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APPROBATION AND ANTICIPATION



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Uninformed criticism and comment necessarily have the negative effect of demotivating the doers, and letting the non-doers get away with inaction.

It is not unusual for authors of orders relating to alleged violation of securities laws, to be castigated for alleged errors in the orders, as well as the alleged inability to understand the issues involved. The criticism extends to adverse comments on the inadequacy of the penalty imposed. Many of these conclusions are arrived at by persons, who have not read the order in its entirety, and have rushed to judgement, based on wholly inadequate summary reports that appear in the media.

In this context, the order passed by Ashwani Bhatia, Whole-Time Member (WTM), SEBI, on April 20, 2023, in the matter of CARE Ratings Limited (CARE), is thought provoking. Briefly stated, it does not omit to set out any material facts. Nor does his order shy away from drawing the right conclusions based on the facts produced before him. What is significant is that CARE had got a retired Judge of the Supreme Court to look into the facts, and the latter came to the conclusion that, on the basis of material placed before him, the charges against the 2 noticees had not been established. As against this finding, the WTM, has, for detailed reasons, recorded in writing, arrived at the conclusion that charges against noticee 2 had been established, and based on that finding, has directed that noticee 2 shall not be associated with any SEBI registered intermediary, directly or indirectly, in any manner whatsoever, for a period of 2 years.

This is not an attempt to delve deep into the details of the order. The order is being used as a peg to hang the argument that orders passed by regulatory agencies should not be dismissed without an understanding of the issues involved, or findings related thereto. The functional autonomy of Regulators is best manifested by fearless and fact-based orders passed by them. The credibility and confidence in the regulatory system is a *sine non qua* for the orderly growth of the market, and a level playing field for all participants therein.

Recently, National Financial Reporting Authority (NFRA) has passed very strict orders against a Partner in one of the major accounting firms in the country. This is not the first time that such orders have been passed by this new Regulator. Earlier in a few cases, taken up nearly at the same time, NFRA had concluded that the absence of

professionalism and independence had considerably diluted the quality of audit undertaken in regard to entities which had come to grief. Add to that, the absence of professional scepticism, and the package is complete.

In one case, NFRA noted that certificates of independence had not been obtained from two of the persons associated with the audit process. It was also noticed that parties connected with the statutory auditor had undertaken other work for the audited entity. Clearly, these are completely unacceptable situations, considering that such conflicts militate against the trust in the auditing profession.

Response of the auditing profession has often centred around the inability to discern every conceivable wrongdoing in the audited entity. In this context, it is useful to take note, as NFRA has done, of the observations of Lord Alverstone, Chief Justice, in his address to the Jury, wherein he has stated that the auditor is not supposed to be a man constantly going about suspecting other people of doing wrong.... If circumstances of suspicion arise, it is the duty of the auditor, insofar as those circumstances relate to the financial position of the company, to probe them to the bottom.... ". Seen through this lens, it would appear that some auditors have turned the Nelson's eye to facts and circumstances that obviously point in the direction of suspicious activities.

When NFRA was first set up, it was felt that in the absence of adequate regulatory capacity and bandwidth, it would not be able to tackle the complex matters that needed to be dealt with. Giving the lie to this expectation, NFRA has acquitted itself creditably in regard to definitive findings and punishments that would send a strong message across the auditing profession. It is useful to remember that NFRA itself was a creature of the dissatisfaction that arose on account of the perceived slackness of the self-regulatory authority in dealing with disciplinary matters quickly and effectively. It is noted that the concerned authority has put out information to demonstrate that the proceedings were concluded reasonably quickly, and the penalties imposed were such as would serve as deterrents. Be that as it may, NFRA is well and truly on its way to establishing an ecosystem in which the auditing profession as an important gatekeeper of governance would not be found wanting.

Mention has been made of these two Regulators to show that while there is always scope for improvement, there is no need for despair or despondency. The RBI also on its part, has put in place prescriptive arrangements that would make banking a less risky proposition for those entrusted with that responsibility, thereby enhancing customer confidence in the entire system.

Is It then time to rest on one's oars? The answer is an emphatic "no". The next set of steps should comprise looking at regulations and enactments to see how they can be reduced in number, on grounds of contextual relevance, and also simplified, so that the scope for interpretation is significantly reduced. The first laudable step, which has been taken by the Ministry of Corporate Affairs, is the decriminalisation of a number of alleged offences, so that the focus remains on the systemically important matters that have an element of criminality residing within them. If this approach is followed, we could have a situation in which there are lesser number of matters to be judicially determined, and where these matters have systemic implications for that segment of the economy, that is regulated. Minor transgressions should not be allowed to clog the pipeline, and should be dealt with through settlement proceedings that can be faster and better than they are at this point of time.

The trinity of surveillance, investigation and enforcement needs to receive much better attention by way of right-skilling the persons involved, and emboldening them to quickly and effectively grapple with the complicated matters that arise for determination.

It is also useful to reflect on the standard of proof that is necessary in such matters. Proving every matter beyond doubt could lead to a situation in which, for want of adequate evidence, some transgressions go unpunished. Serious attention needs to be given by regulatory authorities and by appellate authorities to whether preponderance of probability would be an acceptable standard in the determination of these matters.

Inter se inconsistencies, especially in regard to definitions, in the various statutes relating to the securities markets also need to be addressed expeditiously. The Government has already set in motion an exercise to combine four enactments addressing different aspects of securities laws, ironing out, in the process, the procedural complications, and the inconsistency in definitions, across these statutes. The earlier this matter is resolved, the better it would be for those who are in the regulated universe, and are apprehensive about being at the receiving end of differing interpretations. The urgency of putting in place master circulars cannot be overstressed. Clarity, consistency and certainty ought to be the cornerstones of the legal and regulatory framework in any part of the financial ecosystem. Judicial determination of securities law provisions being relatively recent, and of insurance law being even more recent in India, it is necessary to develop the jurisprudence that would educate and inform all persons who stand to benefit from such an exercise. While enacted legislations might have existed for many years, authoritative rulings by Courts are of relatively recent origin. Judicial determination, which translates to judge made law, should gain ground if the gaps in enacted legislations are to be filled immediately.

Building confidence in the regulatory system also requires a redetermination of the manner in which the accountability of these organisations is enforced. The ideal situation would be one in which every sectoral Regulator appears before the appropriate Committee of the Parliament, and explains what had transpired in the previous 6 months, and what is on the anvil for the next 6 months. This circuitous reporting of functionally autonomous Regulators, through administrative Ministries to the Parliament, should be dispensed with, sooner rather than later.

Regulatory organisations exist in order to ensure orderly conduct in the regulated universe, by providing for a level playing field, and disincentivising errant behaviour on the part of regulated entities. In this effort, it is likely that they would sometimes not measure up to the expectations of the stakeholders. This should not lead to undermining faith and confidence in the regulatory system. The preferred alternative should be to help such organisations course correct, as they seek to measure up to the revolution of rising expectations from the stakeholder community.

Tailpiece

35 years after it first came into existence as a non-statutory organisation, SEBI has acquired a new logo, which, in a manner of speaking, signals continuity with change. The logo seeks to project SEBI as a modern, digital and forward-looking organisation, and introduces a sense of declutter. Does a change in the logo of an organisation herald fundamental changes?

Kuch to “logo” kahenge, “logo” ka kaam hai kehna

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