80 Crore paid to ATSPL was allowed as a deductible expenditure to NMCE, the same was allowed by calling it as a "Embezzlement loss" and not as an expenditure incurred towards development of the software, as has been fictitiously propounded by the *Noticees* in their repeated assertions made during the present proceedings. Hence, the contentions, if any, made by NMCE erroneously before the CIT (Appeals) so as to claim depreciation

for the software assets that never existed or was never developed by ATSPL, carries no significance or relevance after the aforesaid findings and observations made by the Settlement Commission.

xvi. I may find it pertinent to extract here the relevant extract from the aforesaid order of the Settlement Commission:

It is a matter of fact that Shri Kailash Gupta has never disclosed his relationship with ATSPL/ATSLLC to the applicant exchange. Even no disclosure in compliance of the Accounting Standard 18 i.e. related party disclosure has ever been made in connection with ATSPL and ATSLLC. Moreover, provisions of Section 40A(2)(b) are applicable in connection with an expenditure whereas in the present case the amount given to ATSPL/ATSLLC were capitalized on which depreciation allowance was claimed. It is well settled law that no part of depreciation can be disallowed by invoking the provisions of Section 40A(2)(b) of the Act. Apart from that in the present case very serious breach of trust by Shri Kailash Gupta by abusing/misusing his position of Managing Director for personal and wrongful gain at the cost of applicant's funds otherwise available for normal course of business...it may be noted that out of Rs. 28.80 crores being loss due to payment in connection with non-existent software, Rs. 24.76 crores have been written off as depreciation allowance during Assessment Year 2007-08 to 2012-13 as evident from page no. 542 of SOF. Rs. 3.53 crores being payment made to consultant was also written off during various years as per the details given on page No. 102 of paper book No. 2 given on 7th September, 2016. In other words, no separate treatment is required to be given in books of account for writing off of the Embezzlement loss. The applicant has claimed loss in Assessment year 2012-13 i.e. the year of discovery of such loss due to Embezzelment by an employee i.e. shri Kailash Gupta. As per the decision of Hon'ble Supreme Court the treatment of books of accounts is not a deciding/decisive factor for allowing the loss as per the Income-tax Law. …In view of the aforesaid factual and legal positon, we are of the considered view that the fund siphoned off by Shri Kailash Gupta is an Embezzlement loss and allowable in Assessment Year 2012-13.

xvii. Thus, after perusing the aforesaid detailed findings of Income Tax Settlement Commission treating the payments made to ATSPL as

embezzlement loss on account of INR 28.80 crores paid *in connection with non-existent software*, the contention raised by the *Noticees* with an attempt to give a colour of valid transactions to such payments or amount capitalised in the books of NMCE on account of the above stated payment made to ATSPL by holding on to a false claim of depreciation made by NMCE before the CIT (Appeals) is found to be completely devoid of merit and therefore deserves to be rejected for the reasons as described above.

xviii. It is seen that the Income Tax Assessing Officer (AO) in the assessment order had rejected the claim of depreciation of NMCE based on the facts before him which suggested non-existence of the said software. Against the order of the AO, NMCE had preferred an appeal before the CIT (Appeals). It is understandable that notwithstanding the fact that all the factual & circumstantial evidence pointing towards the software development by ATSPL to be a preposterous claim, one cannot ignore the fact that having already suffered the huge pay-outs from its books of accounts, *albeit* in an illicit manner due to the actions of *Noticee no. 2*, NMCE was at liberty and perhaps constrained to claim deduction on such expenditure that was capitalised in its books by way of fabrication of back-dated documents for obtaining approval of Audit Committee as highlighted earlier. However, just because a false claim for depreciation was made before the CIT (Appeals), in the absence of any final outcome thereto, such a claim cannot *ipso facto* nullify the outcome of the detailed inquiry conducted by FMC which, based on concrete documentary evidence and various third party corroborations, has revealed that the payment made to ATSPL was not backed by any software developed or delivered by ATSPL to NMCE. A judicious mind may appreciate that merely because the depreciation was claimed on the so called capitalised expenditure, the same would not turn the colour of the said transaction from fictitious to real, which the *Noticees* are under a strict obligation to prove as genuine, by rebutting the charges and documentary evidences

brought in the SCN, with their own set of evidence and cogent counter arguments.

xix. To sum up the aforesaid observations, NMCE had every right to claim depreciation on such capital expenditure which was incurred out of its funds irrespective of the fact that the transactions resulted in misappropriation of its funds. Further, the statements made on behalf of NMCE before CIT (Appeals) (as claimed as a defence by the *Noticees*) about owning and using the software, could be out of erroneous legal advice with a view to safeguard the interest of NMCE by somehow impressing upon the appellate authority so as to take the advantage of depreciation on the expenditure that was illegally incurred the former MD & EVC (*Noticee no.2).*

xx. Apart from the above observations, it is also of pertinence to mention that the inquiry by FMC has revealed that whatever software development work was done for NMCE was actually being done by another company called Mantissa. It was also found that for rendering their services to NMCE, Mantissa was paid INR 32.34 Lakh through ATSPL and the records show that ATSPL was also reimbursed an amount of INR 33.98 Lakh for rendering services by deploying its engineers at NMCE. Thus, an aggregate payment of INR 66.32 Lakh (INR 33.98 Lakh paid as reimbursement of the salary paid to the staff of ATSPL and INR 32.34 Lakh paid to Mantissa Infotech through ATSPL), was made to ATSPL for assisting NMCE in their software development work which is found to be corroborated by the records, whereas the remaining amount of INR 28.80 Crore (INR 29.47 Crore - INR 66.32 Lakh) paid to ATSPL remains unverifiable and unsubstantiated till date. The aforesaid findings about involvement of Mantissa in assisting NMCE for software development at NMCE is also adequately supported by the email of the *Noticee no. 2* addressed on May 30, 2009 to his son, extract of which reads as: "*Poonam came after I finished talking to you at 1145 from dinner with Rakesh and Prasad. I told her few gaps in understanding of Prasad and Rakesh including the one about*

ATS. She told that they are aware of everything including ATS relation differ from the relation with Mantissa and Mantissa working for ATS. But she still feels that whatever it is good even for ATS also in the process as in 7 years we could not find even a single formal useful and stable resource for ATS as a manager. They also know that you are not an outsider but an equally promoter of NMCE by all means including son of MD.

That means he look in Prasad and Rakesh a local competent managerial skill to drive future plans of ATS as directly in the name of ATS at the back of ATS as enterprise, perhaps such resource may not be interested and through NMCE it is quite likely that one of them ei: Prasad may become interested to take over as CEO ATS after fully understanding in the role, relationship and responsibilities between ATS and NMCE…."

xxi. The aforesaid email extract not only reaffirms the control which the *Noticee no. 2* was exerting through his family members on the operation of ATSPL, but also corroborates that it was Mantissa which was doing the actual job of software development/maintenance for NMCE, and ATSPL was only a name that was used as a software developer, in pursuance of the ulterior motive of the *Noticee no. 2*. The records also contain invoices of Mantissa for software development work, which have been in fact raised "to" ATSPL, which again compounds the fact that ATSPL has not developed any software whatsoever for NMCE and whatever software development has been done for NMCE, the same was done with the assistance of Mantissa. I may also hasten to add here that the Managing Director of Mantissa had furnished a list of its major clients to whom it was providing software development services during the relevant period, while on the other hand, neither ATSPL could showcase any other client for whom it had ever done any software development work except purportedly for NMCE, nor the enquiry team of FMC could even be able to locate the office of ATSPL.

xxii. It may also worthwhile to mention here that the Pipara Report referred to above at para 60 (x) of this order has also recorded a finding that the

Police Investigation has found that the entire work relating to so called Software Development has been carried out by Mantissa Infotech Private Limited. I observe that the records of the said proceedings conducted before the Gujarat Police Authorities are not before me, however in view of the fact that the *Noticees* themselves have filed these extracts of Pipara Report, I have no hesitation to accept the findings and observations made in the said report by the said Auditors which have a strong bearing on the falsehood surrounding the agreements with ATSPL and the wrongful payments made to ATSPL in the name of a software project.

xxiii. It has been an undisputed position that NMCE had paid a total sum of INR 29.47 from the period of 2002-2003 till 2010 to ATSPL for the so called software development project, however, no details of any software that was claimed to have been developed by ATSPL have surfaced either before FMC or before me despite the fact that present proceedings are in fact a second round of proceedings arising out of the same cause of action that arose for the first time in the year 2011. Thus, the tall claims of the *Noticee no. 2* about engagement of ATSPL by NMCE and payments made to ATSPL being genuine transactions remain only an empty assertion *sans* any supporting evidence to lay credence to the claim so made by the *Noticees* during the proceedings. The only credible payment that can be found to have some supporting evidence seems to be the reimbursement of salaries of employees of ATSPL and the payments made to Mantissa through ATSPL, totalling an amount of INR 66.32 Lakh [as explained above at paragraph no. 91(xx)], thereby rendering the balance sum of INR 28.80 Crore (rounded off) (INR 29.47 Crore-INR 66.32 Lakh) to be an amount that was illegally payed out of the coffers of NMCE to ATSPL for which no details have been furnished to justify the transfer of such a huge amount to a company whose physical existence was even not found at the given address and barely had any employees of calibre to justify its claim of being into software development business. The *Noticee no. 2* has also failed to furnish any plausible explanation as to how he got the

information pertaining to ATSPL and what factors weighed in his mind when he decided to avail the services of ATSPL, a company having no *locus standi* and no expertise in the relevant field to which *Noticee no.2* happily caused transfer of crores of rupees from NMCE for which the paper works were directed to be carried out much later. All the afore-discussed evidence surrounding the engagement of ATSPL, creation of back dated agreements, absence of any credentials of ATSPL, absence of Service Tax/Vat registration of ATSPL, absence of approvals, absence of knowledge of the shareholder-Directors about the operation of ATSPL etc., collectively and cumulatively point to an artifice that was perpetrated by the *Noticee no. 2* on NMCE which clearly resulted not only into a huge embezzlement loss to NMCE but also creation of a mirage of a capital asset in form of an high value & expensive software on the balance sheet of NMCE. The presence of the artifice is further fortified from the strange fact that the payments received by ATSPL against the development of the purported software that was capitalised as a depreciable asset in the books of NMCE were shown in its (ATSPL's) own books of accounts under the head of "Loans and Advances" and without any reflection of such amounts under the head of "Profit and Loss", as it ought to be which means the amount received from NMCE was not shown as receipt of software development charges in the profit & loss account of ATSPL. Here again, I must note that Mr. Nisarg Shah, (who has admitted to have finalised the books of accounts of ATSPL also while working as an employee of NMCE), has stated in his statement dated June 03, 2011 that the entries were shown as liabilities in the books of accounts of ATSPL on the instructions of the *Noticee no. 2* only.

xxiv. While the payments made to ATSPL have been found to be without delivery of any actual software, it is also observed here that the initial agreement of NMCE was executed with ATSS LLC and subsequently payments have been made to ATSPL by NMCE, clearly on behalf of ATS LLC. In an email dated March 25, 2010, Mr. Amit Gupta has written to

Mr. Suhel about his working on some assignment. The said Mr. Suhel from his signature on the email signifies himself to be the employee of Arrow Total Solution, LLC. In this connection, I find it worthy to quote the concerns as admitted by the *Noticee no. 2* in engaging ATS LLC. In an email dated December 10, 2010, the *Noticee no. 2* has written to Mr. Amit Gupta that: "*…ATS LLC partnered with ATS India may also need regulatory approvals from RBI under FEMA to expand its presence in India and in this case therefore you can't transfer your obligations to yourself.*

We are under legal advice for obtaining an independent opinion from a FEMA expert as this issue has been raised in FMC audit in last year…"

xxv. The aforesaid admission is sufficient to show that ATSPL was roped in for the work on paper (as no software was delivered by it) by ATS LLC to receive the payments on its behalf and in the said process, the relevant provisions of laws governing Foreign Exchange appears to have been circumvented.

92. Apart from the above noted findings and observations, I find that even the bank account used for making payments to ATSPL has certain relevance for the present proceedings. In terms of the statement of Mr. Rajendrasingh Chudasma, former VP, NMCE used to have four types of bank accounts viz., current account, settlement account, margin account and expenditure account, out of which, he was the authorised signatory for the settlement and margin accounts in all the banks. Further, the *Noticee no. 2* in his statement recorded during the enquiry on January 27, 2011 has admitted that the payments to ATSPL were used to be made from the NMCE Margin Account no. 00060340004245 held with HDFC Bank. It is noted that the *Noticee no. 2* in the next question had attempted to defend himself by claiming that he has not instructed to make payments from the margin account. However, from the testimony of other witnesses like Mr. Rajendrasingh Chudasma, who was the authorised signatory to the said account, it is noted that the instructions to issue cheques to ATSPL out of the said margin account were being issued by the *Noticee no. 2*.

93. In the present proceedings before me, the payments made to ATSPL out of the margin account of the exchange have been attributed by the *Noticees* to the inadvertence of the employees of NMCE. However, Mr. Rajendrasingh, the authorised signatory to the said bank account and the close associate of the *Noticee no. 2*, had stated during the FMC enquiry that there was no risk to margin account since the amount was regularly replenished from the mutual fund accounts. He had further added that it was done, so that there is no trace of the transfer of funds. Thus, the statement given by Mr. Rajendrasingh, indicates that the payment to ATSPL made from the margin account of the Exchange (where margin money paid by the trading and clearing members/brokers are deposited) was not at all an act of inadvertence of the staff; but was deliberately done so as to conceal the misdemeanour of making those illegal pay outs to ATSPL which would be further discussed in the latter part of this order.

94. The *Noticees* have contended that no loss has been caused to anyone by making those huge payments to ATSPL out of the Exchange margin money account as these payments were only book entries. I observe that when such a patently violative act comes to the fore which involves usage of the funds belonging to the trading & clearing members of the exchange, the absence of loss would not be adequate enough an explanation to mitigate the risk that such a practice had posed or would have posed to the risk management system of the Exchange. It needs to be reminded that one of the major charges against the *Noticees* in the instant proceedings is deliberate lapses of corporate governance, the blatant misconduct of the *Noticee no. 2* and the manner in which he tried to manage the affaires of NMCE, directly or indirectly during his association with NMCE or otherwise. The *Noticees* have also contended that the Annual Reports of NMCE for the financial years ending 2009 and 2010 reflect that the investments made by NMCE at the end of relevant financial years were more than the liability it owed to the members. In this connection, I have to point out that irrespective of what was the exact ratio of the assets of the company to its liabilities towards the members, the very act of using the funds kept in the margin money account itself is sufficient enough to indicate that not only the interest of

the trading & clearing members who had paid the margin money against their respective trades was compromised, but even the exchange itself was exposed to a potential catastrophic risk of default.

95. It is also noted from the SCN that there was an instance of gross violation of accounting practice at NMCE. It is noted that on May 30, 2006, a payment of INR 2.47 Crore was made by NMCE to M/s Kushal Enterprises on behalf of ATSPL, but the said transaction was entered into the ledger account of ATS LLC in the books of NMCE. The said firm M/s Kushal Enterprises was not only a member (broker) of NMCE but was also a related party of NMCE as it is a proprietary firm of Mr. Meena Gupta, who is the wife of Mr. Naresh Gupta (brother of the *Noticee no. 2*). As noted from the SCN, there is no records of any service having been rendered by M/s Kushal Enterprises either to NMCE or ATSPL against which such a huge payment could have been made to the said entity. The SCN has found that the said amount was used by the *Noticee no. 2* for the purpose of market making in commodity derivatives trading, an activity that was not allowed under the extant regulatory framework of FMC.

96. In the present proceedings, the *Noticees* have vaguely attempted to escape the aforesaid charge by claiming that once NMCE had paid money to ATSPL, it should not have any concern as to in what manner such funds were utilised by the recipient of such funds and there is no evidence that the *Noticee no. 2* was controlling the bank account of ATSPL. I find the said submission to be largely evasive and erroneous. The charge in this context is that payments were made from the bank account of NMCE to M/s Kushal Enterprises on behalf of ATSPL, and the book entry in this regard was entered in the ledger of ATS LLC as maintained in the books of accounts of NMCE. The *Noticees* have not been able to demonstrate as to what was the commercial transaction of ATSPL or ATSPL LLC with M/s Kushal Enterprise pertaining to the software development of NMCE which would justify the payment of such a large amount to the said Broking Member of NMCE. The *Noticees* have a responsibility to explain as to what was the nature of nexus that existed between ATSPL/ATS LLC and the said commercial transaction with M/s Kushal Enterprises, which

undisputedly is a related party to NMCE. At this juncture, I note that Mr. Rajendrasingh had deposed before FMC on June 17, 2011 certain crucial facts about the aforesaid transactions with M/s Kushal Enterprises, which are as under:

I. M/s Kushal Enterprises was a Broking member of NMCE.

II. Neptune Overseas Limited (*Noticee no. 1*) was providing financial assistance to M/s Kushal Enterprises for trading on NMCE. He (Mr. Rajendrasingh) was dealing with M/s Kushal Enterprises under the instructions of the *Noticee no. 2* on behalf of NOL and on directions whenever received from the *Noticee no. 2*, he had released payments from NOL to M/s Kushal Enterprises.

III. The cheque no. 302958 dated May 30, 2006 for an amount of INR 2.47 Crore was paid from the Margin Account of NMCE to M/s Kushal Enterprises. The said cheque was signed by Mr. Kailash Gupta and Mr. Rajendrasingh (himself) and he used to sign the cheques whenever directed by Mr. Kailash Gupta.

IV. M/s Kushal Enterprises was engaged in Market Making and also in regular trading. To keep its accounts of both the activities (i.e. Market Making and also in regular trading) separate, two accounts (Pro Account and Client Account) were maintained.

97. The aforesaid categorical statements made by Mr. Rajendrasingh clearly exhibit as to how a firm (M/s Kushal Enterprises) connected to an immediate family member of the *Noticee no. 2* was used for carrying out Market Making activities in commodity derivatives away from the eyes of FMC despite the fact that such an activity was not permissible in commodity derivatives market by the Regulator. The *Noticees* have hinged their case on the bye-laws of NMCE and have contended that the said bye-laws containing provisions of Market Making were approved by FMC, therefore, Market Making was duly permitted by FMC. A perusal of the said submissions of the *Noticees* in fact shows that at the relevant time, there was a "*clamour in the commodity market for allowing traders for Market*

Making on non-sensitive commodities" which has also been admitted by the *Noticees* in their submission. I observe that such a statement on the part of the *Noticee no. 2* is self-evident enough to suggest that there was no explicit permission granted by FMC for the purpose of Market Making. Even the Pipara Report [as referred at para 60 (x) above] has also classified the activity of Market Making an illegal activity and prohibited by law which further supports the charges made in the SCN. The *Noticees* have shown the copy of bye-laws which contains a provision of Market Making. Further, the admitted position that at the relevant time there was a clamour on part of the trading members seeking permission for Market Making in non-sensitive commodities would certainly outweigh the approval if any, of bye-laws of NMCE which seems to have been granted by FMC at the time of grant of recognition to NMCE as a commodity derivatives exchange in the year 2002. In any case, being a regulated Exchange, NMCE could not have launched Market Making programme in the Commodities Derivatives Market without the tacit approval and consent of the Regulator. *Noticees* have failed to provide any document to show that the Exchange was getting indulged in promoting Market Making activities under any scheme or notification issued by FMC nor have they been able to produce any details of the Market Making scheme, if any, containing guidelines for the market participants with regard to implementation of such scheme so as to adduce any credibility to their claim that Market Making activities were engaged in by them legitimately during the relevant period.

98. Keeping in view the above discussion, I have no hesitation to hold that the *Noticee no. 2* had not only indulged in Market Making activities for which no specific permission was granted by FMC, but also had transferred large amounts of money under this pretext to the tune of INR 2.47 Crore to his related party. The *Noticees* have put up a lame defence to counter the above charge by asserting that FMC ought to have established that the bank account of ATSPL was being managed by and was under the control of the *Noticee no. 2*. However, it has already been brought out elaborately in the earlier part of this order, as to how one of the authorised signatories of the Bank accounts of ATSPL viz., Mr. Samar

Dave used to sign cheques and send them to the address of NMCE and also the fact that despite resigning from directorship of ATSPL, the family members of the *Noticee no. 2* did not cede their control on the operation of its bank accounts. Thus, nothing more is left or required to be discussed, as the defence raised by the *Noticees* is adequately demolished by the speaking facts, as stated above.

99. It is also noted that out of the bank account of ATSPL, huge payments have been made to as many as 16 different entities, without any basis or commercial transactions. The said fund transfers, as noted from the SCN are depicted herein below:

Table no. 5

Sr. no.	Name of the beneficiary	Amount transferred (INR in Lakh)
1.	Hemant Sarawagi	746
2.	Ashok Kumar J Thakkar	565
3.	Kishor Corporation	177
4.	Ideal Systems	140
5.	Nandini Constructions	17
6.	A. Hirji & Co.	28
7.	Mahakali Enterprises	15
8.	Suraj Computers	26
9.	Ceja Traders, Kolkata	63
10.	Bhootnath Commodities P Ltd., Kolkata	12
11.	D M Finance	70
12.	Kushal Enterprises	202
13.	Surendra Singh Vaghe	4
14.	Suresh Singh	4

15.	Rudrapal Singh Khais	5
16.	Vijay Laxmi Shar	5

100. It is seen that the funds were first received by ATSPL from NMCE's Margin Account (Account no. 00060340004245) and the said funds were transferred to various entities. Out of the aforesaid entities, some are found to be Trading Members of NMCE and there is nothing on record to show that the payments from ATSPL were made to these entities for any legitimate business purpose. The *Noticees* in reply have candidly admitted that the aforesaid entities are Trading Members of NMCE. However, the *Noticees* have contended that the payments made by ATSPL to the aforesaid entities have reverted back to the accounts of NMCE in the form of transaction charges and therefore no loss has been caused to NMCE. After having heard the *Noticees* and having perused the materials, I note that the aforesaid submission is largely evasive as no explanation has been offered so as to justify as to why and how ATSPL had made those payments to the Trading Members of the exchange (NMCE), how was NMCE's interest was served by the aforesaid payments, and how the said funds were used by those Trading Members towards Market Making etc. Similarly the *Noticees* have failed to explain certain vital aspects to the aforesaid transactions such as, how old was the association of such Trading Members with NMCE; what were the other trades (apart from trades executed for Market Making) that these Members were undertaking; and as to what are the exact amounts that were received in the form of transaction charges etc., from those Trading Members and also whether those transaction charges received by NMCE were equal or more than the amounts paid to those trading members towards market making charges. The sole reliance on Pipara report by the *Noticees* to contend that the payments made by NMCE to ATSPL were within the knowledge of the Board of NMCE or to contend that the payments came back to NMCE as turnover charges is a vague assertion, not being borne out of any other records of the matter to corroborate the said assertions and hence, deserves to be rejected *in limine*. Rather, the aforesaid claim of the *Noticees* turns out to be a candid

admission of having defrauded the exchequer of NMCE by making ATSPL a vehicle for transferring large sums of money to various entities under the guise of software development and also using ATSPL as a vehicle for Market Making activity out of the regulatory oversight.

101. It is noted that Mr. Rajendrasingh during his deposition before FMC on June 17, 2011 had stated that the top management of NMCE had appointed certain entities for the purpose of Market Making in certain commodities to bring liquidity. He had further stated that the turn-over charges of those members were required to be reimbursed, along with the charges for Market Making and as the management could not find out a route for such reimbursement, Mr. Kailash Gupta, had offered to allow his son's company for the said purpose. The perusal of the said deposition would further compound the charges that ATSPL was used by the *Noticee no. 2* so as to carry on non-permitted activity like Market Making. I may at this stage note that during his cross-examination before me in the present proceedings, the aforesaid witness (Mr. Rajendrasingh) has also mentioned names of other officials of NMCE like Mr. Anil Mishra, Narayan Rai etc., who according to him, were also involved in the activity of Market Making. The *Noticees* while strongly harping on the aforesaid statement of Mr. Rajendrasingh, have claimed that the action initiated by issuance of SCN by FMC was biased against the *Noticee no. 2*. I have carefully considered the aforesaid submissions but have to observe that the present proceedings are confined to adjudging the roles of the *Noticees* herein in the alleged violations made in the SCN, which include a finding about unauthorised transfer of funds to ATSPL under the garb of software development and further onward usage of such funds for Market Making. When such charges are examined from the lens of the role & activities that *Noticee no. 2* was performing while being MD of NMCE and his close proximity with ATSPL, the only thing that emerges is that the benefactor as well as beneficiary of such funds transfers as well as that of Market Making was only the *Noticee no. 2*. Even assuming that the statement of Mr. Rajendrasingh that some other Exchange officials were also involved in the activities of Market Making, one cannot lose sight of the explicit coercion that the *Noticee no. 2* used

to exercise over the employees and executive of NMCE during the relevant time which has been highlighted in the earlier part of this order. Therefore, in my view there does not appear to be a bias of any kind against the *Noticee no. 2* in the present proceedings, more particularly, considering the misconduct of the *Noticee no. 2* in all the afore discussed transactions and funds transfers, there is nothing on record to justify the claim of *Noticee no. 2* to seek parity with other employee of NMCE in the market making transactions indulged in by *Noticee no. 2* through ATSPL and those Trading members.

102. To sum up aforesaid factual analysis, I observe that there was no permission by FMC for the Commodities Exchanges to indulge in Market Making, yet the *Noticee no. 2* by using ATSPL as a conduit, which was also controlled by him, transferred large amounts of monies from NMCE and used those funds for Market Making. The *Noticees'* claim of having received back those funds in the accounts of NMCE in the form of transaction charges is also found to be a specious and unsubstantiated claim that is liable to be rejected. In any event, even assuming the said claim to be true, the flagrant misuse of the funds kept in the margin money account of the exchange for an activity nor permitted by FMC speaks for itself the kind of irregularities and mis-management the *Noticee no. 2* had perpetrated in the governance and accounts of NMCE during the relevant period. The argument advanced by the *Noticees* that there was no loss to NMCE as the money used for Market Making came back to NMCE (as transaction fees), is self-contradictory as on the one hand, the *Noticees* have endeavoured to justify the transfer of the money to be used for an activity not permitted under the bye- laws of the Exchange, whereas on the other hand the *Noticees* have propounded a narrative that the money transferred for market making had come back to NMCE as transaction charges and hence there was no loss to NMCE. It is not a tenable proposition to first justify the usage of money for a non-permissible activity and then to justify the same again on the ground of having received it back, more so when the said claim is also not backed by any documentary evidence to indicate as to how and when the money was received back by NMCE. Interestingly, the Pipara Report [as referred at para 60 (x) above]

has also pointed out that the money that returned to NMCE as Turnover Charges was on account of Fake Turnover. The report further goes on to observe that the transactions so entered were so intricate that even the Chartered Accountants have not been able to put forth any concrete comment, apart from terming such turnover to be fake. The members who have indulged in Market Making have stated before the Auditors (Pipara & Co.), as well as before the Police Authorities that in realty, the cards of such members were being utilised by NMCE itself to generate fake turnover, which is also supported by the tracing of IP address of such members (used for buying/selling activity) belonging to and registered at NMCE. Thus, the Pipara report, clearly brings out the underlying intricate scheme apparently conceived and executed by the *Noticee no. 2* to create fake turnover for the Exchange, based on so called market making activities in the name of which, substantial amounts of money have been illegally transferred out from the coffers of NMCE by the *Noticees*, especially by the *Noticee no.2*.

103. As far as the *Noticees'* claim to have earned revenue for NMCE out of the said Marketing Making activity is concerned, the same is not also not verifiable from the information available on record. Nonetheless, the charge of permitting the usage of money of NMCE for a non-permissible act and misuse of the funds deposited in the margin account of the Exchange remain established and the justifications provided by the *Noticees* to defend their actions in this regard are grossly devoid of merit and not tenable.

104. Further, it is also noted that out of the funds so received from NMCE by ATSPL, an amount of INR 4.80 Crore (approx.) was transferred from ATSPL to the *Noticee no. 1* and the said funds appear to have been used by *Noticee no.1* to purchase the shares of NMCE held by Mr. Anil Singhania for an amount of INR 3.63 Crore. The *Noticees* have vehemently denied the said charge on the ground of lack of evidence and have also claimed that the said amount of INR 4.80 Crore (approx.) was in fact used for procuring commodities to store in the warehouses of Central Warehousing Corporation (CWC) on behalf of NMCE clearing house. Here again, I find that the *Noticees* have evaded to answer the aforesaid specific charge by making certain frivolous and unfounded submissions which do not

have any link with the said specific charge of using funds transferred to ATSPL for purchase of shares of NMCE. Even with respect to their contentions about procurement of commodities for stocking in CWC warehouse, no details or explanation has been furnished with respect to involvement of ATSPL (the purported software vendor) in the said procurement of commodities stock for the NMCE clearing house to be stored in CWC warehouse. Thus, the *Noticees* have grossly failed to explain anything in their defence to rebut the aforesaid charge of *Noticee no.1* purchasing the shares of NMCE held by Mr. Anil Singhania for an amount of INR 3.63 Crore out of the funds transferred by NMCE to ATSPL.

Allotment of shares of NMCE to NOL (Noticee no. 1):

105. I note that the next set of charges as made in the SCN pertains to the allotment of shares of NMCE (now ICEX) to the *Noticee no. 1*. It is noted from the records that the such allotment of shares was made to the *Noticee no. 1* in the following manner:

Table no. 6

Sr. No.	Details	Date of allotment	No. of shares each of INR 10 face value	Distinctive nos.
1.	1st Allotment	15/02/2002	100	00401-00500
2.	2nd Allotment	10/04/2002	2,50,000	301501-551500
3.	3rd Allotment	23/05/2002	2,50,000	551501-801500
4.	4th Allotment	19/01/2004	19,74,900	3625501-5600400
5.	5th Allotment	14/10/2006	12,37,500	10500001-11737500
6.	6th Allotment	30/12/2006	3,98,280	14601721-15000000
	Total		**41,10,780**	

106. I note that though the allotment of shares was made to the *Noticee no. 1* on multiple occasions, however, for the purpose of present proceedings, the charges in the SCN have been made only for the specific allotments made to it on the dates as mentioned at the Serial nos. 2, 4, 5 and 6 of the table above. It is further noted that the said findings pertain to the basics of the considerations received by NMCE against allotment of such shares. It is noted that there was in existence, a running account between the *Noticee no. 1* and NMCE based on which, the shares were allotted. To understand this issue further, the necessary relevant details as culled out from the SCN are presented as under:

Table no. 7

	No. of Shares allotted (date of allotment)	**Details of payment received from Neptune Overseas Ltd**					**Running account(between NOL and NMCE) Debit-Credit balance in NMCE books of accounts as on date of issuance of shares**	
		Bank details & account No of NOL from which Payment has been Received	Cheque No. & date	Amount (INR)	Date of Receipt of Cheque	Date of deposit of cheque in NMCE a/c		Authority allotting the shares
1	2,50,000 (10.4.2002)	Vijaya Bank (A/C No. 2248)	829949 Dated 26-04-2002	4,00,000	08-04-2002	26-04-2002	7,66,720 (Credit)	Allotted by Standing Committee Dated 10/04/2002 (unsigned minutes) and the Board noted the
		Vijaya Bank (A/C No.	768803 dated 18-05-	21,00,000	09-04-2002	18-05-200	7,66,720 (Credit)	

		2248)	2002			2		allotment on 23/05/2002 at its 2nd meeting
2	2,50,000 (23.5.2002)	Vijaya Bank (A/C No. 2248)	768805 Dated 18-05-2002	25,00,000	18-05-2002	18-05-2002	Nil	Allotted by Board at 2nd meeting held on 23/05/2002
3	19,74,990 (19.1.2004)			1,97,49,000	Deputed to the running account of NOL with NMCE on 19-01-2004	----	29,42,819 (Debit)	Allotted by Standing Committee on 19/01/2004 (unsigned minutes) No Board approval taken
4	12.37.500 (14.10.2006)	HDFC Bank Ltd (A/c No. 00603400 04780)	894830 Dated 05-05-2006	1,85,62,500	05-05-2006	19-12-2006	1,96,88,114 (Debit)	Allotted by Board at 21st meeting held on 14/10/2006
5	3,98,280 (30.12.2006)	HDFC Bank Ltd (A/c No. 00603400 04780)	894907 Dated 25-11-2006	19,40,340	25-11-2006	19-12-2006	1,22,88,114 (Debit)	Allotted by Allotment Committee at its meeting held on 30/12/2006. No Board approval taken
		Vijaya Bank (A/C No. 73010030 0002872)	220910 dated 25-11-2006	4,033,860	25-11-2006	25-01-2007	1,22,88,114 (Debit)	

108. I shall now deal with the afore-listed allotment of shares, one by one.

Allotment of 2,50,000 shares on April 10, 2002

109. With regard to the allotment of 2,50,000 shares of NMCE in favour of the *Noticee no. 1,* it is noted that the same has been claimed to be approved by the Standing Committee on April 10, 2002. However, the minutes of the Standing Committee for the meeting held on April 10, 2002, have not been signed by the members of such Committee. Further, the said minutes mention that the company (NMCE) has already received INR 25 Lakh being the share application money from the *Noticee no 1*. However, the said amount of INR 25 Lakh was received only after the aforesaid date of allotment of shares, in two instalments viz., INR 4.00 Lakh on April 26, 2002 and INR 21.00 Lakh on May 18, 2002. Based on such unsigned minutes, the Board of Directors of NMCE in its meeting held on May 23, 2002, simply noted the factum of allotment of such shares to the *Noticee no. 1*. The SCN states that the *Noticee no. 2* in his capacity of Managing Director of NMCE, by giving wrong information to the Board of NMCE, has misled the Board with regard to the meeting of the Standing Committee to approve the said allotment of shares and has also misled the Board about receipt of application money from *Noticee no.1* towards such allotment before the allotment of the share while the application money in fact was received after the allotment of shares. It has been charged that the receipt of application money in two tranches shows that NOL was not having sufficient money in its account at the time of allotment of shares, and due to the fact that the application money was not received before the allotment of shares, contravention of the provisions of the Companies Act, 1956 has been committed.

110. The *Noticees* in their reply have tried to express their inability to comment on the aforesaid issue stating that the *Noticee no. 2* has no access to the minutes book of NMCE. However, as noted from the written replies of the *Noticees*, it is clear that pursuant to the order dated October 13, 2011 passed by the Registrar of Companies (RoC), the minutes book was indeed provided by NMCE to the *Noticees* for inspection. Thus, there is no reason to accept the said defence sought to be taken by the *Noticees*.

111. I also find from the records that the *Noticees* have tried to brush aside the aforesaid allegation of getting shares allotted to *Noticee no.1* without receiving share application money by claiming that it was the duty of the Company Secretary to obtain signature of the Chairman of the Standing Committee after the meeting was over and any such lapse cannot be attributed to the Managing Director. It has further been contended that the copies of the cheques through which payments were made by *Noticee no.1* have not been furnished to them in support of the allegation. However, I find that the *Noticees* have never asked for the copies of such documents nor have they ever disputed the existence of such cheques. Moreover, since the cheques were admittedly issued from the bank account of the *Noticee no. 1* itself to pay for the share application money, it is absurd on the part of the *Noticees* to seek the copies of such cheques.

112. I observe from the purported unsigned minutes of the Standing Committee meeting that the said meeting is supposed to have been attended by four persons, including the *Noticee no. 2*. However, as noted above the said document (minutes) does not contain the signatures of any of the members of the said committee, in absence of which the authenticity of the said minutes cannot be accepted. The *Noticees* have merely dodged the issue by claiming that it was not the duty of the MD to obtain the signatures of the committee members. However, the said assertion by the *Noticees* is not adequate enough to mitigate the factum of absence of any actual approval from the Standing Committee since undisputedly without signatures, this document cannot be termed a "minutes of meeting". Further, as can be noted from the Table above, the payment against the aforesaid allotment of shares was received from *Noticee no.1* in two tranches, viz., INR 4 Lakh vide cheque no. 829949 dated April 26, 2002 and INR 21 Lakh vide cheque no. 768803 dated May 18, 2002. Both the cheques were drawn on the same bank account of NOL (*Noticee no. 1*) and were deposited in the bank account of NMCE on April 26, 2002 and May 18, 2002. As the payment was received after allotment of the shares, it has been charged that the *Noticee no. 2* has misled the Board of NMCE as in reality, the share allotment to the *Noticee no. 1* was financed by the company (NMCE) itself. The *Noticees* have argued that the

bank account of NMCE could be opened only after the Certificate of Business Commencement was received from MCA by NMCE on April, 2002. However, when this claim of the *Noticees* is examined carefully from the table above, it is seen that the first cheque of INR 4 Lakh was deposited on April 26, 2002 in the bank account of NMCE, thus leaving no scope of any impediment for drawing and depositing the other cheque also in April 2002, instead of postponing the payment. Further, it is also relevant to note here that the *Noticees* could have tried to rebut the above charge by at least showing that there were adequate funds available with the *Noticee no. 1* at the time of allotment but there is no such submission from the *Noticees* in this regard. Therefore, I have to hold that the charges against the *Noticees* stand proved, as undisputedly the application money was not received by NMCE at the time of allotment and the shares were allotted to the *Noticee no. 1* without receiving any application money resulting into a temporary financing of the said allotment by NMCE by misleading the Board of NMCE on the basis of a self-created unsigned minutes of meetings of the Standing Committee.

Allotment of 19, 74,900 shares on January 19, 2004

113. It is noted that the minutes of Standing Committee which was meeting purportedly held on January 19, 2004, in which allotment of 19,74,900 shares of NMCE to NOL/the *Noticee no. 1* was supposedly approved, are also unsigned. The said unsigned minutes mention that the said meeting was attended by Mr. Shanker Lal Guru and Mr. Kailash Gupta (the *Noticee no.2*). First of all the SCN states that Mr. Kailash Gupta being a controlling shareholder & Director of the *Noticee no. 1* was an interested person, hence his presence in the Committee meeting should be ignored for the purpose of quorum, which leaves Mr. Shanker Lal Guru as the only Director present in the said meeting for the purpose of quorum hence it can be construed that there was no quorum in the said meeting and even if that meeting ever took place, the Committee could not have approved the allotment of shares to NOL/the *Noticee no. 1*. The said unsigned minutes record that NOL having paid the share application money and agreed to take share capital of NMCE has been allotted 19,74,900 shares of NMCE.

However, the share application money against allotment of the said shares was "actually never received" by NMCE from NOL, and instead, an amount of INR 1,97,49,000 was debited to the running account of NOL maintained with NMCE. On the said date, NOL had reportedly a credit balance of INR 1,68,06,181 in the accounts of NMCE, which included an amount of INR 100.26 Lakh (INR 1 Crore approximately) credit given to NOL towards pre-operative expenses purported to have been incurred by NOL (INR 94.37 Lakh) and also by ATSPL (INR 5.89 Lakh), which (amount of INR 5.89 Lakh incurred by ATSPL) was also claimed by NOL from NMCE.

114. It is noted that the said pre-operative expenses referred to above were required to be audited and a statement of such pre-operative expenses was required to be submitted for consideration of the Board. In this context, the Board of NMCE in its first meeting held on February 15, 2002, had constituted a Standing Committee of Board of Directors authorising it (Committee) to consider the audited statement of pre-operative expenses incurred by NOL and to decide the amount and the mode of reimbursement of such amount to NOL. However, it has been brought to my notice that the audited statement of the pre-operative expenses was never placed before the Standing Committee or the Board of Directors, as was decided in the first Board meeting. Therefore, it has been charged in the SCN that the *Noticee no. 2* got a credit of INR 100.26 Lakh in favour of NOL (*Noticee no. 1*) towards the pre-operative expenses, without following the directives of the Board of Directors of NMCE and also based on the said fictitious credit entries, shares of NMCE were allotted to *Noticee no. 1*.

115. The Note 4 to the Schedule J forming parts of accounts of the Annual Report of NMCE for the year 2002-2003 states as: *"Pursuant to resolution passed by the Board of Directors in the meeting held on 15/09/2004, and as approved by the Board of Directors in the meeting held on even date, the pre-incorporation expenditure amounting to Rs 72.89 lacs incurred by promoter company, Neptune Overseas Limited, have been incorporated in the financial statements for the period under review."* The aforesaid statement gives an indication about the approval received from the Board of Directors for the incorporation of the pre-incorporation expenditure of INR 72.89 Lakh purported

to have been incurred by NOL. However, what is observed from the SCN is that the Notice for the Board meeting dated September 15, 2004 did not even carry any agenda item for the approval of the pre-operative expenses. Further, the certified copy of the minutes of the said Board meeting also did not contain any discussion on the approval of the pre-operative expenditure. The attendance sheet for the said Board meeting carried no signatures of the four (04) Director who purportedly had attended the said Board meeting, unlike the minutes of other Board meetings. Further, the page containing the details of the pre-operative expenses in the Balance sheets are typed in a font different from the one used in rest of the document, indicating strongly towards the possibility that the records of NMCE as well as the Note 4 to the Schedule J forming parts of accounts of the Annual Report of NMCE for the year 2002-2003 was apparently concocted.

116. Based on the aforesaid facts, the SCN states that the *Noticee no. 2* has caused a false statement in the Balance Sheet and has forged the annual accounts of NMCE as well the Board Meeting Records. During the enquiry, the *Noticee no. 2* was asked multiple times by the FMC to provide the documentary evidence like bills/vouchers, entries in bank account statement etc., in support of the pre-operative expenses claimed to have been incurred by NOL. However, no such documents were furnished by the *Noticee no. 2* and the records contained proper evidences of expenses only for an amount of INR 7,66,720 and the said amount was also reimbursed by NMCE to NOL in April, 2002 itself. In view of the discrepancy in the documents and the absence of sufficient evidence, the SCN narrates that the claim of pre-operative expenses on the part of NOL (*Noticee no. 2*) is a bogus claim. It has further been alleged that once the said bogus claim is excluded/adjusted from the credit taken by NOL in the running account, the credit balance of NOL declines to INR 67.80 Lakh only and if the value of the shares allotted at this stage amounting to INR 1,97,49,000 (at a face value of INR 10 per share) is adjusted against the credit balance of *Noticee no.1* in the said running account maintained in the books of NMCE, then effectively NOL would have a debit balance of INR 129.69 Lakh after offset of entire credit balance of

NOL. Therefore, it becomes clear now that 19,74,900 shares of NMCE were allotted to NOL without receiving payment of any specific consideration from NOL and in terms of the aforesaid charge that NOL was in fact running a debit balance of INR 129.69 Lakh (after adjustment of credit balance of NR 67.80 Lakh), the SCN alleges that as many as 12,96,900 shares of NMCE (valued at INR 129.69 Lakh) were allotted to NOL without receiving any application money from the allottee company, which were financed out of NMCE own funds. Consequently, the aforesaid act has been stated to be in violation of the procedure of allotment of shares, as prescribed under the Companies Act, 1956.

117. As regards the unsigned minutes of Board committee meeting are concerned, the *Noticees* have contended that the all the meetings of the committee were properly conducted with adequate quorum of members. It has also been contended that allotment of shares against full consideration was not a business item under the provisions of Companies Act, requiring any interested Director to abstain from attending such meeting. Further the *Noticees* have again attempted to defend themselves by claiming that it was the task of the Company Secretaries to get the minutes signed. They have also claimed that the unsigned minutes presented to FMC have been fabricated to support the case of FMC. However, such an unsubstantiated & frivolous argument that the unsigned minutes were fabricated to support the case of FMC cannot be entertained at all for the reason that FMC as a statutory Regulator of the Commodity Derivatives Market has conducted its inquiry as per law and has built up the case against the *Noticees* based on the documents & evidences it collected from various sources/persons during the said inquiry hence, there does not appear to be any rationale in the allegation made by the *Noticees* that documents like the aforesaid unsigned minutes were fabricated to support the case of the regulator. Further, the *Noticees* have themselves made self-contradictory statements as on the one hand, it has been denied that only two persons (*Noticee no. 2* and Mr. Shanker Lal Guru) had attended the said meeting of the committee without providing details of any other third persons who had attended the said meeting; while on the other hand, the *Noticees* have also attempted to counter the said charges by claiming that

allotment of shares on payment of full consideration is not a business item. As regards the merits of various expenditure claimed to have been incurred as pre-operative expenses for NMCE, the *Noticees* have contended that they are not in a position to locate the bills and other supporting documents due to passage of time, and can only produce the bank account statements. The *Noticees* have further argued that from the year 2004, the accounts of NMCE were audited, adopted and approved by the Board and the shareholders and as no issue has been flagged either by the auditors or the shareholders, the accounts and status of NOL cannot be disputed at this stage.

118. In this regard, I observe at the outset that the claim of the *Noticees* about authenticity of the total amount of pre-operative expenses of INR 100.26 Lakh appears evasive and unsubstantiated by any supporting evidence. I can see that no details with respect to the component of INR 5.89 Lakh claimed to have been incurred by ATSPL (as noted above) have been provided. The *Noticees* have not furnished the details as to how ATSPL had incurred the pre-operative expenses towards setting of NMCE and under what adjustments, NOL *(Noticee no.1)* is claiming such expenses on behalf of ATSPL. Rather, such a stand on the part of the *Noticees* further strengthens my earlier observations that ATSPL was nothing but a company controlled by the *Noticee no. 2* along with his family.

119. Further, the *Noticees* have claimed efflux of time as the reason of non-availability of the supporting documents and have claimed that they can produce the bank account statement to substantiate those pre-operative expenses, however surprisingly, no such bank account statements have been filed in support of those claims of pre-operative expenses. The contention that passage of time has impaired their ability to defend against the charge also does not appear to be justified when analysed in the background of the present proceedings. The SCN was issued in the year 2011 however, the *Noticees* have not produced any evidence to demonstrate as to what efforts have been undertaken by them in ascertaining evidence in support of such expenditure. The *Noticee no. 2* was very much aware of the said charges in 2011 itself and he got more than 10 years to gather information and evidences in support of his defense to dispel

various charges made in the SCN. Further, it is because of the prolonged litigations pursued by the *Noticees* with a view to come out clean from the order of FMC that the Hon'ble Supreme Court has ordered for a fresh proceeding *de novo* in the matter so that *Noticees* would get a fresh opportunity of natural justice to prove their case with supporting evidence. Hence, *Noticees* were expected to present their arguments in defence with supporting documentary evidences wherever required, which they have not been able to do as can be seen with respect to the above noted charge surrounding pre-operative expenditure. Therefore, at this stage taking a subterfuge of passage of long time or by stating the transaction in question is quite old, do not inspire confidence more so when the *Noticees* have not been forthcoming about the efforts undertaken by them to collect such evidence.

120. I also observe from the records that during the enquiry conducted by FMC, *Noticee no. 2* was repeatedly asked to furnish the copies of supporting documents like vouchers, bills, copies of bank account statement showing entries towards such pre-operative expenses. However, no such documents were furnished by the *Noticee no. 2* to FMC. As noted from the SCN, documentary evidence supporting only an expense of INR 7.66 Lakh were available. Therefore, efflux of time cited by the *Noticees* as a reason for not being able to produce supporting evidences cannot be accepted as a tenable ground for any favourable consideration on this issue.

121. It is seen that after the cross examination of various witnesses in the present proceedings got over, the *Noticees* have filed the copy of a statement of Mr. Nisarg Shah (Senior Executive Finance and Accounts of NMCE at relevant time) recorded before Enforcement Directorate ("ED"), and certain other documents like copy of ledger account of NOL (*Noticee no. 1*) in the books of NMCE which was submitted by Mr. Nisarg during his statement recorded before ED. The *Noticees* have contended that in total, three running ledger accounts of NOL were maintained in the books of NMCE. As per the *Noticees*, the first ledger account was the main account capturing the entire transactional history between the *Noticee no. 1* and NMCE. The ledger account titled as "Neptune

Overseas Limited (Other)" was in respect of the pre-incorporation expenses incurred by *Noticee no. 1* on various items other than capital expenses. The third ledger account named as "Neptune Overseas Limited L&A" was in respect of the amounts paid by NMCE to *Noticee no. 1* for purchase of commodities to be stored in CWC warehouse for the purpose of promotion of delivery based final settlement system at NMCE.

122. The *Noticees* have contended that an amount of INR 1.89 Crore was transferred by NOL to NMCE during the period of July 24, 2002 to September 23, 2002, and all the expenses incurred by NMCE for the F.Y. 2002-2003 were made from the said amount. The said amount was a loan amount which was extended for facilitation of payment by NMCE for capital equipment etc., since NMCE was in grave need of funds at that time. It has further been contended that as on April 01, 2003, an amount of INR 99.70 Lakh (approx.) was brought forward from the second ledger account (maintained for pre-operative expenses) to the first ledger account, and the said amount was the balance of the pre-incorporation expenses incurred by *Noticee no. 1* for and on behalf of NMCE. By contending so, the *Noticees* have argued that as on the date of allotment of shares to NOL, there was sufficient amount standing to the credit of *Noticee no. 1* (NOL), which was adjusted against the allotment of shares to *Noticee no.1* (NOL), instead of making payments to *Noticee no. 1*. Lastly, it has been submitted that the books of accounts of NMCE have been audited and approved by the Board of NMCE and the statutory auditors or the Board of NMCE have never raised any objection. It has further been submitted that the statutory auditors for F.Y. 2002-2003 and 2003-2004 M/s G.K. Choksi & Co. were not examined by FMC during the enquiry proceedings and in terms of a document (in Excel sheet) provided by the said auditor to the *Noticees*, as against a claim of INR 89.70 Lakh (approx.) towards pre-operative expenses an amount only to the extent of INR 72.89 Lakh was allowed by the auditors. The same shows that the auditors have applied their mind and have allowed the expenses deemed reasonable and proper under the said head.

123. I have carefully considered the aforesaid submission so made by the *Noticees* and have also perused the documents viz., the ledger accounts, the statement of Mr. Nisarg Shah recorded before ED, the excel sheet document referred to above etc. In my view, the *Noticees* have not been able to make out a favourable case due to various reasons as follows:

I. The statement of Mr. Nisarg Shah has been recorded by ED in course of the enquiry being conducted under Prevention of Money Laundering Act, 2002. In the said statement, Mr. Nisarg has *inter alia* stated on Oath that NOL (*Noticee no. 1*) had received INR 100.26 Lakh (through five different entries on two different dates, i.e., March 31, 2003 and March 31, 2004) towards reimbursement of pre-operative expenses by way of journal entries, for which he was not able to get any documentary evidence like vouchers etc. I observe that the said statement of Mr. Nisarg Shah was recorded before ED in the year 2013, however, the *Noticees* have not been able to refute the said assertion made by Mr. Shah about reimbursement of pre-operating expenses to NOL and also regarding absence of any vouchers, other supporting documents etc., by producing any counter evidence so as to show that the said statement was unfounded, biased or made under coercion.

II. Apart from the statement of Mr. Nisarg before ED, the *Noticees* have not been able to produce any vouchers, bills, approvals etc., so as to lend some credence to the claim of pre-operative expenses of INR 100.26 Lakh having been incurred by *Noticee no. 1*. It is also noted from the statement of Mr. Nisarg that only for an expense of INR 7.66 Lakh, evidences were available on record and the said amount was reimbursed to *Noticee no. 1* by NMCE in April, 2002 itself.

III. Further, the document that has been produced to show that auditors have verified the pre-operative expenditure claimed to have been incurred on behalf of NMCE, is a mere excel sheet with no credentials assigned to it so that the same can be attributed some evidentiary value. Notwithstanding the same, the submission that the auditors have allowed the pre-operative

expenses partly after application of mind is also a half-baked argument as the said submission does not indicate as to which items of expenses have been approved by the auditors and which were rejected and the reasons behind rejecting such expenses from the fold of pre-operative expenses.

IV. I may also hasten to add here that while the claim of *Noticees* about the existence of three separate running ledger accounts for the same entity (NOL) in the books of NMCE itself raises serious doubts, the subsequent claim of the *Noticees* about the transfer of credit entries from one running ledger to another, further compounds the suspicion about the integrity of these three running ledger accounts and it is apparent that these multiple running accounts in the name of same promoting entity (NOL) were opened only to create inter account adjustments at will by way of self-made unverifiable journal entries with an intent to create a high level of confusion so as to escape audit scrutiny. To illustrate, the ledger account named as Neptune Overseas L&A contains only those entries limited to the purported loan of INR 50 Lakh extended to NMCE on March 27, 2004. However, entry of the said loan has also been incorporated in the main ledger on March 31, 2005. Besides, there are numerous entries recorded in the main ledger account which show transactions of large amounts of monies between NOL and the Margin account of NMCE, which were undertaken glaringly in gross violation of risk management system of the Exchange and in breach of the very propriety that NMCE being a Commodity Derivatives Exchange ought to have maintained, by providing a Chinese wall to safeguard the money belonging to its trading members deposited in the Margin account only for effecting smooth clearing & settlement of trades. By indulging in such large scale transactions to and fro from the Margin Account, the *Noticees* have not only violated the crucial principle of risk management to be followed by a Commodity Exchange to keep a separate margin account, but have also put the entire trading platform to settlement risk.

V. It may also be highlighted here that the excel sheet which is claimed to be prepared by the Auditors regarding pre-operating expenses glaringly contains entries for travel expenses incurred by Mr. Amit Gupta (as part of those pre-operating expenses), who did not have any formal connection with NOL or NMCE at the relevant time.

VI. It may be noted that the pre-operative expenses, as the name suggests should be restricted only to the expenses that a promoter of an entity incurs before it gets completely operational. As per their own reply, NMCE became operational on November 26, 2002, however, the so called pre-operational expenses are seen to have been incurred even after the said time. The aforesaid observation is also corroborated by the statement of Mr. Nisarg Shah who has deposed before ED stating that supporting documents like vouchers etc., have been found by him only for an expenses of INR 7.66 Lakh and it is noted from the first page of the ledger account titled as 'Neptune Overseas Limited (Other)' that the said amount was reimbursed to NOL in April, 2002 itself. Thus, once the pre-operative expenses are incurred and also reimbursed to the promoting company (NOL) and the newly created entity (NMCE) becomes operational, the claim of having continuously incurred expenses thereafter and terming those expense to be pre-operative expenses is clearly a deceptive device to extract money from the company (NMCE) which as stated above, is also contradicted by the documents (aforesaid ledger account) submitted by the *Noticees.*

VII. Lastly, as narrated in the SCN, the pre-operative expenses were required to be audited and considered by the Standing Committee of the Board of Directors, which would have decided on the appropriate amount of such pre-operative expenses and the mode of reimbursement of such amounts to be made to NOL. As stated earlier, there are no authentic minutes of Standing Committee to rely upon and to get convinced that said Committee has indeed approved the amount of such pre-operating expenses as well as the proposed mode of reimbursement of such amount.

124. From the aforesaid discussions, it is clear that the *Noticees* have not been able to substantiate the genuineness of their claim that NOL had an outstanding credit of INR 100.26 Lakh towards in its running ledger accounts with NMCE. Further, the SCN makes a categorical aspersion that contrary to the notes to the audited accounts for the relevant FY, the Notice for the Board meeting dated September 15, 2004 did not have at all an agenda regarding the approval of pre-operative expenditure, hence, there was no occasion for the board to approve such pre-operating expenditure. I also note that the Pipara Report [referred at para 60 (x) above] has also mentioned that the certified copy of minutes of the Board Meeting dated September 15, 2004 does not indicate any discussion on the approval of Pre-operative Expenditure.

125. Thus, the *Noticees* have not been able to bring on table any credible evidence so as to justify the credit balance of INR 100.26 Lakh in favour of NOL in the books of NMCE since all the claims and documents so submitted have been found to be *sans* merit. The claim that such pre-incorporation expenses are reflected in the audited financial statements for the year 2003-2004 would also not help the *Noticees* as there is no answer from the *Noticees* to the charge that there is no evidence to suggest that the said item of pre-incorporation expenses was ever discussed in the standing committee meeting or the board meeting of NMCE as alluded to by the *Noticees*. The aforesaid findings also bring home the charge that the procedure of allotment of shares as laid down under the Companies Act, 1956 were violated while the allotment of 19,74,900 shares of NMCE were made to the *Noticee no. 1* without any consideration.

Allotment of 12,37,500 shares of NMCE made on October 14, 2006:

126. It is noted from the SCN that the Board of NMCE in the meeting held on October 14, 2006 was informed that it (NMCE) has received application for Rights Issue form NOL along with the share application money of INR 1,85,62,500, and accordingly the Board decided on the allotment of 12,37,500 shares (Face value of INR 10 each at a premium of INR 5 each) of NMCE to NOL. However, the SCN narrates that the said consideration amount of INR 1,85,62,500 was not received by NMCE on the said date and in fact, on the said

date, it was noticed that NOL had a debit balance of INR 1,96,88,114 in the accounts of NMCE. The SCN states that the application money was realised by NMCE only on December 19, 2006 and even on the said date, a debit balance of INR 1,57,88,114 was outstanding against NOL in the books of NMCE. In view of the afore stated debit balance and in absence of the fact that the amount so received cannot be adjusted against the said debit balance, the SCN has rightly found that NOL was financed by NMCE for allotment of shares and *Noticee no. 2* has misled the Board of NMCE about having received the application money without receiving any such amount and also by concealing the fact of a large amount of debit balance already lying against NOL.

127. With respect to the aforesaid charge in the SCN, I find the *Noticees* have given completely vague and evasive response. They have tried to explain that the outstanding balance shown in the running ledger account of NOL (*Noticee no.1*) in the books of NMCE was on account of purchase of commodities made by NOL to store those commodities in the CWC warehouses on behalf of the clearing house of NMCE to generate liquidity in trading of commodity derivatives and to facilitate entry/exit of speculators and other investors in the commodity derivatives market. It has further been contended that the said debit balances were later on closed and settled by liquidating the commodity stock on behalf of the clearing house. At the outset, the aforesaid explanation offered by the *Noticees* is not supported by any details such as the name & quantities of commodities purchased on behalf of the clearing house by utilising funds of the Exchange (NMCE) nor any justification has been provided as to why would a clearing house of a commodity exchange procure physical commodities and store them in CWC warehouse since it is the sellers who trade on the platform of NMCE are required to deposit their commodity stocks in the exchange accredited warehouse to meet their delivery obligations. The job of clearing house is to facilitate clearing & settlement of trades executed on the Exchange which included facilitating physical delivery of commodities by sellers to buyers. Therefore, it is beyond one's comprehension as to why would NMCE allow NOL to buy physical stocks of commodities by using exchange money

purportedly on behalf of the clearing house which is neither required nor it is permissible for an Exchange to get involved in procurement and hoarding of commodities in the exchange accredited warehouses. Therefore, the said purchase activity indulged in by NOL cannot be said to be a legitimate activity to justify those purchase transactions claimed to have been done on behalf of clearing house of NMCE. Further, there are no details as to what happened to the money received after liquidating such commodity stock that was claimed to have been purchased by the *Noticee no.1*. Notwithstanding the same, I observe that the aforesaid submissions are candid admission of the fact that there indeed was a debit balance against NOL on the date of allotment of shares to *Noticee no.1* and in the absence of any evidence to substantiate that the payment of application money was made before the shares were allotted, I observe that the charges that the allotment of shares to NOL was made without consideration and the same was financed by NMCE is established and such allotment of shares was not done in accordance with the applicable provisions of the Companies Act, 1956.

Allotment of 3,98,280 shares of NMCE to NOL on December 30, 2006:-

128. The last issue pertaining to allotment of shares is the allotment of 3,98,280 shares of NMCE to NOL on December 30, 2006. It has been stated in the SCN that on December 30, 2006, the Allotment Committee of the Board of NMCE was informed that NMCE has received application with share application money from NOL, based on which the aforesaid allotment was made. However, the share application money was realised in parts, i.e., INR 19,40,340 on December 19, 2006 and INR 40,33,860 on January 25, 2007. Further, on the date of realization of this application money, there existed a debit balance of INR 1,22,88,144 against NOL in the books of NMCE. Therefore, the said amount received as share application money from NOL was first required to be adjusted against the debit balance standing against NOL but as the same was not done, it has amounted to practically financing the allotment of NMCE shares to NOL by NMCE itself. In this connection, it has also come to my notice that out of the funds received by ATSPL from NMCE purportedly for software development an

amount of INR 1.75 Crore was passed on by ATSPL to NOL which was apparently utilised by NOL to make payments to NMCE against its debit balance of INR 1,22,88,114 standing in the books of NMCE as well as towards the share application money of INR 40,33,860. Such round tripping of money from NMCE via ATSPL and then NOL back to NMCE in the form of share application money (apart from repayment of debit balance) forms the basis of the finding that the allotment of 3,98,280 shares of NMCE to NOL were in fact financed by NMCE itself which, apart from being a fraudulent act committed by the *Noticees* was also in violation of the provisions of Companies Act, 1956.

129. I find the *Noticees* in their reply have attempted to portray that the aforesaid debit balance of NOL in the books of NMCE as determined by FMC during its inquiry was the result of combining the entries of the three running ledger accounts in the name of NOL in the books of NMCE. The *Noticees* have claimed that such a practice of clubbing entries of different ledger accounts is contrary to the accounting practice. However, such an argument is of no help to the *Noticees*. The *Noticees* have not pointed out any specific accounting standard which does not permit such clubbing of entries more so when all the three ledger accounts are maintained in the name of same entity (NOL) and as highlighted earlier, the *Noticees* themselves have marked the entries/outstanding amounts from one ledger account to the main ledger of NOL in the books of NMCE. Further, the explanation of the *Noticees* that cheques were received by NMCE on November 25, 2006, but were deposited only on December 19, 2006 and January 25, 2007 cannot be accepted since it was the *Noticee no. 2* only who was managing the operations of both NOL (issuer of cheque) and NMCE (recipient of cheque). Lastly, the *Noticees* have plainly denied the charges of round tripping of funds of NMCE via ATSPL to NOL and further from NOL to NMCE in form of application money without substantiating or justifying such funds transfers in any manner. Such an evasive denial is sufficient to show that there was no legitimate business transaction between NOL and ATSPL and there was no apparent commercial reason for ATSPL to transfer funds to NOL. Conclusively therefore, the amounts from the coffers of NMCE were first paid to ATSPL under the garb

of software development, and from there on, some amount was transferred to NOL, which was utilised by NOL to pay towards the consideration of shares of NMCE itself. However, on the date of such payment, NOL owed an amount of INR 1,22,88,114 to NMCE, which ought to have been first settled by NOL before using its funds (received from ATSPL) towards payment of application money. Furthermore, the Board of NMCE was never apprised about such allotment of shares presumably due to the aforesaid deficiencies and ill-intent involved in those transactions, therefore, the claim of the *Noticees* about the ratification of the said allotment by the Board by reflecting such event in the Annual Return and Annual accounts, does not hold any water. Under the circumstances, it is clear that the allotment of 3,98,280 shares of NMCE in favour of NOL was financed by NMCE itself by indulging in a manipulative scheme so as to fabricate the ratification of such allotment by the board by incorporating the same in the Annual accounts behind the back of the Board of NMCE and the Board of NMCE was hoodwinked in the entire process.

130. Apart from my aforesaid independent analysis and findings, I also observe that the Pipara Report [referred at para 60 (x) above] has also pointed out to the absence of actual payment received and payments received belatedly by NMCE towards the shares allotted by it to NOL. The said report, while categorically recording that there is an absence of Board Approval thereby suggesting falsification of records with respect to allotment of shares, has further recorded as follows:

"Apart from the above irregularities in the allotment of shares, it is found that the following shares subscribed by NOL of NMCEIL, are made out of the funds received from NMCEIL itself, which has been paid to ATS PL, under the guise of agreements pertaining to Development of Software, as discussed herein above, as is clear from the following table –

Date of Allotment	*Number of Shares*	*Total Amount (Rs.)*	*Actual Date of Receipt of Payment in Bank A/c of NMCEIL*	*Source of Such Money in the books of NOL*
10/04/2002	*2,50,000*	*2,5,00,000*	*26/04/2002 – Rs.*	

			4,00,000 *18/05/2002 – Rs. 21,00,000*	
19/01/2004	*19,74,900*	*1,97,49,000*	*No Actual Payment is received against this allotment, but running A/c was debited on 19/01/2004*	*Refer Note 1**
14/10/2006	*12,37,500*	*1,85,62,500*	*19/12/2006*	
30/12/2006	*3,98,280*	*59,74,200*	*19/12/2006 – Rs. 19,40,340* *25/01/2007 –* *Rs. 40,33,860*	*Payment of Rs. 40,33,860 is out of money received from ATSPL of Rs. 1.75 crore on the same date*

Note 1: The amount of 1.97 Crores includes credit by way of Journal of Rs. 99,70,973 from one A/c of NOL to Another A/c of NOL maintained in books of NMCEIL.*

Such credit of 99,70,973 was created to NOL by way of Pre-operative expenses of Rs. 74,45,240 and travelling expenses of Shree Kailash Gupta, Legal & Professional Charges and Other Expenses incurred by NOL of Rs. 13,10,789.

And other credit also pertains to preliminary expenses and credit for printing stationery etc. expenses.

Accordingly the entire credit of Rs. 99,70,973 is towards expenditure incurred by NOL on behalf of NMCEIL for which no supportive evidences are available and thus the allotment is made merely by a Journal Entry without actual receipt of money.

4) In addition, we found that as both ATSPL & NOL were related companies to Shree Kailash Gupta, therefore, there has been a transfer of Rs. 480.12 lakhs from ATSPL (amount received in the name of development of software from NMCE) to NOL & later these funds were used by NOL for purchase of shares of NMCE."

131. At the end of the foregoing factual analysis and discussions as supported by the findings of the Pipara Report, there remains no doubt that the allotment

of shares of NMCE to NOL on various occasions was done with numerous irregularities such as improper allotments without following the prescribed procedure, not obtaining approval of the Board of Directors, delayed payment of allotment money, falsification of records and purchase of as many as 29,32,680 shares of NMCE by NOL from the money belonging to NMCE itself, which lead me to an ostensible conclusion that NOL does not have any lawful right on such shares which were allotted to it without any consideration.

Appointment of Consultants:

132. *Noticee no. 2* while acting as MD of NMCE, had appointed 144 Consultants out of which, approval to engage only 11 Consultants have been found during the FMC enquiry. On the appointment of the remaining 133 Consultants, it is observed that an amount of INR 4.07 Crore has been spent. It was revealed that no approval was obtained from the Board of NMCE prior to engaging such Consultants and the process of identification of work, scope of work etc., has not been crystallised while appointing these consultants. Further, no records of any actual service rendered, or any reports submitted by such Consultants are made available. It is noted that NMCE had incurred huge costs (INR 36.46 Lakh) on expenses toward travel, entertainment etc., of Mr. N.K. Choubey, Ex-Chairman of NMCE even after he ceased to have any association with NMCE and there was nothing on record to show any verifiable service rendered by Mr. Choubey during the period of July 2008-February 2011. In view of the above, the SCN finds that two other Consultants, viz., Mr. Kalpen Shah and Mr. V.M. Mehrishi have aided the *Noticee no. 2* in his misdeeds and omissions. It is noted from the SCN that during the period of October 29, 2005 to December 01, 2010, an amount of INR 59 Lakh was paid to M/s V.M. Mehrishi & Associates. It has also been observed in the SCN that Mr. Mehrishi was one of the Directors of ATSPL, which has been used as a medium to siphon off funds from NCME.

133. In response to the aforesaid observations of the SCN, the *Noticees* have contended that it was well within the power of *Noticee no. 2* acting as MD of NMCE, as approved by the Board to appoint experienced persons as Consultants. In this regard, the *Noticees* have not disputed the findings pertaining

to the engagement of Consultants, however, have raised a feeble plea expressing their inability to defend the said findings on account of not having access to the records.

134. The *Noticees* while narrating the experience & expertise of Mr. V.M. Mehrishi (experience with Gujarat AgroIndustries Corporation) and of Mr. Nishikant Choubey (former MD of CWC), have tried to justify their engagement by contending that the salary pay-out to such experienced persons would have been multi-fold. I find that the said argument is patently misplaced and misconceived as admittedly it was the *Noticee no. 2* who has exercised his discretion unequivocally to engage such Consultants. There is no whisper of any Board Consultation or any discussion with Board members with respect to the need to engage such Consultants with details of the services expected to be rendered by such Consultants which would bring any value addition to the functioning of NMCE. It has been however submitted that the *Noticee no. 2* was at all times authorised to appoint Consultants and decide their remuneration. I observe that it is not the case of alleging absence of authority, rather a clear cut case of malfeasance on the part of *Noticee no. 2* resulting in abuse of authority by the *Noticee no.2*. I find that there are no details with any cogent evidence available in the records which would have given an indication that such Consultants have provided any valuable contribution to the functioning of the NMCE. The above claim of the *Noticee no. 2* about the expertise of those consultants engaged by him remains unfounded as no document or any other evidence has been produced to justify with specific reasons for engaging those Consultants in such large numbers. Having gone through the records, I find that the charge against the *Noticees* actually revolves around the issue of governance and misuse of power vested in the authority (*Noticee no.2* as the MD & EVC of NMCE). The *Noticee no. 2* in response to the above stated charge of misuse of power by engaging large number of consultants without any justification has merely attempted to justify that he was having the authority through Board to appoint Consultants. However, the *Noticee no. 2* has not made any attempt to even explain the necessity of engaging as many as 144 Consultants. Moreover, the *Noticee no. 2* has a

responsibility to explain as to why appointment of large number of Consultants were done unilaterally in an opaque manner without any justification as stated in the SCN. In the absence of any cogent explanation or justification, such an arbitrary exercise of discretion vested in him to appoint such a large number of Consultants without any reasons & justifications constrains me to come to a finding that the *Noticee no. 2* by such actions has caused substantial amounts of financial loss to the NMCE.

135. I note that the *Noticees* have in their defence, referred to the engagement of Ms. Shweta Mishra, (daughter of Mr. Anil Mishra) also as a Consultant and the fact admitted by Mr. Anil Mishra during the cross-examination stating that no approval of Board was taken to engage Ms. Mishra as a Consultant and further that she did attend the Board Meeting. By referring to the above appointment of Ms. Mishra the *Noticee no. 2* has argued that he was also well within his authority to engage such Consultants. In this regard, on a careful perusal of the entire statement recorded during cross examination of Mr. Anil Mishra, it is observed that Mr. Anil Mishra has explained the engagement of her daughter as a Consultant by stating that at the time of her engagement, she was already working as a recruiter with an American Multinational; that she had done some internship in Europe where she was paid Euro 2400 per month; that she was paid Consultancy fee equal to her existing remuneration; that she has executed myriad works for NMCE like developing employee referral policies, recruitment process, workforce planning, leave policy etc.; and that all such assignments executed by her have been properly documented in the records of NMCE. It has been stated by Mr. Mishra that she has also appeared before the Board of Directors of NMCE once so as to brief them about her work profile. It is noticed that there has been no aspersion from the *Noticees* about the details furnished by Mr. Anil Mishra regarding the job profile of Ms. Mishra or regarding the consultancy services that she is stated to have rendered to NMCE whereas, the *Noticees* have not been able to furnish any details with respect to the specific services rendered by those 144 Consultants engaged by *Noticee no. 2* as matter of justifying their engagement by him. The *Noticees* have also argued that FMC kept

a threshold of INR 2 Lakh as Consultancy fee to deliberately exclude the name of Ms. Shweta Mishra from the list of consultants engaged by NMCE. In this connection, I observe that there is no such list available in the records with respect to engagement of Consultants with any particular threshold level of payments made to them. The reference of payment of INR 2 Lakh in the SCN seems to be a general categorisation of payments apparently made with an attempt to highlight the fact that 88 one time payments made to the Consultants costed less than INR 2 Lakh each while 45 bigger payments made to the Consultants collectively amounted to INR 3.53 Crore. Moreover, in view of the detailed statement made by Mr. Anil Mishra elaborating various functions performed by Ms. Shweta Mishra at NMCE, the allegation of bias on the part of FMC is found to be unfounded and has been made with an attempt to create prejudice in the present proceedings. From the above discussions, it is evident that the *Noticee no. 2* has practically admitted the finding of SCN that there were irregularities committed in engagement of Consultants. Moreover, the *Noticee no.2* has grossly failed in justifying the engagement of even a single Consultant by presenting the detailed work profile or specific services rendered by the Consultant to NMCE whereas Mr. Anil Mishra has explained at great length in his statement, the details of the functions performed by Ms. Mishra as a Consultant in NMCE. Therefore, merely citing of another example of engagement of Consultant would not help the cause of *Noticee no. 2* to refute the charges made on him in the SCN. On the contrary, such a stand taken by *Noticee no. 2* to justify his afore-stated abuse of power & authority by merely drawing attention to another example of engagement of consultant, without making any effort to justify his own act of appointing 144 consultants for a small Commodity Exchange like NMCE further fortifies the charges of misuse of power, mis-management and commission of various malpractices at the cost of NMCE levelled against him in the SCN.

136. As stated above, the *Noticees* have tried to put forth various vague submissions to justify the acts of engaging 144 consultants for NMCE. There is no detail with respect to the consultancy services purportedly rendered by the

three specific persons named in the SCN viz., Mr. V.M. Mehrishi, Mr. Kalpen Shah and Mr. N.K. Choubey. The past experience of these persons as cited by the *Noticee* to justify their appointment as Consultants would not be adequate to certify if they have rendered any actual Consultancy services to NMCE, for which *Noticee no. 2* ought to have provided the details of such consultancy services rendered by them with documentary support, however, the *Noticee no. 2* has not been able to furnish even the basic details of such services, leave alone any documentary evidence to justify the engagement of these three Consultants .

137. Rather, there appears to be clear cut evidences to suggest that Mr. Mehrishi and Mr. Kalpen Shah were helping the *Noticee no. 2* in his misdeeds. In fact, Mr. Mehrishi, apart from being engaged as a consultant for NMCE, was also appointed as a Director in ATSPL, which (ATSPL) has already been found to have been used as a conduit to siphon off the funds of NMCE under the guise of software development. As regards Mr. Kalpen Shah, he is seen to be engaged in discussion with *Noticee no. 2* for the purpose of assisting in back dating of the agreements with ATSPL, as is evident from the email dated August 18, 2010 addressed by Mr. Kalpen Shah to *Noticee no.* 2 which *inter alia* reads as:

"*I had word with Mr. Rai and told that you have agreed for capitalisation.*

Issue now remains, who will sign agreement.. old agreements need to be modified. according to him, mishraji has apprehension of FMC Chairman, however, I told him clearly to ask mishraji that it will be necessary for him to sign, since it's not by design we are doing or asking him to sign but due to peculiar situation. To which even mr. rai agreed that at some point of time, mishraji have to admit the existence of agreement to FMC Chairman.

To my mind, his apprehension relates to old matters, more particularly with reference to Shetty report now since board and every one know about ATS…it will be necessary for him to sign to make agreements believable, that way you will not be directly held responsible.

…

My question, we must decide, whether we want ATS LLC to be part of agreement or not?

I think, we should remove ATS LLC…

Above all, we must work in a disciplined way to establish that ATS does not belongs to you.

Regards

Kalpen."

138. It is noted from the records that copy of the aforesaid email (alongwith other emails) was put before Mr. Kalpen Shah during recording of his statement under Oath (on June 18, 2011) at FMC and he had duly confirmed the authenticity of said emails by signing on such copies of those e-mails.

139. At this juncture, I observe that the transactions executed by NMCE with ATSPL and the *malafide* involved in the same need no further reiteration. As can be seen from the above quoted emails, Mr. Kalpen Shah is not only seen to be favouring the proposal for modifying the old agreements (getting them signed by Mr. Anil Mishra) but also is aware of the fact that the Board of NMCE knows about the dealings with ATSPL, because of which he was notably trying to provide inputs so as to protect the interest of Mr. Kailash Gupta by emphasising on the point to have a "*disciplined way to show that ATSPL doesn't belong to Mr. Gupta*". Apart from above, there is another email dated August 31, 2010 (also part of the acknowledged emails) wherein Mr. Kalpen Shah can be seen to be providing his inputs on the concerns regarding procurement of bills, quotation for approval note etc. It has already been observed and held in the earlier part of this order that the employees of NMCE were acting under the command and directions of Mr. Kailash Gupta and as the fact suggest, they were also being coerced to act as per the directions of Mr. Gupta, however, Mr. Kalpen who was a mere Consultant cannot claim that his aforesaid email conversations were made under any such coercion nor any such claim has been made on his behalf as well. It is also notable that during the present proceedings, the *Noticees* have given up their right to cross-examine Mr. Kalpen Shah for the reasons best known to them. Under the circumstances, and keeping in view the way the above noted Consultant engaged by the *Noticee no. 2* has conducted himself apparently to

subserve the interest of Mr. Gupta, I have no hesitation to hold that although Mr. Kalpen Shah was purportedly engaged as a Consultant to NMCE, there is nothing to show that he has rendered any Consultancy services to NMCE and rather has been found to be involved/indulged in aiding *Noticee no. 2* in committing the acts that have led to numerous violations of laws.

140. To sum up, I observe that the *Noticee no. 2* was authorised by the Board of NMCE to engage Consultants, a power which he clearly misused by engaging various persons without first identifying the needs for engaging those consultants; without documenting any of such engagements; without apprising the Board about these engagements for which there is no available record, and rather whatever records are available, they profoundly speak in support of the SCN as is observed demonstrating how a few of these Consultants have aided and guided the *Noticee no. 2* in connection with the violations committed by him.

Purchase of cars and other expenses:

141. The next charge noted in the SCN is the misappropriation of funds belonging to NMCE and the use of such funds on and for the family members and relatives of *Noticee no. 2* even though such relatives had no official connection with NMCE. The SCN quotes many such examples, which are briefly tabulated herein below:

Table no. 8

Sr. No.	Name	Amount	Details
1.	Ms. Anjana Gupta	19.20 Lakh	Foreign Travel, Purchase of phones and mobile phones, interior work on their Paldi flat, LCD TV and A.C. installed at Paldi flat.
2.	Shri Nanak Gupta	3.88 Lakh	On account of foreign travel, local travel, mobile phone etc.
3.	Shri Amit Gupta	1.38 Lakh	Foreign and local travel and mobile phone
4.	Pooja Gupta	2.03	Foreign travel, local travel and mobile phone

		Lakh	
5.	Shri Kailash Gupta	20.93 Lakh	Registering 3 cars purchased out of the Exchange funds in his own name instead of the Company's name
6.	Ms. Rekha Nanak Gupya, Ms Karishma Gupta, Ms Shakuntala Gupta, Mr Naresh Gupta, Mr. Kaushik Gaurav Verma, Mr Kunal Verma, Mr Milan Nanak Gupta etc		Reimbursement of their personal expenses
7.	Ms. Poonam Gupta	11.45 Lakh	Car purchased from the funds of the NMCE
8.	Shri Nanak Gupta	14.40 Lakh	Car purchased from the funds of the NMCE

142. It is noted that in their reply, the *Noticees* have plainly denied the aforesaid charge and have not even attempted to controvert the said finding of the SCN either by showing any kind of formal association of the family members with NMCE or in the alternative, by providing any other explanation in support of such denial. As can be noted from the aforesaid table, various expenses towards mobile phone, foreign travel, electronics items like LCD TV, interior work of flat etc., have been incurred from the funds that belonged to NMCE. I observe that even though these family members were not employed with NMCE or having any official association with it, still were able to extract funds for their personal expenses, which they did not deserve at all. It is further observed that an email dated January 03, 2009, was addressed by *Noticee no. 2* regarding resignation of Mr. Neeraj Gupta, AVP IT, NMCE to his family members like Mr. Amit Gupta and copy of said email was marked to Ms. Puja Gupta, Ms. Poonam Gupta and Mr. Nanak Gupta. I observe that undeniably when family members are being involved in discussion about resignation of a Senior Level employee and such family members are also involved in misappropriation of money belonging to NMCE for their personal benefits/expenses, the same raises serious doubt about

the governance and fairness in the management of NMCE giving rise to a perception in the market as rightly acknowledged by *Noticee no. 2* that NMCE was being run as "*Gupta Gupta and Company*".

143. The aforesaid charge also pertains to the misappropriation of funds as three cars were purchased from the funds of NMCE but were registered in the personal name of Mr. Kailash Gupta. The total cost of said cars was INR 20.93 Lakh and the details of said cars are: Chevrolet Optra GJ1 HG 3903, Hyundai Santro GJ1 HK 3212 and Hyundai I20 GJ1 KB 7460. One of the cars was being used by Mrs. Anjana Gupta (wife of *Noticee no. 2)*, while another was being used by Ms. Poonam Gupta (daughter of *Noticee no. 2)*. Another car which was registered in the name of NMCE was being used by Mr. Nanak Gupta, son of *Noticee no. 2*. All the expenses pertaining to insurance, petrol, maintenance, driver's salary etc., were being borne by NMCE. While Mrs. Anjana and Mr. Nanak were not having any formal association with NMCE at all, Ms. Poonam Gupta who was working as Vice President, was being given the benefit to enjoy the car belonging to NMCE and such a perk was not extended to any other employee of her stature.

144. In response to the above charges levelled in the SCN, the *Noticees* have contended that the costs of the said vehicles were duly reflected in the books and balance sheet of NMCE. It has also been contended that the said vehicles were *de facto* and *de jure* owned by NMCE and were being used for the purpose of NMCE's business. One cannot fathom as to how the wife and son of Managing Director of a company were carrying out the business activity of NMCE without any formal association with it. Thus, the said claim of the *Noticee no. 2* is found to be merely a bald assertion and there is no documentary evidence furnished to show as to how the vehicles which were purchased in the personal name of *Noticee no. 2* and used by his family members can be reflected in the books and balance sheet of NMCE and if that is the case, then it further reinforces the aforesaid charges and establishes the charge of muzzling of corporate governance where, a person sitting in the driving seat of a Managing Director abuses his dominant position and utilises the resources belonging to a corporate body to be

used and utilised by the family members of the said MD who have no direct association with the said corporate body. The *Noticees* have also cited the details of some vehicles which as per their claim, belonged to NOL/*Noticee no.1* but were being used by NMCE till the year 2007 and have claimed that the new cars were purchased in the name of *Noticee no. 2* to replace those vehicles. However, the said submission is again devoid of any documentary proofs like Board Meeting Minutes etc., and there is no supporting evidence to corroborate the aforesaid claim being made by the *Noticee no.2*, hence has to be discarded. Similarly, the claim made by the *Noticee no. 2* that it is a common practice followed by corporate houses to register vehicles in the names of individual promoter to save registration cost is also nothing but an ambiguous and frivolous assertion without any legal basis.

Miscellaneous

145. Moving on further, I note that the next set of charges pertain to the subversion of corporate governance in NMCE. The SCN alleges that in addition to systematically, continuously and criminally defrauding NMCE, *Noticee no. 2* as MD and later as Executive Vice Chairman has completely subverted the corporate governance at NMCE, bypassing the institutional structure of Board of Directors, Committees of Board and deliberations with Senior Executives etc. which normally symbolise good corporate processes and good governance practice. In addition to various findings and issues raised in the SCN which have already been discussed till now in this order demonstrating various aspects of corporate mismanagement and poor governance, some other issues and findings which also glaringly expose the shoddy governance in NMCE during the relevant period as brought out in the SCN are highlighted as under:

I. Bypassing institutional structure:

146. The factual narrations and deliberations made in the foregoing paragraphs of this order are replete with illustrations depicting the dictatorial manner in which the *Noticee no. 2* was managing the affairs of NMCE and the non-transparent & partisan manner in which the Exchange entered into commercial dealing with its related parties like ATSPL and its promoting company, i.e. NOL.

To briefly recall a few of such dealings, it is seen above that the senior employees of NMCE were coerced to work for other group companies such as NOL and ATSPL directly controlled (NOL) by *Noticee no. 2*; the shareholding of ATSPL was transferred to *benamidars* whilst the actual control of its functioning was retained with him/his family members; the reasonable process of engaging any vendor through competitive bidding process was bypassed and ATSPL was directly engaged and paid humongous amounts even though it lacked basic competence to deliver the desired software; the agreements with ATSPL were created only after making the huge payments to ATSPL so as to satisfy the queries of Audit committee; large amount of funds were paid to related parties without any justification and the shares of NMCE were allotted in favour of NOL without receiving the consideration or application money for the said shares etc. The level of control that *Noticee no. 2* was exerting over the affairs of the Exchange having no regard for the much needed process of discussion/approvals with the Senior Executive/Board Members, which a professionally run regulated Exchange was expected to follow for better management of the Exchange, is well evident from various deliberate actions and inactions noticed on the part of the *Noticee no. 2* in the discussions in the foregoing part of this order. The misconduct of the *Noticee no. 2* assumes further clarity from an email dated June 18, 2010 addressed to Ms. Poonam Gupta, in which the *Noticee no. 2* has candidly admitted that he cannot discuss all the issues of ATSPL with professionals in management and that they have to "select their own moves in the corporate games of chess".

147. Further, it is seen from records that there have been exchanges of emails between *Noticee no. 2* (in capacity of MD, NMCE) and Mr. Neeraj Gupta, (the then VP, IT, NMCE). Though the exact reason of the exchange of emails is not clear, however, the subject in one such email dated January 02, 2009 reads as: "Disconnect of my cabin". *Noticee no. 2* can be seen addressing to Mr. Neeraj as: "*You may agree or not but I have many times alerted you regarding your such a stubborn and arrogant attitude as I also cannot tolerate the same any more, which you should have somehow improved in starting of 1st day of the year.*"

148. The content of the afore-cited email indicates aspersions being made by Mr. Neeraj Gupta and *Noticee no. 2* on each other. Mr. Neeraj, who in fact is the nephew of *Noticee no. 2* and was working in NMCE as VP, IT, while criticizing the attitude of *Noticee no. 2* has gone on to say as: "*…you may also try to introspect your attitude towards others, and the reasons why our exchange has not grown professionally during all these years inspite of all your efforts. So many Senior people have come and gone and we are still there from where we started….I am sending my formal resignation….*"

149. It is also observed that instead of professionally handling his personal animosity with a senior official of the Exchange, *Noticee no. 2* later on converted such an internal matter of the Exchange into a family affair. As the MD of NMCE, the professional reaction to a senior official putting up his resignation should have been engaging in deliberations on the next course of action on the issue with other senior officials or board members within the company itself, however, within few minutes, *Noticee no. 2* forwarded the email of Mr. Neeraj Gupta to his son, Mr. Nanak Gupta for taking a view collectively apparently with other family members. Accordingly, subsequent emails of the same day (January 02, 2009) show discussion happening on the above issue between *Noticee no. 2,* Mr. Amit Gupta, Ms. Puja Gupta and Ms. Poona Gupta, who are all the family members of *Noticee no. 2.* Admittedly, only Ms. Poonam was having employment with NMCE, that too as VP, Business Development. There is no answer from the *Noticees* in the present proceedings as to whether the issue of resignation of VP, IT was ever discussed with any other professionals of NMCE. The *Noticees* have attempted to take shelter under the fact that Mr. Neeraj is the nephew of *Noticee no. 2* and therefore there is no harm in discussing his resignation with his family members. The said submission is clearly misconceived, since irrespective of his family relationship, it is the issue of deciding on the resignation tendered by a VP, IT from the employment of a company, on which there was no inherent official right vested in the family members of *Noticee no. 2* to take a decision. However, as the facts of the matter profoundly suggest, *Noticee no. 2* has never identified NMCE as a separate legal corporate entity being run by professionals and rather has apparently managed its affairs as a family run business and such an

attitude can also be evidently noticed from an email dated May 30, 2009, sent by the *Noticee no. 2* to Mr. Amit Gupta, wherein it has written as: "*They also know you are not an outsider but an equally promoter (sic) of NMCE by all means including son of MD*".

150. The *Noticees* have submitted copies of certain emails as Annexure "R" to their written reply dated April 05, 2021 in order to support their submission that *Noticee no. 2* was 'discussing with ATSPL' the manner in which software supplied to NMCE could be improved and was ideating on the ways for improvement of such software. The said emails have already been formed part of the chain of emails already discussed and relied upon in the present proceedings and I find there is nothing new in these emails to support the aforesaid contention. From the contents of the said emails, there does not appear any discussion with respect to improvement of software supplied by ATSPL nor any of the said emails has been addressed to any of the officials of ATSPL asking them to improvise the software in any manner. Rather, the contents of said emails exchanges once again indicate as to how Mr. Samar Dave was having close nexus with *Noticee no. 2*. The aforesaid inference/finding of mine comes out clear from the fact that when Mr. Neeraj informed the *Noticee no.2* that he will resign, *Noticee no. 2* proposed to his son Mr. Amit Gupta (with copies marked to his two daughters viz., Ms. Puja Gupta and Ms. Poonam Gupta) as: "*We will now need Samar Dave to take over at once as CTO NMCE or CTO designate from ATS*". The next email issued by *Noticee no. 2* after a few hours of receiving the resignation email from Mr. Neeraj (on January 03, 2009 at 00:17 pm) was marked to all the aforesaid persons as well as to Mr. Nanak Gupta also. The relevant portion of the said email is reproduced hereunder:

"*In domain Samar or Vijay may be able to pick up very fast. You may talk to Bhavit to support Samar and Vijay in case of need… As a resort in case Neeraj opplogise (sic) now and want to stay, let Samar or Vijay be put above him. ….*" . Thus, in the aforesaid email correspondences of *Noticee no. 2* nowhere he discusses about any parameters for improvement of any software purported to have been supplied by ATSPL and rather has got busy discussing with his family members about replacing Mr.

Neeraj Gupta with a substitute official to look after IT Department in NMCE. Apart from the above, there are also other emails on record like the email of May 30, 2010 wherein *Noticee no. 2* has admitted that in seven years, they have not been able to find out a single resource for ATS as a manager. Similarly, in another chain of emails dated March 25-27, 2010, *Noticee no. 2* indicates that the staff of ATSPL was not having any work and has suggested to Mr. Amit Gupta as: "*It is not all difficult to give responsibilities in shifts to ATS resources which is 5 on role of ATS directly since they have no work.*"

151. The aforesaid email sent by *Noticee no. 2* and the findings and detailed observations earlier made in this order about the lack of requisite expertise or resources of ATSPL collectively reinforce the fact that ATSPL was not having any competence to develop any kind of software for NMCE. The payments made under the guise of software development have been rather stealthily used to fund the purchase of shares of NMCE itself, in the name of *Noticee no. 1*, for which detailed observations have already been recorded in preceding portion of this order. Further, it has also been found and discussed how some funds which were routed through ATSPL have been utilised for the purpose of Market Making activity in Commodity Derivatives Market, i.e., an activity that was not permissible at that time by the Regulator (FMC), hence any such deployment of funds by surreptitiously routing it through ATSPL in the name of software development was not only illegal but also constituted a fraud by a regulated commodity exchange under the extant regulations. The aforesaid said chain of emails thus indicates that an attempt to develop a market making module was being made under the directions of *Noticee no. 2*. The claim that the money paid from ATSPL to NOL and other trading members came back to NMCE as turnover charges is again an admission on the part of the *Noticees* about running an illegal market making scheme by involving various brokers. At the same time his claim that the money paid to trading members through ATSPL for market making returned back in the form of turnover fees, not only merely remains a claim unsubstantiated by any supporting facts or calculations but also can no way be accepted as a valid reason to justify their action of secretly running a market

making scheme through the conduit of ATSPL. Having already paid huge sums to ATSPL for implementing marker making or transferring funds to *Noticee no.1*(NOL) to acquire further stakes in NMCE, the *Noticee no. 2* was rather seen coercing employees of NMCE to create and sign backdated agreements with ATSPL so as to regularize the afore discussed payments already made to ATSPL for various purposes other than for any software development. Under the circumstances, the transactions executed with ATSPL were manifestly hollow, specious and loathed with criminal intent, so much so that it was deliberated between *Noticee no. 2* and his family member to windup the operations of ATSPL before the underlying malfeasance gets exposed.

152. With respect to the incompetence of ATSPL and the finding that it was in fact Mantissa, which had developed/maintained a software for NMCE, *Noticees* have contended that Mr. Anand Shah (of Mantissa) and Mr. Neeraj were mere diploma holders and it was beyond their competence to use java independently. However, during his cross examination, Mr. Anand Shah has given a detailed account of the process with respect to how the software was developed by Mantissa for NMCE. The relevant extract of the question put to Mr. Anand and the response thereto as recorded during the cross examination, is extracted hereunder:

"Q.22 How did Mantissa Infotech Pvt. Ltd. proceed to develop the software for NMCE?

Ans. As and when any need of the software arises, respective users would convey it to Mr. Neeraj Gupta, VP(IT) of NMCE first. After the go ahead from Mr. Neeraj Gupta, I myself along with my team member would discuss the business requirement in detail with the respective users. Once the requirement capturing stage is over, we used to design the system on paper. The design of the system includes design of the user interface, the database, etc. Once the application designing is completed, it was pushed to coding stage. During the coding stage, the software application was given to respective users for unit testing and bugs reported by users from unit testing were corrected. Once the entire application coding / development is completed, it was given to respective users for integration testing. On the successful completion of integration testing, the software application used to get deployed in the production environment. This was the process

generally followed for software development at NMCE. We also used to keep Mr. Neeraj Gupta updated / involved during the process."

153. Furthermore, the contentions of the *Noticees* in support of their claim of software being developed by ATSPL for NMCE are demolished by the fact that while the name of the software that was quoted as a project assigned to ATSPL has been christened as 'CFTS Software', as stated by Mr. Neeraj Gupta in his statement recorded before FMC on April 29, 2011, the so said CFTS was having performance related issue and was not implemented.

Abetment of criminal acts by family members and relatives of Noticee no. 2

154. It is noted from the SCN that in the wake of inquiry being conducted by FMC into the affairs of NMCE, there was an attempt to enter into the premises of NMCE so as to sabotage the IT and software systems during the intervening night of February 21-22, 2011. The said attempt was organised and planned by Ms. Poonam Gupta with the help of her husband Mr. Kaushik Gaurav Verma, Mr. Suneil Jain (employee of NMCE), Mr. Vishal (professional hacker) and Mr. Shekar Singh (who had arranged the hacker for Ms. Poonam). As per the messages sent by Ms. Poonam to Mr. Neeraj, the attempt was made to disable the exchange IT system for deleting inconvenient transaction trails about which she explains her intention as: "*didn't know how to help papa in all this entire crisis*". In this respect, *Noticee no. 2* had confessed about the said attempt and had sought forgiveness for his daughter's above act from the Board of Directors in the meeting held on February 26, 2011. Admittedly, there is no denial to the said charges in the present proceedings nor the contents of the aforesaid message have been disputed. I observe that the *Noticees* have merely claimed that neither any loss has been caused to NMCE nor any data compromise took place due to the said event. I am of considered view that such a serious act with clear *malfide* intent is another evidence of how a recognised & regulated national commodity derivatives exchange was being treated as the personal property of the family of *Noticee no. 2,* so much so that the daughter of *Noticee no. 2* dared to attempt to trespass the security system of a public utility financial institution and a national

multi-commodity exchange like NMCE to sabotage its IT system, with a motive to clear the tracks of all the illicit transactions and other misdeeds committed by the *Noticees* which need no reiteration at this stage. The *Noticees* have merely rested their case by mainly stating that no "actual loss" was caused by such a concerted effort to breach and tamper with the systems of NMCE by using a professional hacker. In no reasonable terms, such a criminal attempt of trespassing the property of a public limited company which was engaged in a sensitive business of a commodity trading platform under the recognition granted under FCRA, can ever be considered venial to be condoned nor the absence of any actual loss, if any, can be considered as a mitigating factor to condone such an act that was committed to help the *Noticee no.2* by his daughter. Therefore, one can arrive at a finding in the totality of the circumstances that *Noticee no. 2* is guilty of the abetment of the said crime as stated above.

155. I have already held as to how the margin account of NMCE which ought to have been strictly used for the purposes of collecting margin from the members to be used for settling & clearing of their trades, was misused to make payments to ATSPL and NOL. Given the crucial importance and the sensitivity attached to the maintenance of a margin account in a recognised commodity derivatives exchange as part of the critical risk management system of the exchange, by misusing the funds of margin account for transferring funds out to outside entities, I find the significance & sensitivity of the margin account was given a complete disregard by the *Noticees* thereby endangering the risk management system of NMCE. Such a blatant act of compromising the risk management system of the exchange by siphoning off funds from the margin account itself that was so critically connected to the very functioning of NMCE as an exchange, speaks volumes about the unprofessional approach of running NMCE as a private concern of *Noticee no. 2*. By such an act, *Noticee no. 2* being MD of NMCE has not only clearly failed to discharge his duties as the custodian of the funds belonging to the members of NMCE but also has put the functioning of the exchange into jeopardy.

156. The SCN also states that *Noticee no. 2* had engaged in trading in rubber in the physical market through *Noticee no. 1* and the said act was in violation of condition of demutualisation on the basis of which recognition was granted to NMCE as a national multi-commodity exchange. It has been contended in reply that the said act was done with a view to promote the development of and to facilitate convergence of rubber future contract prices with the spot prices. I have considered the said submission and I observe that it is beyond comprehension as to how trades by a single entity would have led to development of the spot market of rubber and as to how such trades would lead to convergence of future prices and spot prices. On the other hand, when the MD of a Future Commodities Exchange indulges in physical trading of commodity through his separately owned entity on which the exchange is already running a futures contract, apart from involving a gross conflict of interest, such an act of operating in physical market amounted to an act of influencing the spot price of such a commodity which was not the job of the *Noticees* but was a function of demand and supply factors of the market. The *Noticees* were running a recognised pan India electronic anonymous trading platform for commodities which was expected to be neutral to the price of any commodities and such an exchange and its promoters or related parties should not have any trading interest in any commodity. However, in a flagrant display of conflict of interest, the *Noticees* have admittedly been involved in trading in and in influencing the spot prices of rubber on which they were running a future contract in the exchange platform thereby exposing the fact that the management of exchange, by their trading activities in commodities were clearly diluting the aspect/condition of demutualisation of the exchange.

157. I must recall here that the present proceedings are a fallout of the order dated November 27, 2020 of the Hon'ble Supreme Court, vide which the matter has been remitted to SEBI for passing an order afresh. However, in discharging the said duty, I cannot lose sight of the fact that the original order dated July 23, 2011 passed by FMC on the same set of facts & charges contained various directions to NMCE, as reproduced below:

i. *The NMCE is directed to place before the Board of Directors the evidence regarding the irregularities in the allotment of shares of NMCE to NOL for convening an extra-ordinary meeting of the General Body of the NMCE to consider passing a resolution to authorize the Exchange to refer the matter to the appropriate authorities under the Companies Act, 1956 for cancellation of the irregular allotment of 29,32,280 shares to the NOL and any other action as provided under the Companies Act, 1956; Needless to say, the impugned 29,32,280 shares presently held by NOL will not have voting rights.*

ii. *The NMCE is directed to take appropriate legal action against Shri Kailash Ramkishan Gupta and Arrow Total Solution Pvt. Ltd. Ahmedabad to recover the wrongful and illegal over-payment of Rs. 28.80 crore to Arrow Total Solution Pvt. Ltd. out of the total payment of Rs. 29.47 crore made to it.*

iii. *The NMCE is directed to take appropriate legal action to recover the wrongful and illegal payment of Rs 2.47 crore made to Kushal Enterprises, Ahmedabad.*

iv. *The NMCE is directed to initiate legal proceedings to recover an amount of Rs. 3.53 crore being the substantial payments made in respect of 56 consultancies (out of total of the 144 consultancies) made over the years without proper authorization and without following the due process. In particular, legal action may be initiated for recovering the wrongful and unauthorized payment of Rs. 59 lakhs to M/s V. M. Mehrish & Associates and Rs. 36.46 lakh from Shri N. K. Choubey and/or Shri Kailash Gupta who caused these payments to be made.*

v. *The NMCE is directed to initiate legal proceedings to recover from Shri Kailash Gupta an amount of Rs. 20.93 lakh misappropriated by him by registering 3 cars purchased out of the Exchange funds in his own name instead of in the name of NMCE.*

vi. *The NMCE is directed to calculate the expenditure incurred on the vehicles provided to Shri Kailash Gupta's family members not connected with the affairs of the Exchange, by way of petrol/diesel, maintenance, depreciation and driver's salary and recover the*

same from Shri Kailash Gupta. The vehicles must also be recovered and restored to the Exchange, if necessary, with the help of the police authorities.

vii. *The NMCE is directed to recover from Shri Kailash Gupta all the monies reimbursed to his family members for their personal expenses including travel expenses.*

viii. *The NMCE is directed to immediately file criminal cases against Shri Kailash Gupta for his various criminal acts of mission and commission elaborated in this order involving embezzlement of NMCE funds, unauthorized and illegal payments to ATSPL to the tune of Rs. 28.80 crore for non-existent software development and software services, misappropriation of NMCE assets, frauds, fabrication of records and ten false agreements and tampering with records.*

ix. *The NMCE is directed to immediately file a FIR against Mr. Kailash Gupta who has all along been in effective control of ATSPL for perpetrating a fraud on NMCE and claiming payments for non-existed software development and software service, thereby causing it a wrongful loss of at least Rs. 28.80 crore. The four transferee benami shareholders of ATSPL may be made the co-accused.*

x. *The Enforcement Division of the Commission is directed to initiate legal action under the relevant sections of the IPC against Shri Kailash Gupta for causing falsification, fabrication and forgery of ten false agreements between the NMCE with Arrow Total Solutions LLC/Arrow Total Solution Pvt. Ltd. and compelling Exchange Executives to sign them, under duress, and for failing to furnish records requisitioned by the Commission in violation of Section 20 (a) (i) and Section 20 (a) (ii) of the F. C. (R) Act, 1952.*

xi. *The NMCE is directed to initiate an enquiry whether there is evidence of violation of the provisions of the FEMA in making payment to Kushal Enterprises, Ahmedabad against the claim of ATSLLC, USA in the books of the NMCE, and if there is such evidence, refer the matter to the Enforcement Directorate for appropriate action under the FEMA.*

xii. The NMCE is directed to refer to the Board of Directors of the Exchange a copy of this order and the statement of Shri Bharat Shah, Partner of M/s Shah and Dalal, Chartered Accountants, who were the Statutory Auditors for NMCE since the financial year 2004-05 till 2009-10 and also Statutory Auditors for Neptune Overseas, Neptune World Trade and ATSPL, made during the enquiry conducted by FMC. The Board of the NMCE may consider referring the case to the Institute of Chartered Accountants, the self-regulatory body of the Chartered Accountants in India, for appropriate disciplinary action against the Chartered Accountant for negligence, dereliction of duty and lack of professional integrity in not noticing or bringing to the notice of the Board of the Exchange or to the FMC the conflict of interest involved in the dealings of the NMCE with the ATSLLC/ATSPL and NOL.

xiii. The NMCE is directed to review all the consultancies and discontinue, wherever not yet discontinued, all the consultancies which were granted without following transparent arms' length competitive bidding process or without due authorization from the Board of the Exchange or relevant committee of the Board, if any. The NMCE would be free to retain any of the consultancies after obtaining ex-post facto authorization from the appropriate authority.

xiv. The NMCE is directed to immediately file an FIR, if not already filed, against Ms Poonam Gupta nee Verma, her husband Shri Kaushik Gaurav Verma, the then Exchange Employee Shri Suneil Jain, the professional hacker Shri Vishal and Shri Shekhar Singh, Employee of M/s Tarmac Affairs, P R Agency of the NMCE for common conspiracy and illegal trespassing in to the Exchange premises late night on 21st -22nd February, 2011 and making a systematic attempt at sabotaging the IIT and software systems of the Exchange."

158. The records before me suggest that in pursuance of the aforesaid directions passed by FMC, various enforcement actions both civil and criminal in nature got initiated by NMCE which have also been noted in the judgment dated November 27, 2020 of the Hon'ble Supreme Court of India. The Hon'ble Supreme Court, while remanding the matter to SEBI has observed *inter alia* as:

"…*The effect of the aforesaid direction is that the order of the FMC dated 23.7.2011 has been set aside and a fresh order has to be passed. The different proceedings initiated, still pending almost at a nascent stage, are in pursuance of that order. The natural consequence, thus, would be that those proceedings would have to be kept in abeyance for the time being, till a view is taken by SEBI in pursuance of the directions passed by this order and would have to abide by the decision taken by the SEBI or in appeal arising therefrom….".*

159. From a reading of the directions passed by FMC vide its order dated July 23, 2011 and the aforesaid observations of the Hon'ble Supreme Court, I note that various actions have already been initiated by NMCE including setting the criminal law in motion. Thus, as a consequence to various steps taken by NMCE to comply with the directions issued by FMC, other agencies *inter alia*, the Gujarat State Police and Enforcement Directorate have also initiated various criminal actions against the *Noticees* which are now pending at different stages of their respective proceedings. However, I note that in terms of the aforesaid directions passed by the Hon'ble Supreme Court of India, the said proceedings have been kept in abeyance till the completion/disposal of the present proceedings. Notwithstanding the fact that those proceedings initiated by different Enforcement Agencies have been kept in abeyance in terms of the order of the Hon'ble Apex Court, with respect to the merits of the directions issued by the erstwhile Regulator of NMCE, i.e., FMC as have been reproduced at paragraph no. 157 above, I am constrained to observe that the facts and evidences as well as supporting documents based on which FMC had issued those directions to NMCE to initiate a number of administrative and legal actions against the *Noticees,* remained *pari materia* the same facts, evidences and supporting documents on which the present proceedings have been anchored, and the present order is being issued relying upon the very same facts and evidences which were in the forefront of the Regulator, when FMC passed its order dated July 23, 2011 against the *Noticees*. The *Noticees,* despite making their best efforts to counter the findings of the SCN and the evidences on the strength of which FMC had passed its order and even after getting adequate opportunities during the present proceedings, have not been able to, either rebut any of those findings

or demolish any of the evidences which were relied upon by FMC in its order. Under the circumstances, in my view, the directions issued by FMC at para no. 34 of its order dated July 23, 2011 still continues to hold on to their grounds on their own merit and substance, based on strong factual and evidentiary support. Hence, the proceedings initiated by different agencies against the *Noticees* pursuant to the actions taken by NMCE in compliance with the order and directions of FMC, deserve to be continued against the *Noticees*.

160. Further, all the aforesaid acts of misdeeds and misconduct that have been committed by the *Noticees* resulting in siphoning off & misappropriation of funds of NMCE towards different illicit purposes such as fictitious software development by ATSPL, market making, share allotment to *Noticee no.1* without consideration, illegal payment to M/s Kushal Enterprises, payments to large number of Consultants in a fraudulent manner, misusing funds for personal cars & other privileges etc., as discussed elaborately in the foregoing parts of the present order, strongly call for appropriate preventive and remedial measures both civil and criminal to deal with the flagrant violations and illegalities caused by the *Noticees* while managing the affairs of NMCE.

161. I have already held earlier as to how, the *Noticee no. 2* has not been able to furnish the necessary details regarding the pre-operative expenses of INR 100.26 Lakh purportedly claimed to have been spent by *Noticee no. 1* on behalf of NMCE. It should be noted that the enquiry that was being conducted by FMC as a statutory regulator under the FCRA was a statutory enquiry and *Noticee no.2,* being at the helm of affairs of NMCE as well as that of NOL during the relevant period was under a bounden obligation to cooperate with the enquiry proceedings and to furnish the complete, true and correct information to the regulator. However, no such information was furnished with respect to the so called pre-operative expenses of INR 100.26 Lakh claimed to have been incurred by NOL on behalf of NMCE against which the shares of NMCE were allotted to NOL. I have already discussed at length and observed in the preceding paragraphs of this order that the *Noticee no. 2* had deliberately and apparently in a pre-mediated manner had engaged in siphoning off large amounts of money

from NMCE to ATSPL under the garb of software development and have pointed out how large sums of those amounts received in the accounts of ATSPL were also further transferred onwards to different entities under the pretext of various illicit purposes/expenditure. The claim of such highly expensive software worth of more than INR 29 Crore having been developed by ATSPL remained unverifiable and unproved on the face of strong suspicion based on oral depositions as well as documentary evidences available on records that belie such a claim. Further, while FMC was conducting its inquiry in the present matter, *Noticee no. 2* being the MD/EVC of NMCE during the relevant period when the impugned illicit transactions and deals were taking place, was under a statutory obligation to provide at least those information/documents which per his own belief, the *Noticee no. 2* considered to be true. However, on the contrary and apparently to cover up the traces of fund diversion to ATSPL, forged and concocted documents were furnished during the inquiry.

162. Under the circumstances, as the *Noticee no. 2* furnished the back dated agreements with ATSPL knowing very well that those agreements were false in their material particulars and were created only for the purpose of regularising the payments already made to ATSPL without any board process or due procedure, it can be certainly held that the *Noticee no.2* has committed an offence under Section 20 (a) (i) of FCRA and further, by his failure to provide the supporting documents pertaining to pre-operative expenses without any reasonable cause, *Noticee no. 2* has committed an offence under Section 20 (a) (ii) of FCRA.

163. To sum up the saga of the entire proceedings, I observe that the present case is not a case built upon mere inferences drawn on preponderance of probability or based on any conjectures & surmises, but rather it's a case where, the findings and charges against the *Noticees* are deeply rooted in the hard facts pertaining to various transactions entered into by or at the behest of the *Noticees* while managing the affairs of NMCE. These facts and transactions are also strongly corroborated by a good number of witnesses who have been working with or associated with NMCE or with the *Noticees* during the relevant period of time, during their depositions both before FMC and before me in course of the

cross-examinations and are also substantiated by a host of documentary evidences including the confessional emails wherein *Noticee no. 2* can be seen himself talking about the way he was controlling NMCE and ATSPL and how he persuaded his employees to create and sign backdated agreements. The incompetence and empty claim of ATSPL to develop any software for NMCE is proven by the facts that it did not possess even an email id, website, Service Tax number, or any other past or current customer to showcase its work except for NMCE whose promoter as well as MD was the father/husband of promoters of ATSPL. Even the office of ATSPL could not be located on visit by the inquiry team of FMC. As already demonstrated and held in the early part of this order, the shareholding of ATSPL was transferred from the family members of *Noticee no. 2* in favour of some *benamidar* shareholders and the new Directors were appointed who practically were acting as pawns under the control of *Noticee no. 2*. Strangely also, one of such directors who was sitting in USA has claimed to have contributed towards software development by talking to other staff over phone calls. Backdated agreements were created under a pre-planned manner to hoodwink the authorities and audit committee so as to justify the funds already paid to ATSPL, whereas such funds were in fact used for other purposes including the activity of market making in the commodity derivatives market, knowing well that market making was not a permitted activity during the relevant point of time. The entire scheme of keeping both NMCE and ATSPL under close control of the *Noticee no. 2* and his family members, notwithstanding the fact that NMCE being a Recognised National Commodity Derivatives Exchange deserved to be well governed and professionally managed, is accentuated by the suggestion from the family members of *Noticee no. 2* to wind up ATSPL as they felt threatened by the possibility of their fraud coming to the fore. The fictitious credit entries of pre-operative expenditure in the running account with NOL and the consequential allotment of shares of NMCE against those non-existent credit entries and corresponding amounts, is also another example of how, every deceptive effort was made towards the personal yet unlawful enrichment of the *Noticees*. The rights over the properties and infrastructure of NMCE were exercised by the *Noticees* and their family members in a manner that rendered

NMCE look like a family owned company and not a professionally run or board governed company which is exemplified by not only by the misuse of the office cars of the exchange as personal cars by the family members, but also by the aforementioned daring attempt by the daughter of *Noticee no.2* to illegally trespass and sabotage the IT infrastructure so as to destroy the evidence trail from the records & accounting systems of NMCE. In the process of running a nation-wide Recognised Commodities Futures Exchange, the employees of NMCE were coerced to do illegal things like signing backdated agreements and releasing payments on the directions of *Noticee no. 2* without any legitimate purpose etc., else they would have lost their employment. During the course of enquiry conducted by FMC and the cross examination proceedings conducted before me under the present proceedings, the witnesses largely deposed, reiterated and corroborated almost all the charges levelled in the SCN which are also supported by the documentary evidences. The explanations offered and arguments advanced by the *Noticees* to rebut various charges made in the SCN suffered from glaring infirmities, inconsistencies and various inherent contradictions which can barely stand on their grounds on the face of the witnesses re-affirming during cross-examinations their statements made before FMC against the *Noticees* which are further corroborated by documents including email conversations etc., available on the records. On the whole, the *Noticee no. 2* who has claimed to have created NMCE by putting in his hard efforts, is unfortunately also seen to have entered into a Faustian Bargain for the sole motive to enrich himself and his family members at the cost of the same entity which he had set up as a nation-wide Commodity Exchange as early as in 2002. As per his own admission, he played a game of corporate chess by picking up the players selectively and running NMCE as Gupta and Gupta Company.

164. In the light of the foregoing discussions and my findings & observations on various issues raised against the *Noticees* in the SCN based on appreciation of factual details of the case, I am constrained to hold that the *Noticees* are guilty of abusing their executive and controlling position in the affairs of management of NMCE of which *Noticee no. 2* was the Managing Director and then became

Executive Vice Chairman, in course of which by committing various fraudulent acts, they have caused illegal monetary benefits to the firms and companies controlled by/connected with them or their close relatives at the expense of NMCE. I am convinced that there are undeniably substantial and strong evidences on records which lead to an unassailable conclusion that the *Noticees,* by indulging in various acts of illegality and impropriety and by their fraudulent conduct in managing the affairs of NMCE as have been clearly delineated issue wise in this order, cannot be held to be "fit and proper" who possess any general reputation, character, fairness, honesty and integrity for the purpose being eligible to hold shares of a Commodities Future Exchange recognised by a regulator under FCRA 1952 (now SCRA, 1956) beyond a threshold limit of shareholding in respect of which a shareholder has to be fit and proper to hold such shareholding in terms of the extant applicable guidelines issued by FMC. Accordingly, for all the reasons detailed out in the present order in all the preceding paragraphs, and in the public interest, I, in powers conferred on me under Section 11 (1), 11 (2) (j), 11(4), 11B and Section 19 of SEBI Act, 1992 read with Section 12A of Securities Contracts (Regulation) Act, 1956 and read with Section 4 (b) and 29A of FCRA, pass the following directions:

i. The *Noticees* are declared not "fit and proper person" in terms of the applicable Guidelines dated July 29, 2009 on Equity Structure of Nationwide Multi-Commodity Exchanges after five years of operation, as amended from time to time by FMC.
ii. *Noticee no. 2* is not a "fit and proper person" to hold any position in the management and Board of any association/Commodities Exchange recognised or registered by Government of India/FMC/SEBI.
iii. The *Noticees* shall not directly and through any entity controlled by them (either directly or indirectly), hold any shares in any Association/Commodities Exchange recognised or registered by Government of India/FMC/SEBI in excess of the 2% of total issued capital of such Association/Exchange. The *Noticees* shall bring down their holding in ICEX or any other recognised Association/Commodities

Exchange to 2% or less within a period of three months from the date of this order.

165. Apart from the afore-stated directions, keeping in view my findings recorded with respect to the aforesaid various fraudulent acts of omissions and commissions on the part of the *Noticees* resulting in diversion and misappropriation of funds from NMCE as well as commission of series of irregularities thereby causing erosion of governance at NMCE bearing serious implications on various other enactments as stated in the SCN, I hold that, the directions issued by the erstwhile regulator, FMC to NMCE that have been reproduced at para no. 157, shall be construed to be the directions being issued in the instant proceedings as well to NMCE (now merged with ICEX), and accordingly, NMCE (now merged with ICEX), is hereby directed to act upon those directions and take all the possible steps in compliance with the said directions. It is also directed that the proceedings that have already been commenced by NMCE pursuant to the directions of erstwhile Regulator FMC, as reproduced at para no. 157 of this order, shall be proceeded with, in accordance with law.

166. This order shall come into force with immediate effect.

167. A copy of this order shall be served upon the *Noticees* and all the recognised stock exchanges including ICEX.

-Sd-

DATE: NOVEMBER 17, 2021 **S.K.MOHANTY**

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA