**APPELLATE TRIBUNAL, PREVENTION OF MONEY LAUNDERING ACT AT NEW DELHI**

**Date of Decision: 27.06.2017**

**MP-PMLA-2335/DLI/2016 (Stay)**
**FPA-PMLA-1168/DLI/2015**

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| National Spot Exchange Ltd. | ... | Appellant/Applicant |
| Versus | | |
| The Director,<br>Financial Intelligent Unit-India,<br>New Delhi | ... | Respondent |

**Advocates/Authorized Representatives who appeared**

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| For the appellant | : | Sh. R. K. Handoo, Advocate<br>Shri Yoginder Handoo, Advocate |
| For the respondent | : | Shri Neeraj Kishal Kaul, ASG<br>with Sh. Satish Aggrawala,<br>Advocate & Ms. Neelu,<br>Legal Consultant |

**CORAM**

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| **JUSTICE MANMOHAN SINGH** | **:** | **CHAIRMAN** |
| **SHRI KAUSHAL SRIVASTAVA** | **:** | **MEMBER** |
| **SHRI ANAND KISHORE** | **:** | **MEMBER** |

**JUDGMENT**

**FPA-PMLA-1168/DLI/2015**

1. The present appeal has been filed by the appellant challenging the order passed by the Director, FIU-India under No. 23/DIR/FIU/IND/2015 dated 04.11.2015 imposing a penalty of Rs. 1.66 crores on the appellant company on the grounds that the appellant company is a "Reporting Entity" in terms of Section 2(1)(wa) of the Prevention of Money Laundering Act, 2002 ('PMLA') as an "intermediary", contrary to the definition of "Intermediary" as given in Section 2(1)(n) of PMLA as amended on 15.02.2013.

2. The appellant National Spot Exchange Ltd. (hereinafter referred to as "NSEL") is a Spot Exchange. Vide Gazette Notification dated June 5, 2007, NSEL was granted exemption under section 27 of the FCRA from operation of the said Act for all forward contracts of one day duration for the sale and purchase of commodities traded on NSEL subject 10 the following conditions:

i) No short sale by members of the Exchange shall be allowed.

ii) All outstanding positions of the trade at the end of the day shall result in delivery.

iii) The National Spot Exchange Ltd. shall organize spot trading subject to regulations by the authorities regulating spot trade in the areas where such trading takes place.

iv) All information or returns relating to the trade as and when asked for shall be provided to the Central Government or its designated agency,

v) The Central Government reserves the right to impose additional conditions from time to time as it may deem necessary,

vi) In case of exigencies, the exemption will be withdrawn without assigning any reason u. public interest.

3. Section 12 of the PMLA and the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 (hereinafter referred to as the "Rules") framed under the PMLA impose on all reporting entities obligations that include maintaining prescribed records of specified transactions, appointing a Principal Officer and a Designated Director, performing client due diligence and furnishing to Director, Financial Intelligence Unit- India (hereinafter referred to as "Director, FIU-IND") prescribed reports including reports on suspicious transactions (STRs). It is submitted by the respondent that Rule 3 of the Rules specifies the

transactions, the records of which are to be maintained; Rule 7 prescribes the procedure and manner of furnishing information, including an obligation to evolve an internal mechanism for detecting the prescribed transactions. Rule 8 of the Rules prescribe the time of furnishing such information and Rule 9 of the Rules prescribes the procedure and manner of verification of records of identity of clients. Rule 2 of the Rules defines a transaction, to include any payment made or received in whole or in part of any contractual or other legal obligation. The Rules also specify the situations that could indicate the existence of suspicious transactions that would warrant filing suspicious transaction reports (STR) under Rule 7 of the Rules. These situations are as follows:

a) Transaction which gives rise to a reasonable ground of suspicion that it may involve proceeds of an offence specified in the Schedule to the PMLA, regardless of the value involved;

b) appears to be made in circumstances of unusual or unjustified complexity;

c) appears to have no economic rationale or *bona-fide* purpose; or

d) gives rise to a reasonable ground of suspicion that it may involve financing of the activities relating to terrorism.

Section 13 of the Act confers on the Director, FIU-IND powers to enquire into cases of failure to comply with the provisions of sections 12 and 12A of the PMLA and the Rules framed thereunder and to impose sanctions including fines in case of such failure to comply.

4. In the impugned order it has been found by the respondent that the Appellant has failed to its obligations under the PMLA, 2002 as per details mentioned below:-

- failed to appoint a Designated Director, as required under ***Rule 7 (1) of the Rules.***
- failed to appoint a Principal Officer, as required under ***Rule 7 (1) of the Rules.***
- failed to furnish FIU-IND details of its members in violation of ***Section 12-A of the Act***.
- failed to furnish to FIU-IND, despite repeated requests, details of its Board of Directors and key officials, in violation of ***Section 12A of the Act***.
- failed to fulfil its obligations under the PMLA by not evolving a mechanism for detecting and furnishing suspicious transaction reports, resulting in failure to examine 134 contracts that were in operation during the period from 15 February 2-13 to 31st July 2-13 in violation of ***Section 12 (1) (b) of the Act*** read with the ***Rule 7 and 8 of the Rules***.

In view of said findings against the appellant, the respondent has imposed major penalty of rupees one crore sixty six lacs u/s 13(2)(d) of the Act on the appellant company for not furnishing the reports. The details of penalty amount are mentioned in Para 26 of the impugned order.

5. The brief facts are that the Respondent, Director, FIU-India by communication dated 16.01.2015 issued communication to the appellant company why action be not taken against it for not complying with obligations under PMLA as a "reporting entity" as, allegedly, appellant is an "Intermediary" by inclusive definition of Section 2(1)(n) of PMLA, as amended w.e.f. 15.02.2013 (Rules were framed in August, 2013).

The said communication was followed by communications dated 06.02.2015, 12.05.2015 and 05.06.2015 asked to give the details of members of Board of Directors and key officials of the Appellant Company who were holding office during the period from 15.02.2013 to 19.09.2014.

6. The Appellant Company by communications dated 30.01.2015, 16.02.2015 and 26.05.2015 informed the Respondent that provisions of PMLA are not applicable to the Appellant Company as Appellant Company not a "recognized association" or "registered association" under Forward Contracts (Regulation) Act, 1952 (hereinafter called as FCRA) therefore it is not an "Intermediary" as per definition of 2(1)(n) of PMLA, the information sought is without jurisdiction.

7. The Respondent Director, FIU-India thereafter on 11.08.2015 issued a Show Cause Notice to the appellant company alleging that even though appellant company is not a "recognized association" or "registered association" under the FCRA but is a "deemed Intermediary" and therefore a "reporting entity" in terms of Section 2(1) (wa) of the said Act, viz. PMLA and therefore was required to comply with the obligations laid down u/s 12 and 12A of the PMLA Act and Rules.

It was alleged that by virtue of having facilitated trade in contracts having settlement period of more than 11 days, which could not be carried without being registered or recognized under the FCRA, Appellant Company is a "deemed Intermediary" and therefore a "deemed reporting entity" under PMLA and thus allegedly wilfully failed to get registered as a reporting entity and not appointing Principal Officer and furnishing

details as per PMLA rules, the Appellant is liable for penal action u/s 13(2) of PMLA.

8. The Appellant Company in response to the said Show Cause Notice submitted a detailed legal submission on 01.09.2015 addressed to the Respondent, Director-FIU-India reiterating that the Appellant Company is neither a "recognized association" nor a "registered association" in terms of FCRA and hence is not a "reporting entity" and therefore the proceeding initiated by the Respondent, Director-FIU is beyond jurisdiction and asked the respondent to drop the Show Cause Notice. Without prejudice, the reply to the Show Cause Notice was given to the Respondent. In reply, the same stand was taken by Appellant Company that it is not a recognized or registered association in terms of FCRA who has also been granted exemption u/s 27 of the said Act. As the Appellant Company is outside the range of provisions of the FCRA, therefore no proceedings could be initiated against the appellant company under PMLA.

9. By notification dated 06.08.2013, the Central Government directed *inter-alia* that no contracts in any commodity shall be undertaken by Appellant Company without proper approval of the Central Government and all the operations of the Appellant Company came to be suspended with effect from the said date. Government of India also withdrew the said notification by way of Notification dated 19.09.2014 wherein it was stated in the said notification that the Central Government in exercise of the powers under Section 27 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) had exempted all forward contracts of one day duration for the sale and purchase of commodities traded on the National Spot Exchange Ltd. from the operation of provisions of the FCRA".

10. The Respondent, Director, FIU communication dated 18.08.2015 sought information to provide the details of list of Directors and Key officials during the period 15.02.2013 to 19.09.2014 and current Board of Directors and Key officials and also the details of members of NSEL with their addresses. The same was responded by the Appellant Company by communication dated 26.08.2015 again reiterating that the proceedings initiated under PMLA by the Respondent are without jurisdiction.

11. The matter was fixed for personal hearing. After the personal hearing on 15.09.2015, the Respondent, Director-FIU passed the impugned order dated 04.11.2015 which has been challenged by filing of present appeal.

12. Notice in the appeal was issued. As far as interim protection sought by the appellant is concerned, vide order dated 31.08.2016, 09.09.2016 the appellant was directed to deposit an amount of Rs. 25 lacs with the Director FIU in the form of fixed deposit.

13. During the course of hearing of the appeal the respondent has also filed the applications for filing the additional documents. The prayer is strongly opposed by learned counsel for the appellant who has also filed the reply by opposing the said request.

14. Both parties addressed their arguments in the main appeal as well as in the application for additional documents which are sought to be produced by the respondent. One of the documents was filed in sealed cover which is placed on record subject to the objection raised by the appellant. The order was duly reserved.

15. The prayer of the application is strongly opposed by on behalf of the counsel for the appellant who argued that the Tribunal is not empowered to allow such prayer and the present appeal, thus is to be decided on the basis of material placed on record before the Adjudicating Authority otherwise the appellant would loose the opportunity to rebut those documents which were not produced/proved before the trial court. It is not a practice in criminal proceedings to take the additional documents on record as it would harm the case of the accused person. Further, these documents have not been examined and discussed by the department which passed the impugned order. At the stage of appeal, the respondent cannot be permitted to improve upon impugned order which is passed as per material available on record. Counsel has referred the decision of the Supreme Court reported in AIR 1978 Para 8 in the case of Mohinder Singh Gill Vs. Chief Election Commr. 1 SCC 406 read as under:

> "*8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. IN Gordhandas Bhanji.*
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> *"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting's and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."*

16. It is argued by Mr. Neeraj Kishan Kaul, ASG that most of the documents are in the nature of correspondence addressed to the appellant by the Government pertaining to the subject matter. It is

submitted that the taking on record of such documents would not prejudice the case of the appellant. Thus the rebuttal may not be required as these documents are known to the appellants. Copies are also in its possession. These additional documents would go into the route of the case and in order to decide the real controversy between the parties, these may be taken on record.

17. Out of nine additional documents, admittedly five of the documents are authorized by or addressed to the appellant pertaining to the dispute in hand. The four remaining documents are the communication between departments of the Government and/or police authorities pertaining to affairs of the appellant.

18. Section 35 of PMLA, 2002 provides that the Appellate Tribunal no doubt shall be bound by the procedure laid down by the Code of Civil Procedure 1908 but shall be guided by the principles of natural justice. Sub-section (2) of Section 35 allows the Tribunal for the purpose of discharging its function, the same powers as are vested in a civil court while trying against are given which includes to receive the evidence. The Appellate Tribunal is also allowed to regulate its own procedure.

19. After hearing the rival submissions of the parties, we are of the view that mainly legal issues are involved in the present dispute. In case it is necessary then we would decide application filed by the respondent for filling the additional documents as we have noticed that reference of most of the documents are already mentioned in the pleadings of the parties. Thus, at present, we would consider the matter on the basis of existing material available on record.

20. The case of the appellant in appeal is that the Director-FIU has failed to appreciate that his powers to impose penalty is only provided, 'exhaustively' under section 13 (2) of PMLA on failure to comply with the obligations under Chapter-IV of PMLA and the obligations are given in Section 12 of PMLA to maintain records; furnish to Director the prescribed information; verify the identity of the clients; identify the beneficial owner and maintain the records. However in the present case the Ld. Director, FIU has no power to create a "reporting entity" by deeming such entities and impose penalty for alleged default in not getting registered as "recognized or registered entity" under FCRA or for default in appointing the designated Director or Principal Officer or not reporting when even as per Ld. Director, FIU the Appellant Company is not a reporting entity as per respective statutes. The respondent has wrongly assumed jurisdiction under PMLA against the Appellant Company, the Ld. Director, FIU has without authority of law.

21. The FCRA is a self-contained Code providing its own provisions for investigation, adjudication, penalty. The respondent had no power into the arena of the provisions of FCRA as has been done by the Respondent to make basis of assuming jurisdiction.

22. As per appellant, respondent infact is re-writing the provisions of FCRA, inasmuch as, the "recognition of association" is defined u/s 2(j) of FCRA to be an association to which the recognition has been granted by the Central Government u/s 6 in respect of goods, class of goods specified in such recognition.

The recognization of an association is not a matter of course but is the desire of an association which may be unregulated association but would desire to get itself registered with FCRA as a "recognized

association", for which u/s 5 of the FCRA an application is required to be made to the Central Government and the Central Government after thorough inquiry and in public interest on being satisfied would grant the recognition to the said association which can be withdrawn only after giving a reasonable opportunity u/s 7 of the FCRA.

The recognized association are subject to periodical returns in terms of Section 8, annual returns to the Commission u/s 9 and to follow the Rules as laid down under the FCRA.

23. Even if appellant company is to be treated as a recognized association, the provisions of FCRA are applicable, inquiry is to be conducted by satisfaction of Central Govt. but the respondent is not empowered to take steps while exercising the jurisdiction under PMLA.

24. The respondent has failed to appreciate that the Central Govt. itself stated in its notifications that applicant company was exempted from the operations of the provisions of the FCRA Act. The respondent has no authority to adjudicate on matters under the FCRA in that whether contracts beyond 11 days delivery were in violation of FCRA or not and whether such contracts needed to be transacted only in a recognized or registered association.

25. It is stated on behalf of the appellant that the respondent in para 12 (without relied upon material) in the show-cause notice in the impugned order has alleged that, "by permitting contracts with delivery period of more than 11 days, NSEL (Appellant Company) permitted execution of forward contract, an act which required recognition or registration under FCRA Act and therefore by not getting registered or

recognized under FCRA and carrying out contract with delivery period of more than 11 days the appellant company allegedly not only violated the exemption granted in 2007 but also, willfully violated the provisions of FCRA and resultantly the provisions of PMLA as there is no whisper in the whole of the Show Cause Notice or in the relied upon material or in the correspondence exchanged wherein a single contract has been shown to have delivery period of more than 11 days. In the absence of any such details or contracts which have been made the basis of his erroneous reasoning and not having confronted the same to the appellant company renders the order un-sustainable.

It is also submitted that there is no provision in FCRA of assuming or deeming that in the event of default in any contract would result a Forward delivery contract. The approach of respondent is without jurisdiction and thus the order passed is a nullity. There is also no provision in PMLA that if an unregulated association facilitates a Forward contract, such entity would be deemed to be a registered or recognized association under FCRA and that the provisions of PMLA would be deemed to have been violated.

26. Learned counsel appearing on behalf of appellant submits that in Chapter V of FCRA including prosecution and forfeiture of properties; FCRA being a self contained Code, the Ld. Director, FIU had no jurisdiction to assume that the Appellant Company is deemed to be a "recognized association" or a "registered association" and proceed to imposed the obligations and penalty under PMLA.

It is argued on behalf of the appellant that the respondent in the present case was not clear whether to put the appellant company as a

"recognized association" or "registered association" even by his invoking of deeming tool rendering the order erroneous and *void ab initio*. The respondent has wrongly passed the impugned order by assuming that the appellant is the "registered association" by the Central Government for which application is required to be made u/s 14A of FCRA to the Commission which infact is true. The recognized association and registered associations are defined in law, which cannot be interfered with or deemed by the respondent. The "recognized associations" and "registered associations" have certain obligations to perform under the FCRA.

27. It is urged on behalf of the appellant that the respondent cannot interpret the provision of the Act if language of the definition is clear and understandable. Different interpretation cannot be given. It is submitted that in the impugned order, the respondent has ignored the admission made by Forward Markets Commission, a statutory body under FCRA who had filed an affidavit before the Hon'ble High Court in W.P No. 199/2016 admitting that the appellant company is not a "recognized" or "registered association" under FCRA. On the basis of said admission the appellant company cannot become "reporting entity" liable to proceed with under the law PMLA, 2002.

28. In order to appreciate the argument of both parties it is necessary to refer the relevant Statutory Provisions of the PMLA Act, which are reproduced as under:-

**"Section 2(1)**

*(n) "**intermediary**" means,—*

*(i) a stock-broker, sub-broker share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser or any other intermediary associated with securities market and registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992); or*

*(ii) an association recognized or registered under the Forward Contracts (Regulation) Act, 1952 (74 of 1952) or any member of such association; or*

*(iii) intermediary registered by the Pension Fund Regulatory and Development Authority; or*

*(iv) a recognized stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);]*

***(wa)** "**reporting entity**" means a banking company, financial institution, **intermediary** or a person carrying on a designated business or profession…"*

(emphasis supplied)

29. The obligations cast upon a "Reporting Entity," as defined under the PMLA Act, are inter-alia contained in Section 12 of the Act, and Rule 7 of the Rules if the party involved in covered under the said provisions. These provisions are reproduced as under:-

***"Section 12: Reporting entity to maintain records.—***

*(1) Every reporting entity shall—*

*(a) maintain a record of all transactions, including information relating to transactions covered under clause (b), in such manner as to enable it to reconstruct individual transactions;*

*(b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;*

*(c) verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;*

*(d) identify the beneficial owner, if any, of such of its clients, as may be prescribed;*

*(e) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.*

*(2) Every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force, shall be kept confidential.*

*(3) The records referred to in clause (a) of sub-section (1) shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.*

*(4) The records referred to in clause (e) of sub-section (1) shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.*

*(5) The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this Chapter."*

***"Rule 7 Procedure and manner of furnishing information.—***

*(1) Every banking company, financial institution and intermediary, as the case may be, shall communicate the name, designation and address of the Principal Officer to the Director.*

*(2) The Principal Officer shall furnish the information referred to in rule 3 to the Director on the basis of information available with the banking company, financial institution and intermediary, as the case may be. A copy of such information shall be retained by the Principal Officer for the purposes of official record.*

*(3) Every banking company, financial institution and intermediary may evolve an internal mechanism for furnishing information referred to in rule 3 in such form and at such intervals as may be directed by the Reserve Bank of India or the 1[Securities and Exchange Board of India or the Insurance Regulatory and Development Authority], as the case may be.*

*(4) It shall be the duty of every banking company, financial institution and intermediary to observe the procedure and the manner of furnishing information referred to in rule 3 as specified by the 1[Reserve Bank of India, the Securities and Exchange Board of India and the Insurance Regulatory and Development Authority under sub-rule (3)], as the case may be."*

30. Few relevant provisions of the Forward Contracts (Regulation) Act, 1952, are reproduced as under:-

"Section 2(a)

*"association" means any body of individuals, whether incorporated or not, constituted for the purpose of regulating and controlling the business of the sale or purchase of any goods:*

"**Section 2(j)**

*"recognised association" means an association to which recognition for the time being has been granted by the Central Government under Section 6 in respect of goods or classes of goods specified in such recognition;*

**Section 2(jj)**

*"registered association" means an association to which for the time being a certificate of registration has been granted by the Commission under Section 14-B;]*

**Section 14-A.**

*Certificate of registration to be obtained by all associations.—(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.*

**Section 27**

*27. Power to exempt.—The Central Government may, by notification in the Official Gazette, exempt, subject to such conditions and in such circumstances and in such areas as may be specified in the notification, any contract or class of contracts from the operation of all or any of the provisions of this Act.*

31. Section 5 provides for "*Application for recognition of associations",* Section6 provides for *"Grant of recognition to association" and* Section 7 *for Withdrawal of recognition*].

32. Section 14-A of the FCRA Act, stipulated that without registration, no entity can carry out the trade and business relating to forward contracts. Therefore, registration in terms of Section 14-A is mandatory.

33. It is the admitted position in the matter that on 9th November 2010, with a view to be able to trade in NTSD Contracts, the Appellant made an application to the Forward Markets Commission for registration under Section 14 A which would confer upon it the status of a "registered association" in terms of the FCRA. The said application was pending before the FMC.

34. The appellant was aware that in order to carry out trade or business in forward contracts, of the nature not mentioned in the Exemption Notification dated 05.06.2007, it would be required to seek registration under Section 14A of FCRA as the appellant itself has filed the application for registration.

35. Admittedly as per exemption Notification dated 5th June 2007, the Central Govt. in exercise of the powers conferred by Section 27 of the FCRA, granted the Appellant herein, an exemption for "all forward contracts of one day duration for the sale and purchase of commodities traded on the National Spot Exchange Ltd. from operation of the provisions of the said Act" subject to certain conditions. If there is no further forward contract(s) between the appellant and third party, the matter ends here itself. However, it has not happened even as per the case of appellant, they undertook other trades in forward contract after the expiry of one day period. Though the Appellant was not required to fulfill any other obligations under the FCRA and only trade in forward contracts of one day duration. It is the case of the respondent that in view of conduct of the appellant who was not required to be a "recognized association" or a "registered association" under the provisions of FCRA.

36. It is case of the respondent that as per reports gathered by the respondent who alleged that NSEL had been undertaking activities that were not covered by the exemption granted to it vide the Gazette notification dated 5th June. 2007 and carrying out of which could be authorized only to an association 'recognized' or 'registered' under the FCRA, and that transactions /contracts facilitated by NSEL had led to defrauding of thousands of investors involving several thousands of crores of rupees, there were concerns that NSEL, in carrying out these non-exempted activities without getting 'recognized or 'registered', had deliberately avoided coming under the purview of PMLA and fulfilling its obligations under PMLA. These obligations include, as mentioned above, carrying out customer due diligence and filing prescribed reports including STRs, with Director, FIU-IND. The alleged violations by NSEL included facilitating trading in "non-existent goods", which was

tantamount to short selling, and offering contracts with settlement period of more than 11 days which were two of the six specific conditions that formed the basis of exemption granted to NSEL by the Central Government in 2007. Accordingly by way various letters issued in 2015 NSEL was asked to explain its conduct and also why action should not be taken against it under section 13 of the PMLA.

37. The respondent after having heard the appellant has passed the detailed order, all the submission addressed by the appellant have been discussed, and dealt with particularly in the Para 20, 22 and 25 of the impugned order:-

The same are reproduced below:-

> *"20: This deliberate act of avoidance of law was mala-fide as NSEL's own admissions show that it was aware of the risk of money laundering inherent in its operations as well as in the operations of its members. The nature of allegations being investigated against NSEL viz., cheating, forgery, criminal breach of trust, money laundering and criminal conspiracy, give ample indication that the violations by NSEL merit a more serious treatment than any innocent breach of law. That the FCRA does not mention the words 'deemed intermediary' or the PMLA does not mention the words 'deemed reporting entity' cannot be used as a shield to rationalize NSEL's acts of omission and commission and is not germane. The deeming treatment would derive from the substantive nature of the activities undertaken by the NSEL and the obligations of NSEL would be judged solely on the basis of its activities, actions and intentions. As stated, NSEL's actions in willfully avoiding its obligations under the FCRA as well as under the PMLA on this substantive ground.*
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> *22: NSEL has submitted that the Government notification dated 5th June 2007, did not have any condition that the settlement period of contracts should not be more than 11 days; that 11 days period was not applicable to NSEL contracts; that if any conditions of June 2007 notification were violated then penalty would be imposed under Section 20 or 21 of the FCRA and not under PMLA. These are flawed and make-believe arguments and therefore not acceptable. NSEL had been granted exemption on the condition that no short sales by the members will be allowed and all outstanding positions at the end of the day shall result in delivery. By no stretch of imagination, this can be taken to mean that the period of delivery can be indefinite or infinite or the contracts could be executed without the underlying*

*commodities. Any such interpretation can only be termed as perverts and mischievous as that would lead to misuse and perpetuation of malpractice, as has been clearly illustrated by the failure of NSEL contracts for which thousands of investors lost their money.*

*25: NSEL has stated that imposition of penalty under Section 13(2)(d) requires proof of mens rea which is totally absent in the present case. In the support of this, it has stated that the rules under the PMLA came into force only in August 2013. NSEL has also stated that before a penalty under clauses (a) to (c) of sub section 2 of Section 13 cannot be imposed. As far as the issue of mens rea is concerned, it is amply clear from NSEL's own admission that it was aware that the operations of NSEL and its members were vulnerable to money laundering and financing of terrorism, however, a legal view was taken that NSEL did not have any reporting obligations due to exemptions under section 27 of FCRA. This would appear like a wishful thinking. NSEL has not produced any evidence of any consultation with any authority including its regulator or FIU-IND whether it was obligated under the PMLA. What is striking is that this was done fully knowing that the operations of NSEL and its members were vulnerable to money laundering. Therefore, the mens rea is evident. It appears that NSEL was more concerned about interpreting the laws etc in a manner that would give it a reason to avoid being regulated or furnishing any reports rather than serving the public interest. The mens rea is also evident from the persistent refusal of NSEL to furnish to FIU-IND even routine information, despite repeated letters of requests, including the information on its directors and senior management and submit to the other requirements of law. This is hardly how a law abiding entity conducts itself. This non-cooperation coupled with clear understanding of the vulnerability and risks involved in its operations clearly prove that NSEL had the mens rea underlying its repeated violations of the PMLA obligations. As to the penalties, the different penalties mentioned in Section 13(2) of the PMLA do not represent the sequential order in which the penalties have to be imposed on a reporting entity for being in violation of PMLA. These penalties can be imposed in any order depending on the gravity and the nature of violation. In the present case, there is ample evidence of the wilful violation of the law and, therefore, NSEL cannot be let off with a penalty that should normally be imposed for minor violations."*

38. As per section 2(c) of the FCRA, forward contract means a contract for delivery of goods, and which is not a ready delivery contract. Under section 2(i) of the FCRA, ready delivery contract means a contract which provides for the delivery of goods and the payment of a price therefore, either immediately or within such period not exceeding eleven days after

the date of the contract and subject to such conditions as the Central Government, may by notification in the official gazette, specify. Thus any contract that has a delivery period of more than eleven days is not a ready delivery contract, and therefore a forward contact. Therefore, in permitting contracts with delivery periods of more than eleven days, NSEL permitted execution of forward contracts, an activity which required it to be registered or recognized under the FCRA.

39. The findings in the impugned order given by the respondent that the appellant had been undertaking activities that were not covered by the exemption granted vide Gazette Notification dated 5th June, 2007. The first two conditions of the exemption were as follows:

(i) no short sales by members of the Exchange shall be allowed.

(ii) all outstanding positions of the trade at the end of the day shall result in delivery.

40. It is argued on behalf of the appellant that the respondent did not understand that the definition of the "recognized association" and "registered association" is exhaustive by use of the word "means" which respondent converted into "includes" as is apparent from the communication dated 16.01.2016. The respondent did not appreciate that use of the word "means" renders the definition restricted which could not have been interfered by the respondent exercising powers under PMLA. It is argued on behalf of the appellant that the respondent while referring the definitions of "Intermediary" and "reporting entity" in Section (1) (n) and 2 (1) (wa) is also restricted by use of the word "means" definitions to contrive occasion to proceed against Appellant Company

under PMLA. Counsel has referred the judgment of the Hon'ble Supreme Court for definition of "means" and "includes" as reported in Feroze N. Dotivala V. P.M. Wadhwani – (2003) 1 SCC 433, the relevant paras are reproduced hereunder for ready reference of this Hon'ble Tribunal:

> *"...13. The legislature, while defining a word or a term, is fully competent even to assign an artificial meaning to the word (see KishanLal v. State of Rajasthan). It can also restrict the meaning of a word by defining it in that manner. Generally, when the definition of a word begins with "means" it is indicative of the fact that the meaning of the word has been restricted; that is to say, it would not mean anything else but what has been indicated in the definition itself. There can also be extensive definitions when the definition starts with "includes". This Court, in the case ' reported in P. Kasilingam v. PS.G Collegi of Technology observed at AIR p. 1400: (SCC p. 356. para 19)*
>
> *"A particular expression is often defined by the legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that 'definition is a hard-and- fast definition, and no other meaning can be assigned to the expression than is put down in definition'. (See Gough v Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labout Court)".*
>
> *A reference may also be made to IRC v. Joiner. All ER at p. 1061.*
>
> *14. Generally, ordinary meaning is to be assigned to any word or phrase used or defined in a statute. Therefore, unless there is any vagueness or ambiguity, no occasion will arise to interpret the term in a manner which may add something to the meaning of the word which ordinarily does not so mean by the definition itself, more particularly, where it -is a restrictive definition. Unless there are compelling reasons to do so, meaning of a restrictive and exhaustive definition would not be expanded or made extensive to embrace things which are strictly not within the meaning of the word as defined. No such compelling reason has been indicated to us by reason of which some more ingredients may be read in the term "paying guest", other than which simply flow from the definition as provided. In the case in hand the definition of the words "paying guest" begins with "it means". It is to be read and understood in the manner defined. There would be no justification to expand or to further restrict*

*it by including or superimposing some ingredients or elements which otherwise do not admit of such inclusion and to give a different colour and meaning to the defined word. A person answering the description of "paying guest" in accordance with Section 5(6-A) of the Act is to be treated as such without requiring fulfillment of any other condition:.."*

It is stated that since the Appellant is not a "reporting entity", it did not have any obligations, as applicable to reporting entities, under the Section 12 of the PMLA, 2002, the question of imposing penalty arise u/s 13(2)(a)(d) under PMLA, 2002 does not arise.

41. Admittedly the PMLA Act was amended w.e.f. 15.02.2013, whereby, the definition of "intermediary" under Section 2(1)(n) was expanded to include "an association recognized or registered under the Forward Contracts (Regulation) Act, 1952 (74 of 1952) or any member of such association." By the said amendment, the definition of "reporting entity" under 2(1)(wa) was added to include "a banking company, financial institution, intermediary or a person carrying on a designated business or profession."

42. The intent of the said provision of law applies that a "recognized association" or a "registered association" under the FCRA became an intermediary under the PMLA Act. An "intermediary" under the PMLA by virtue of being a "reporting entity" was required to maintain records in compliance with Section 12 of PMLA r/w Rule 7 of the PMLA Rules, 2005].

43. Had the appellant been carrying on business unknowingly or with the *bona-fide* intention as an innocent party, the position would have

been different, rather in the present case the appellant had been indulging in NTSD Contracts without its application for the same having been allowed, and thereby also violating the terms and conditions of the Exemption Notification dated 05.06.2007, the Government issued Suspension Notification dated 6th August 2013. The suspension Notification notes that the Appellant has contravened the specific conditions under which exemption was granted to it, and thus the notification directed suspension of trading activities.

44. It is correct that under the Provision of PMLA, 2005 (as amended), the FCRA is not specified in Part A, B or C of Section 2 (y) of PMLA as a "scheduled offence" under PMLA. By way of amendment on 15.02.2013 Section 2(wa) was incorporated defining a "reporting entity" to mean a banking company, financial institution, intermediary or a person carrying on designated business or profession.

Section 2 (n) (ii) of PMLA was also incorporated by the same amendment and defines "Intermediary" as an association recognized or registered under Forward Contract (Regulation) Act, 1952, or any member of such association. Admittedly there is no provision in PMLA empowering the Director FIU to deem any person as a recognized association or registered association under the FCRA Act.

Undisputedly Section 12 obligates reporting entity to maintain records and section 13 of PMLA empowers the Director to impose fine with regard to obligations of the reporting entity under the said Chapter and under section 13(2) of PMLA if the Director in the course of an inquiry finds that the reporting entity's designated director has failed to comply with the obligations under this chapter, the Director can proceed to punish such persons after inquiry as stipulated from (a) to (d) of the said section 13 of PMLA.

45. In the present case, the Director, FIU issued show cause notice asserting that by way of Amendment dated 15.02.2013, an association recognized or registered under the Forward Contracts (Regulation) Act, 1952 or any member of such association, is include in Section 2 (n) (ii), hence the appellant company would become an "intermediary" under Sec. 2(n) of PMLA and consequentially would be deemed to be a "reporting entity" under Sec. 2 (n) of PMLA and consequentially would be deemed to be a "reporting entity" under Section 2 (wa) of PMLA. No doubt the time of issuance of show cause notice, FIU was aware that appellant was not registered a "reporting entity" by deemed fiction. The Ld. Director FIU alleged that as a "reporting entity" appellant company was bound to discharge the obligations under section 12 of PMLA as it was felt that the Prevention of Money-Laundering Act (Maintenance of Records) Rules, 2005 in which allegedly, the appellant company has failed, hence notice to show cause as to why penalty should not be imposed for such default.

46. Section 2 (j) of FCRA Act defines recognised association to "mean" an association which has been granted recognition by the Central Government under Section 6 of FCRA. Section 5 of FCRA provides that any association desirous of being recognised under FCRA can make_an application to the Central Government under Section 6 of FCRA. The Central Government, after inquiry and on being satisfied, may grant recognition_on conditions, in respect of specified goods or class of goods in respect of forward contracts, and under Section 7, it can be withdrawn after enquiry and under Section 8 of the Act certain returns and periodicals are to be submitted by the recognised association.

47. As certain parties were taking advantage of not becoming recognized association so as to avoid obtaining the registration. The FCRA Act, 1952, was repealed by the Central Government with effect from 28.09.2015 and under the new Act Section 27A onwards to 29-D have been repealed by Finance Act, 2015 under section 28-A all recognised associations under the Forward_Contracts (Regulation) Act, are deemed to be recognised stock exchanges under the Securities Contracts (Regulations)Act, 1956 and the job of the Commission has been entrusted to Securities Exchange Board.

48. The meaning of association is given and procedure is laid down in the Act to recognize the association (as defined u/s 2 (a) of FCRA) to get recognised as per the procedure laid down by law in FCRA Act. Chapter IIIA of FCRA deals with registered Association Section 2 (jj) of the FCRA Act defines "registered association" to "mean" an association to which a certificate of registration has been granted by the Commission under section 14-B of the said Act.

49. It is the admitted position that there are penal provisions i.e. Section 20 to 24 under the FCR Act. However, as per amendment carried out in the PMLA, 2002 w.e.f. 15th February, 2013, an additional venue has been added to impose the penalty if any party has failed to report the entity which is either recognized association or a registered association under the FCA Act. It means that in case of violation of Section 12 of PMLA, the penalty can be imposed u/s 13 of PMLA, 2002 despite of having the penal provisions of FCR Act are available. As a matter of fact, in view of amendment in the PMLA, 2005 the said proceedings have become additional form to impose the penalty under section 13(2) of the Act.

50. The respondent has given its findings that the exemption u/s 27 of FCR Act applied only for contracts of one day duration, all other contract undertaken at or through the appellant company were contract subject to requirements of FCRA including the requirement of recognition or registration. Since the Government of India Notification date 06.08.2013 states that NSEL has contravened the specified conditions subject to which exemption was granted, hence violation.

51. It is also held in the impugned order that the management of the appellant company has facilitated contract/ transactions while investors would advance money to buyers without adequate stocks of commodities or on the basis of fraudulent or forged warehouse receipts. The monies diverted were siphoned off by the buyers, as a result, there was a settlement crisis in July 2013, where the appellant was asked to settle all outstanding transactions/contracts and over 13,000 investors lost the advances to the tune of Rupees Five thousand crores. Cases have already been registered and assets attached by the Economic Offences Wing of Maharashtra Police under the MPID Act.

It is held in the impugned that the appellant company were undertaking activities that require recognition or registration under FCRA, and it is obligatory under the law for the appellant company to get registered or recognized under FCRA, before undertaking such activities. By willfully not registering or getting recognized under FCRA, the appellant company has not only violated FCRA, but also PMLA and that PMLA is a Central legislation dealing with Prevention of Money-Laundering Act that involves significant public interest and requires proactive measures by the reporting entity.

52. In the impugned order conclusion is arrived that the act of getting

the registered or recognized would have made it liable under PMLA as a reporting entity and by choosing to willfully carry out activities that required being registered or recognized under FCRA, and NSEL knew that it required to be registered and "have knowingly and willfully avoided its obligation under PMLA despite being aware that the activities were vulnerable to money laundering and financing of terrorism.

53. The Appellant in the matter had been carrying out activities which required that it mandatorily take registration / recognition under the provisions of the FCRA, and violated the specific terms and conditions of the Exemption Notification dated 05.06.2007, therefore it is rightly held that Appellant was held responsible for violation of the provisions of the PMLA Act and Rules.

54. It is admitted position that by notification dated August 6, 2013 all operations of NSEL were suspended and vide notification dated September 19, 2014 the exemption under section 27 was withdrawn. There is no valid argument of NSEL who stated that the notification clearly states that exemption was from the operations of the provision of the Act (FCRA) and, therefore, when NSEL exempt from the provisions of FCRA, the contracts having settlement period of more than 11 days may be carried out without being a recognized or registered association. It is not correct to allege that it was not a reporting entity as envisaged under the provisions of PMLA and hence the consequential obligations as stated in Para 7 of the notice are not applicable to NSEL, its Directors and officials.

55. There is also no force in the submission of the appellant that even

if any of the conditions were violated the penalty consequence under the Provisions of Section 20 of the FCRA would follow. The FCRA does not speak of an entity committing violation become a "deemed recognized" or "deemed registered" entity. In case the said provision are read carefully, the same cannot preclude the respondent to take action under the provisions of PMLA, 2002 in case the appellant covers with the meaning of section 12 of the PMLA, 2002.

56. There is no force in the submissions made on behalf of the appellant when it was contended that non-existent legal concepts such as 'deemed intermediary' under the FCRA and a 'deemed reporting entity' under the PMLA have been erroneously introduced in the impugned Order in view of which the Appellant cannot be compelled to adhere to provisions of PMLA as admittedly the Appellant was in trading activities which were outside the ambit of the exemption. It could not have been done in view of requirement to be registered under the FCRA. **Section 14 A** of FCRA in no uncertain terms provides that –

> *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.***
>
> (emphasis supplied)

57. Carrying out the business in the absence of the non registration is illegal and contrary to law which was a known fact to the appellant. However it appears from the conduct of the appellant that it did not process its application for registration with the Government for the last more than seven years in order to take the advantage intentionally. The appellant could not have absolved itself from the obligations to report the entities under Section 12 of the Act. Further the appellant is beneficiary

of its own wrong. Now the wrong doer cannot take the shelter for non-registration or defence of recognised association. The business carried out by the appellant in the present case that the appellant is not a "recognised association" is malafide as the appellant was giving the impression that it is an association. The third parties have dealt with the appellant as a "recognised association" that it is clear violation of FCRA, the appellant is deemed to be treated as "recognised association" for the purpose of reporting the entities within the meaning of Section 12 of the PML Act, 2002 as the appellant has committed the act of "recognised association". The meaning of intermediary u/s. 2(n)(ii) of PMLA, 2002 that either of an association or registered under the FCRA, no doubt the appellant did not obtain the registration, atleast, the present case falls in the first expression of an association recognised. Though 2(jj) and 2(j) has a condition that the association is recognised by Government and the registration is to be obtained. The appellant itself has taken the advantage without registration and the appellant has chosen to carry out its activities as if it is an association recognised.

58. The Appellant was aware of the requirement of registration under Section 14A of FCRA. The Exemption Notification covers only one kind of contract and as engaging in other contracts would require registration, the Appellant had made an application on 9thNovember 2010 to the FMC. During the pendency of its application, the Appellant should have waited for registration or the appellant could have taken the legal recourse for obtaining the registration on urgent basis. But it has not happened. The appellant intentionally and deliberately did go ahead and indulged in contracts outside the exemption notification, without being registered. Therefore, the plea of the Appellant that an association is not recognized

association under FCRA and the rigours of PMLA would not apply is bogus and merits no consideration.

59. The other argument of the appellant that the consequences if any of non-registration under FCRA would be limited to violation of FCRA and not under the PMLA provisions as the recognition/registration under FCRA entitles an entity to engage in trading activities pertaining to Forward Contracts. The recognition/registration also places upon an entity the obligation to adhere to provisions of the PMLA which regulates the outflow of money through such trading activities. Therefore the provision of two statutes are to be read as co-jointly. The Appellant, in the present case, has wilfully and deliberately violated provisions of FCRA by non-registration and has taken the benefit out of this contravention by avoiding compliance with PMLA. Section 2(n)(ii) of PMLA, 2002 is to be applied to recognised association at once if the activities of the party is as of recognised association. In Section 2(n)(ii) the term used is an association recognised or registered under FCRA. Thus violating the provisions of FCRA by non-registration and subsequent non-performance of obligations under PMLA, while continuing to engage in the trade of forward contracts, has to invite penalty under both the statutes.

60. The Appellant as per its own conduct now cannot argue that the consequences of non-registration under FCRA would be limited to violation of FCRA. After the amendment of PMLA, 2002 he is also liable for his obligations as a reporting entity within the meaning of PMLA, 2002, in view of the interconnected scheme of PMLA and FCRA. In case the arguments of the appellant is accepted, none of the parties would obtain registration deliberately who would keep on taking advantage of

non-registration by violating the provisions of FCRA and when the time of obligations under the PMLA would come, the parties would take the shelter that since no registration is obtained under FCRA, the provision of PMLA would not be attracted as the party is not a recognized association or a registered association within the FCRA and hence not an intermediary under PMLA. For the reasons already discussed the said plea of the appellant cannot be allowed.

61. It is also a matter of fact that the Appellant till date has not challenged the cancellation of Exemption, by Notification dated 19.09.2014. Therefore, the grounds for which the Govt. has passed the order cancellation of exemption, on the grounds of contravention of the Exemption, remain uncahallenged and valid.

62. The case in hand is not a case of innocent party. In the present case, the appellant were fully aware about the consequences of registration and non-registration. There is no material placed by the appellant in order to show that despite the fact that application for registration was filed in 2010, the appellant in order to show its *bona-fide* has expedited the registration by issuing the reminders. Thus, the conduct of the appellant would show that it has been done in order to take the advantage of its own wrong doing.

63. Under these circumstances, as far as merit of the case is concerned, the appellant has failed to make any case. We are of the considered view that the appellant were obligated as a reporting entity within the meaning of Section 12 of PMLA, 2002. All the arguments of the appellant in this respect are rejected.

64. As far as imposition of highest penalty u/s 13(2)(d) of PMLA, 2002 is concerned, it is rightly argued on behalf of the appellant that it is duty of the respondent to give reasons why other actions contemplated in clause (a) to (c) of Sub section 2 of section 13 of the PMLA shall not meet the ends of justice before imposition of penalty in terms of Clause (d) thereof. The Rules in relation to maintenance of records and reporting for Reporting Entity as defined in Section 2(1)(wa) pursuant to an amendment to the PMLA came into force only on August 27, 2013. No person can be penalised if the Rules relating to Reporting Entity themselves were not in force. The Rules were introduced on August 27, 2013. NSEL had stopped business pursuant to statutory order issued by Government of India on August 6, 2013. To some extent the argument of the appellant are sustainable but the fact remains that the amended provision of under the Act were enforced w.e.f. 15.02.2013. As such, there was a violation of the Act by the appellant before 6th August, 2013. With regard to imposition of maximum penalty is concerned, it is the admitted position that on this aspect the order is non-speaking and no valid legal reasons are given.

65. Section 13 reads as under:

> *Powers of Director to impose fine:-*
>
> *"(i) The Director may, either of his own motion or on an application made by any authority, officer or person, call for records referred to in sub-section (1) of section 12 and may make such inquiry or cause such inquiry to be made, as he thinks fit.*
>
> *(2) If the Director, in the course of any inquiry, finds that a banking company, financial institution or an intermediary or any of its officers has failed to comply with the provisions contained in section 12, then, without prejudice to any other action that may be taken under any other provisions of this Act, he may, by an order, levy a fine on such banking company or financial institution or intermediary which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.*

*(3) The Director shall forward a copy of the order passed under sub-section (2) to every banking company, financial institution or intermediary or person who is a party to the proceedings under that sub-section."*

66. In the case of Jameel vs. State of Uttar Pradesh in (2010) 12 SCC 532 page no. 47 Para no. 14, 15 & 16

> **"14.** *The general policy which the courts have followed with regard to sentencing is that the punishment must be appropriate and proportional to the gravity of the offence committed. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime.*
>
> *15. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.*
>
> ***16.** It is the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."*

67. There is force in the argument of the appellant. If major penalty as provided under the statute is to be imposed, a valid explanation are to be given in the impugned order as to why the major penalty of one lac for each failure is imposed but such explanation/reasons are missing in the present case although the conduct of the appellant was discussed in different context.

68. We are of the view that if discretion is exercised to impose the maximum penalty of one lac for account of each failure, a reasoned order

was to be passed. Therefore, in the absence of reasoned order and discussion hereinabove, we reduce the penalty from one lac for each failure to Rs. 15,000/- for each failure.

69. The appellant by earlier dated 31.08.2016 has already deposited Rs. 25 lacs with the respondent as an interim measure. We direct that in view of our this order, the appellant if entitled to any consequential refund after deducting the penalty as upheld in this order, the said amount be refunded to the appellant within four weeks from the receipt of our judgment.

70. As far as the appeal on merit is concerned, no ground of interference of impugned order is made out. The present appeal is, accordingly, disposed of by modifying the part of the order in relation to imposing the maximum penalty. All applications pending including the application for filing the additional documents are disposed of accordingly.

**(Justice Manmohan Singh)**
**Chairman**

**(Kaushal Srivastava)**
**Member**

**(Anand Kishore)**
**Member**

**New Delhi,**
**27th June, 2017**
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