


Sahara Guilty! What Next?

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It is inconceivable that a group can raise Rs 24,000 cr from over 2 cr investors without SEBI regulating of the issue. And so it's no surprise that the Securities Appellate Tribunal ruled that Sahara's mega fund raising comes well within SEBI's jurisdiction. But in doing so, has SAT entrusted SEBI with more powers over unlisted companies than was envisaged in legislation. Payaswini Upadhyay finds out.

Rs 26,000 crore in 6 weeks- that's how much the two Sahara group companies need to pay its 2 crore OFCD investors- that's because SAT has ruled that these optionally fully convertible debentures issued by the unlisted Sahara Housing Investment Corporation and Sahara India Real Estate Corporation are

Securities as defined under Section 2h of the SCRA

==> The issue was public issue requiring mandatory listing under Section 73 of the Companies Act.

==> And Section 11, 11A and 11B of the SEBI Act gives the market regulator complete jurisdiction over these OFCDs.

==> Despite SAT's adverse ruling, Sahara still has some fight left in it.

Satish Kishanchandani,
Co-founding Partner, DSK Legal
Counsel for Sahara

"The next course of action would be to file an appeal in the Supreme Court. Companies are issuing ESOPs to more than 50 employees, would that become a public issue then?"

There has been no investor grievance. So if the question comes up of investor protection, the question should also be addressed whether there has been an investor grievance."

These are some of the arguments that the two Sahara group companies are expected to make in the apex court. But these are among some of the larger questions that emanate out of this order by SAT.

For instance experts say SAT's order confounds the applicability of the Companies Act in cases involving unlisted companies. There is also some confusion regarding what makes a security marketable and what is a debenture. But most importantly

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lawyers ask if SAT's order has given SEBI unfettered powers over fund raising by unlisted companies.

Vikramaditya Khanna
Professor of Law, University of Michigan

"While one may agree that the outcome in itself may be very desirable and it makes a great deal of sense, the actual reasoning leaves us with some gray areas where you can imagine practitioners and business people finding themselves a little lost."

Let's start with the first gray area - To support that its OFCDs are not securities, Sahara relied on the Companies Act definition. But SAT said the SEBI Act is a self contained code and any reference to the Companies Act is not legally tenable.

But when it came to defining 'public issue', SAT itself referred to the Companies Act - drawing the definition from Section 67 (3).

Vyapak Desai
Head-Capital Markets
Nishith Desai Associates

"What SAT has in its interpretation done is somewhere said that you cannot go to Companies Act for help when you want to interpret certain definitions which may be not present or incomplete in a particular situation which is something that can lead to several debates going forward because at the end of the day, everything goes hand in hand and you generally fall back on those laws when there is a Corporate law and Securities law issue."

The second interpretation that experts are concerned about is the way SAT has defined 'marketable securities'. As per SAT, any product capable of being bought and sold in the market is a marketable security. There need not be an actual sale. But under the Stamp Act marketable security means 'a security of such a description as to be capable of being sold in any stock market in India....'

Vyapak Desai
Head-Capital Markets
Nishith Desai Associates

"Anything which can be bought or sold is marketable would obviously throw few questions and its implications and consequences under other Corporate laws and economic laws like Stamp Acts and other similar Acts. This word marketable is used in several contexts and having different interpretations. So now one would question if anything or everything which can be bought or sold is marketable, then what kind of securities would fall under the category of not-marketable and what would be the purpose of the word marketable or like nature in the definition of securities."

JN Gupta
Former Executive Director, SEBI

"I think SAT has not laid down any condition for this. What SAT has clarified that the arguments which were made by Sahara in their application that since these OFCDs are not marketable, they are not securities. What SAT has demonstrated that these OFCDs are indeed marketable securities. Apart from that, SAT has not laid down any condition."

The way the nomenclature of these marketable securities has been looked at by SAT seems to have added to the confusion!

Debenture is not defined by SEBI. Sahara had argued that its Optionally fully convertible debentures were in fact convertible bonds and so 28(1)(b) of the SCRA and the provisions relating to listing would not apply to them. SAT held that Sahara's OFCDs are debentures- one because the company had named them so and also because they shared characteristics with other debentures in the securities markets. But the order misses a definition or description of 'debenture'

Vyapak Desai
Head-Capital Markets
Nishith Desai Associates

"My view would be that one could have easily issued such an instrument with same terms and conditions by saying it's an optionally fully convertible bond."

Vikramaditya Khanna
Professor of Law, University of Michigan

"SAT continues to stick to the notion that as long as it is called a bond and the price is set in advance, then it can be exempted- I could imagine that would incentivize people issuing shares to recategorize their instrument as not being a debenture or scrip but rather simply be a bond. And that raises the broader question- how do you differentiate something that is called a bond but looks otherwise like a scrip. The judgment talks about hybrids which mixes debt and equity features. So the label you give something may not be very indicative of what it is; you actually have to look at the substance but the SAT decision doesn't give us any guidance as they what they would look for in deciding whether something that's called a bond or called a debenture should actually be treated as a bond or debenture."

JN Gupta
Former Executive Director, SEBI

When you convert any convertible instrument into a share or whatever instrument is to be created, it is a primary issue because you get it from the company whereas SCRA applies only to the secondary market transactions where you can buy and sell things. That's why I am of the firm opinion that Sec 28(1)(b) does not exempt anything; all the securities are included."

Technical arguments aside, the biggest issue, experts say, is the way SAT has looked at powers of SEBI under Section 11 of the SEBI Act. In its argument, Sahara maintained all along that since it is an unlisted company with no intention of listing its securities, SEBI had no jurisdiction over it. SAT held that the SEBI Act needs to be given 'widest possible interpretation' if investor interest and regulation of the securities market are to be taken care of.

JN Gupta
Former Executive Director, SEBI

"Anything where public interest gets involved or lot of people get involved should take precedence over private interest and that is what SAT has said."

Vikramaditya Khanna
Professor of Law, University of Michigan

"Now what is the negative of that? The negative is that companies may decide that it is easier not to raise capital in India but to raise it elsewhere. Arguably we have experienced that if you look at other jurisdictions where after the US enacted Sarbanes Oxley, you saw a lot of issuances going to London to

the AIM market- the alternative investment market- which was perceived to be less onerous in terms of the regulations that it imposed upon companies. And of course, not all regulations are made the same – some are effective, some are not that effective but generate a lot of cost. So if one is trying to develop the securities market in India, you need to make it a place both that is safe for investors but also a place that is not cost prohibitive."

All the experts we spoke to conceded that given the facts in Sahara's case, SAT's order is bang on. But several of these interpretations by SAT may create problems for future such issues- especially the one that gives unfettered powers to SEBI to regulate the unlisted space- one argument that I got was that its not whether you're listed or unlisted that decides SEBI's jurisdiction. If the activity that you carry on, for instance raising public funds, SEBI will have jurisdiction. If that's the line of argument that the apex court takes, unlisted public companies will get concerned.

In Mumbai, Payaswini Upadhyay