THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

(Set up by an Act of Parliament)

ORDER UNDER SECTION 21B(3) OF THE CHARTERED ACCOUNTANTS ACT 1949 READ WITH RULE 19(1) OF THE CHARTERED ACCOUNTANTS (PROCEDURE OF INVESTIGATION OF PROFESSIONAL AND OTHER MISCONDUCT AND CONDUCT OF CASES) RULES, 2007.

File No.: DC/469/2016

In the matter of:

Shri S. Vijayarangam,
Assistant General Manager,
Special Enforcement Cell,
Securities & Exchange Board of India,
Kurla Complex, Bandra East,
Mumbai 400 051 **……Complainant**

Versus

CA. Subrate De (M. No. 054962) of M/s De & Bose **……Respondent No. 1**
CA. Durgadas De (M. No. 003729) of M/s De & Bose **……Respondent No. 2**
Chartered Accountants,
8/2, Kiran Sankar Roy Road,
2nd Floor, Room No. 1 & 1B,
Kolkata-700 001

Members Present:

CA. Prafulla Premsukh Chhajed, Presiding Officer
Smt. Anita Kapur, Member (Govt. Nominee)
Shri Ajay Mittal, IAS (Retd.), Member (Govt. Nominee)
CA. Debashis Mitra, Member
CA. Manu Agrawal, Member

DATE OF HEARING: 20.08.2019

PLACE OF HEARING: MUMBAI

Parties Present:

CA. Subrata De – Respondent No.1
CA. A. P. Singh - Counsel for both the Respondents

1. Vide report dated 29.01.2019 **(copy enclosed),** the Disciplinary Committee was of the opinion that CA. Subrate De (hereinafter referred to as the **'Respondent No. 1'**) was **GUILTY** of Professional Misconduct falling within the meaning of Clauses (7) and (8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949 (hereinafter referred to as the **'Act'**) and CA Durgadas De (hereinafter referred to as the **'Respondent No. 2'**) was **GUILTY** of Professional Misconduct falling within the meaning of Clause (7) of Part I of the Second Schedule to the said Act. The allegations with respect to the Respondent No. 1 was relating

to the statutory audit of Sahara India Real Estate Corporation Ltd (SIRECL) and Sahara Housing Investment Corporation Ltd. (SHICL) (hereinafter collectively referred to as "**Companies**") for the period ending 30th June, 2010 and 30th June, 2011 when the Companies had raised substantial sum of money from the public by issuing OFCDs but the Respondent was silent in his related audit reports as well as under Clause 4(xx) of CARO, 2003 . With respect to Respondent No. 2, it was alleged that a common certificate dated 12th July, 2013 was issued by him for both the companies without indicating individual liabilities of these companies separately and that the Respondent No.2 had accepted refunds/conversion without proper verification of the proceeds utilized in the process while issuing the certificate.

2. An action under Section 21B (3) of the Chartered Accountants Act, 1949 was contemplated against both the Respondents and a communication dated 28th June 2019 was addressed to both the Respondents thereby granting them an opportunity of being heard in person and/or to make a written representation before the Committee on 16th July 2019 at Kolkata.

3. Thereafter, vide e-mail dated 8th July 2019, the Respondent No. 1 sought adjournment of hearing while informing about the demise of Respondent no. 2 on 26th June 2019 who was the father of Respondent No. 1. He also enclosed the copy of his death certificate.

4. Thereafter, vide communication dated 7th August 2019 Respondent No 1 was again granted an opportunity of being heard in person and/or to make a written representation before the Committee on 20th August 2019 at Mumbai.

5. The Respondent no. 1 appeared in person before the Committee on 20thAugust, 2019 at Mumbai and also made his written representations dated 22nd March 2019 as well as oral submissions before the Committee wherein, he stated that

(i) The extant case was not properly authorized in accordance with the applicable Rules.

(ii) He was not engaged by the two companies in any capacity at the time of submission of the Red Herring Prospectus to the Registrar of Companies and that the Respondent did not provide any report or certification which could be deemed as having assisted the companies for raising money through OFCDs and had relied upon the legal opinions (produced by the company) from certain luminaries of the profession and had relied on

such opinions and information produced before him while performing the audit procedures and accordingly arrived at the opinion contained in his audit reports.

(iii) The Respondent contended that he had ensured that his reports contained appropriate disclosures relating to the issue of OFCDs, being treated as public issues, consequent to the final order of the Hon'ble Supreme Court dated 31st August, 2012 and he argued that just because in its final order dated 31st August, 2012Hon'ble Supreme Court had held that the issue of OFCDs by the said companies was public in nature it did not mean that the Respondent was guilty of professional misconduct. During the course of performing his procedures of audit, he had relied upon the opinions of the experts and that the decision of the Hon'ble Supreme Court was an event that occurred after the date on which the audit reports in question were already signed by him.

(iv) He further contended that the composition of Disciplinary Committee which heard the matter under Section 21B(3) of the CA Act 1949 had undergone a change as compared to the Disciplinary Committee Bench-III which arrived at a finding in the matter on 2th January 2019.

6. As regard the plea of Respondent that the extant complaint case was not properly authorized, as the Complainant was not authorized in terms of Rule 3(3) of CA Rules, 2007, the Committee noted that stated objection of the Respondent had been dealt in detail in paragraph 4 and 5 of the Findings Report and thus rightful authority was granted to the Complainant to file the matter with the Institute.

7. The Committee considered the written as well as oral submissions made by the Respondent and noted the applicability of provisions of proviso to Section 67(3) of the Companies Act, 1956 which clearly stated that if an offer or invitation to subscribe for shares and debentures is made to fifty persons or more, then despite the fact that such a subscription was not made available to persons other than those receiving the offer or it was made by way of private placement, it would be regarded as an invitation or offer to the public. In the extant case, the Committee noted from the balance sheet of SIRECL & SHICL for the period ending 30th June 2010 and 30th June 2011, that outstanding unsecured loans under the head OFCDs were reported at approx. Rs. 11,921 cr and Rs. 17,799 cr respectively **(D- 110, D-139)** for SIRECL and at approx. Rs. 2740 cr and Rs. 6375cr for SHICL **(D-40, D-60)** which indicated that substantial money was received during the period audited by the Respondent. Further, referring to the details regarding total number of investors as at April 13, 2011 and August 31, 2011 **(C-31)** for both the Companies, it was

clear that the OFCDs were being subscribed by lakhs of investors. Hence, it was evident from information available on records, that the said offer or invitation was made to persons far more than 50. Accordingly, it was viewed that in terms of Proviso to Sec 67(3) of the Companies Act, said issue was the public issue. Considering it as a private placement was a violation of Companies Act, 1956. It was viewed that such requirements existed before the Supreme Court Order.

8. As regard the plea of Respondent that he had relied upon the legal opinions from certain luminaries of the profession on point of principle of law and interpretation of the Act, the Committee considered the details regarding total number of investors as at April 13, 2011 and August 31, 2011 **(C-31)** for both the Companies and noted that it was clear that the OFCDs were being subscribed by lakhs of investors and this fact was never considered in any of the legal opinions being relied upon by the Respondent and thus in view of the Committee, the assumptions or facts that were of significance to legal opinions were not correct. The auditor should have evaluated the reasonableness of legal opinion based on assumption that the offer may exceed fifty whereas in actual practice it had been subscribed by lakhs of investors and there was no doubt that the offer was made to more than those numbers. Hence, there was violation of SA 620. The Committee viewed that the claim of the Respondent that he had disclosed the details after the Hon'ble Supreme Court passed the Order on August 31, 2012 was not tenable as there was no change in legal position pursuant to the Supreme Court order and Supreme Court had only confirmed the legal position as it existed pertaining to public issues and upheld observations of SEBI and SAT made in relation to the public issue made by the two Sahara entities. As regard the plea of the Respondent wherein he had inter-alia stated that the Committee that conducted the disciplinary hearings was different from the one which dealt with/was empowered to pass order under Rule 19 (1) of the said Rules, upon examination of the relevant provisions of the Chartered Accountants Act, 1949 and the Rules framed there under, the Committee noted that the said plea of Respondent was legally not tenable as neither the Chartered Accountants Act, 1949 nor the Rules framed there under specifically provided for or confers on the party a "*right to have his case decided by a judge who heard the whole of it*".

9. The Committee further noted that before the period ended on June 30, 2011, the SEBI had, in compliance with the Order and Directions of the Hon'ble Supreme Court, passed an Order dated on June 23, 2011 against SIRECL and SHCIL, directing them to 'refund the monies collected by them' through RHP along with 15% rate of interest (C-371).

However, such fact was neither disclosed in the financial statements nor did the Respondent No. 1 report the same in the audit report. It was viewed that the impact of such order was significant although subject to further order of Supreme Court. The auditor signed the financial statements of both the enterprises in Dec 2011 as the auditor's report of SIRECL was signed on 3rd Dec, 2011 and that of SHlCL was signed on 5th December 2011. There was sufficient time lapse from the date the order was passed till the date when auditor's report was signed. The Companies must had received the order in the period of 5 months but the Respondent No 1 being the auditor chose to remain silent on the matter and continued to report in pursuance to clause 4(xx) to CARO, 2003 that the company had not made any public issue. Thus, it is evident that the Respondent had deliberately concealed the fact and also omitted to report a material fact known to him in his audit report.

10. Thus, upon overall consideration and looking in to the facts of the case and as per paragraph 13 of SA 250, "Consideration of Laws and Regulations in an Audit of Financial Statements", mandating that the auditor should obtain sufficient audit evidence regarding compliance with laws and regulations which may had material impact on the financial statements, the Committee was of the view that in case, if the auditor observed that there was non-compliance which had an impact of material misstatement then the auditor was required to express qualification as per SA 705. It was noted that in extant case there was non-compliance of Section 67 of the Companies Act, due to which there were was a judgment that impacted the financials of the companies involved substantially, still the auditor remained silent. It was a violation of SA 250 as well as SA 705. It was, accordingly, viewed that the Respondent had violated the provisions of SA 250, 620 and 705. The Committee also noted that despite an order of Hon'ble Supreme Court, dated June 23, 2011 against SIRECL and SHCIL, directing them to 'refund the monies collected by them' through RHP along with 15% rate of interest, the Respondent as an auditor continued to report in pursuance to clause 4(xx) to CARO, 2003 that the company had not made any public issue. Thus, it was a matter of concealment and misstatement of information in the financial statements audited by the Respondent. He not only failed in discharging his responsibilities as an auditor, but also in a way assisted the Companies to raise huge funds in violation of the Companies Act, SEBl Act and SEBl (ICDR) Regulations without any regulatory approvals from SEBl.

11. The Committee was thus of the opinion that the misconduct on the part of the Respondent had been established within the meaning of Clauses (7) and (8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949 and keeping in view the facts and circumstances of the case as aforesaid, ordered the removal of name of Respondent **CA. Subrate De (M. No. 054962)** from Register of Members for a period of 24 (twenty four) months and due to death of the **CA Durgadas De**, the Respondent No 2, the extant matter against him became infructuous and accordingly the proceedings were abated against the Respondent No 2.

Sd/-
[CA. Prafulla P. Chhajed]
Presiding Officer

Sd/-
[Smt. Anita Kapur]
Member, Govt. Nominee

Sd/-
[Shri Ajay Mittal, IAS (Retd.)]
Member, Govt. Nominee)

Sd/-
[CA. Debashis Mitra]
Member

Sd/-
[CA. Manu Agrawal]
Member

Date: 20th August, 2019

Place: Mumbai

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

(Set up by an Act of Parliament)

CONFIDENTIAL

DISCIPLINARY COMMITTEE [BENCH-III (2018-19)
[Constituted under section 21B of the Chartered Accountants Act, 1949]

Findings under Rule 18(17) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007

File No. : DC/469/2016
In the matter of:

Shri S. Vijayarangam,
Assistant General Manager,
Special Enforcement Cell,
Securities & Exchange Board of India,
Kurla Complex, Bandra East,
Mumbai 400 051 **……Complainant**

Versus

CA. Subrate De (M. No. 054962) of **M/s De & Bose No. 1** **..…Respondent**
CA. Durgadas De (M. No. 003729) of **M/s De & Bose No. 2** **.....Respondent**
Chartered Accountants,
8/2, Kiran Sankar Roy Road,
2nd Floor, Room No. 1 & 1B,
Kolkata-700 001

Members Present:

Naveen N.D Gupta, Presiding Officer
Anita Kapur, Member (Govt. Nominee)
CA. Shyam Lal Agarwal, Member

PARTIES PRESENT:

CA. Subrata De – Respondent No.1
CA. A. P. Singh - Counsel for both the Respondents

DATE OF HEARING: 20.11.2018
PLACE OF HEARING: MUMBAI

Allegations of the Complainant, SEBI, Mumbai:

1. **Shri S Vijayarangan, Asstt. General Manager, Special Enforcement Cell, Securities and Exchange Board of India (SEBI), Mumbai** (hereinafter referred to as the '**Complainant**') had filed complaint in Form 'I' dated 11th April, 2014 (C-1 to C-393) against CA. Subrate De (hereinafter referred to as the '**Respondent No. 1'**) and Durgadas De (hereinafter referred to as the '**Respondent No. 2'**) of **M/s De & Bose, (FRN No. 302175E) Kolkata** (hereinafter referred to as the '**Respondent-Firm'**). It was noted that the background of the case was as under:-

1.1 Sahara India Real Estate Corporation Ltd (SIRECL) and Sahara Housing Investment Corporation Ltd. (SHICL) (hereinafter collectively referred to as "**Saharas**") had collected amounts aggregating approximately Rs.19,400.87crores and Rs.6,380.50crores respectively from various subscribers through Red Herring Prospectuses (RHP) dated 13.03.2008 and 16.10.2009 respectively.

1.2 As per the Annual Returns of period ending 30th June 2010 and 30th June 2011 submitted by the **Saharas**, the Respondent No. 1 was the statutory auditors of SHICL and SIRECL for the said period.

1.3 It was stated that the Respondent No. 1 being the auditors of SIRECL and SHICL had distorted and concealed the public issue of Optionally Fully Convertible Debentures (OFCD) by the Sahara and misrepresented those as private placement, which deprived crores of investors of the Investor Protection Safeguards under the Companies Act, SEBI Act, and SEBI (ICDR) Regulations, thereby not only failing in discharging their responsibilities as an auditor, but also assisting the Companies to raise huge funds in violation of the Companies Act, SEBI Act and SEBI (ICDR) Regulations and without any regulatory approvals from SEBI.

1.4 With respect to Certificate dated July 12, 2013, issued by Respondent No. 2, it had been stated that the SEBI could not inspect the Books of Accounts of SIRECL and SHICL and other related records, since the same were not produced by the Companies. However, the following related information/details which had come to light during the process of enforcement of the Hon'ble Supreme Court Order along with preliminary observations were reported as under:-

a) **Saharas** had admitted that the receipts on behalf of the two Sahara Companies were issued to the investors by the firm Sahara India in which they were partner to the extent of 34%, whose infrastructure and organization were utilized (on the basis of a written arrangement) by the two Sahara Companies. It was also admitted vide their letter dated 19.03.2013, that the redemption payments to the investors had been made in the same manner, through Sahara India. However, as per the Complainant, the alleged refunds made by Saharas could not be linked to the bank records of the **Saharas**. Further, the bank books of Sahara India and other related documents had not been produced by **Saharas**

before SEBI. As such SEBI was not able to verify the alleged refunds made by **Saharas** in the books of Sahara India.

b) As per the details provided by **Saharas** to the Complainant, they had allegedly refunded principal amount of Rs 21,722.53 crores till November 2012 to 2.20 crores OFCD holders and that 95.76% of the said principal amount had been refunded by way of cash. It was also noted that interest rates alleged to be paid varied from investor to investor and was not paid as fixed under the schemes or the Order of the Hon'ble Supreme Court dated 31.08.2012.

c) Further, it was claimed by the **Saharas** in their appeals before the Hon'ble SAT221/2012 and before the Hon'ble Supreme Court in C.A. 8643/2012 that the assets should not be attached as the process of attachment and sale by SEBI would drag on till January 31, 2013. Further vide their letter dated 19.03.2013 it was claimed by the **Saharas** that the assets had been disposed off to pay the investors. As per the Complainant, it was not known how the **Saharas** generated cash flows to make the alleged refunds, considering that the assets were not sold when the aforesaid appeals were filed and pending refunds were claimed to had been made before the filing of the aforesaid appeals. The claim in letter dated 19.03.2013 could not be verified as the details of the assets and their disposal and the audited Balance Sheets of the FY 2012-13 had not been furnished to SEBI inspite of being called for. It appeared to the Complainant that the RespondentNo.2 had accepted refunds/conversion without proper verification of the proceeds utilized in the process as the Respondent No 2 had certified these alleged redemptions till August 31, 2012 vide its certificate dated July 12, 2013 **(C-389)**.

d) The Respondent No.2 had issued a common certificate dated July 12, 2013 **(C-389)** for both the Companies without indicating individual liabilities of these Companies separately.

e) Early redemption prior to the year 2013 was not possible in any of the six schemes floated by Sahara, except in case of Nirman bonds issued by SIRECL. However, as per the refund details provided by Saharas in the soft copy, an amount of Rs 16,260.28 crore, out of the total unredeemable amount of Rs 24,029.73 crore as on August 31, 2011 (i.e. about 67.66% of the total amount) was already shown to be refunded by Saharas to about 1.54 crore investors (of both SIRECL and SHICL taken together) as on August 31, 2012 i.e. the date of the judgment and order of the Hon'ble Supreme Court. It was stated that these alleged refunds on such a large scale were never intimated to Hon'ble Supreme Court or to SEBI. Upon preliminary examination of the documents provided, SEBI had noted back dating of refund documents, instances of pre-dating i.e. prior to the request made by the bond holder for redemption. Thus, prima facie it also appeared to the Complainant that Saharas had refunded/converted the schemes from back date leading to the apprehension that they might be fabricating documents to show that the repayments/redemptions were made prior to the date of the judgment dated August 31, 2012 rendered by the Hon'ble Supreme Court. Thus, the Respondent No. 2 had accepted such refunds without demur and without adequate due diligence as the Respondent No 2 had certified these alleged redemptions vide its certificate dated July 12, 2013 **(C-389)**.

f) Further, as per the directions of the Hon'ble Supreme Court Order dated August 31, 2012, though no refunds could be made by the **Saharas** directly to the OFCD holders subsequent to August 31, 2012, yet monies had been allegedly refunded/redeemed, and that the same as per the Complainant

appeared to be through a process of adjustment with other group concerns inter alia by giving "advance" for future purchades of items sold by Sahara Q Shop Unique Products Range Ltd. (SQUPRL) and against "loans" which were obtained by becoming a "normal member" of SCCSL, in prima facie violation of the RHP and the terms of the OFCDS. As per the Complainant, while adjustment between liabilities owed to a single person could be lawfully made; adjustments of liabilities between different legal entities arouse suspicion about possible manipulation in the books of account. It appeared to the Complainant that the Respondent No. 2 had accepted such adjustments without demur and without adequate due diligence as he had certified these alleged redemptions vide its certificate dated July 12, 2013.

g) The Respondent No. 2 vide its certificate dated July 12, 2013 had stated that he had carried out verification and examination of OFCD redemption accounts as per standard practice and procedure, and, in respect of OFCD holders' redemption accounts, where supporting documents were not available with regard to redemption and not produced before them, such OFCD holders accounts had been treated as unpaid and outstanding as on August 31, 2012.

h) However, contrary to the above, as per the Complainant, it was receiving investors claims along with original documents for refund, which had actually been shown as refunded prior to August 31, 2012, in the refund CD provided by **Saharas** to SEBI. Therefore, a per the Complainant there was a clear discrepancy between the claims of the investors vis-à-vis the claims of the **Saharas** and the certificate issued by the Respondent No. 2.

1.5 Against the aforesaid background, the charges of the Complainant alleged against the Respondent No. 1 and the Respondent No. 2 could be summarized as under(C-3):-

1.5.1 **Against Respondent No. 1:**

a) The Companies had raised substantial sum of money from the public and the Respondents as auditors had failed to flag the violations of Companies Act, 1956 and other related laws in this regard and prima facie violated SA 250.

b) The Respondent had prima facie failed to comment on the management's disclosure on the end use of public issue proceeds and verification thereof and thereby failed to comply with Clause 4(xx) of CARO, 2003.

1.5.2 **Against Respondent No. 2:**

It was alleged that Respondent No 2 had

a) issued a common certificate dated 12th July 2013 for both the Companies without indicating individual liabilities of these Companies separately.
b) accepted refunds/conversion without proper verification of the proceeds utilized in the process while issuing certificate dated July 12, 2013.

Proceedings:

2. At the time of last hearing on 16th July 2018, the Committee noted that Respondent No. 1 along with his Counsel was present before the Committee. The Counsel submitted that he would also be representing Respondent No.2. Thereafter, the Committee asked whether the charges to be read out or these could be taken as read. The Counsel for the Respondents stated before the Committee that he was aware of the allegations raised against the Respondents

and the same might be taken as read. On being asked, as to whether they pleaded guilty, they did not plead guilty and opt to defend the case. The Counsel for the Respondents made submissions in the matter before the Committee. The Respondent No.1 was examined by the Committee on the submissions made by him. Based on the documents available on record and after considering the oral and written submissions made by the Respondents before it, the Committee concluded the hearing in the matter and the judgment was reserved with an instruction to the Respondents to submit his further Written Statement to defend his case.

3. At the time of hearing on 20th November, 2018, the Committee noted that the Respondent No. 1 along with his Counsel were present in person to appear before the Committee. The Counsel submitted that he would also be representing Respondent No.2.. The Committee further noted that the Complainant in the instant matter was not present. Before proceeding further in the matter, the Committee noted that there was a change in the constitution of the Committee since its last hearing and asked the Counsel for the Respondents whether the Respondents desired to seek de-novo or want to proceed in the case from where it was left earlier. The Counsel for the Respondents stated before the Committee that since the constitution of the Committee had changed, the Respondents would seek grant of de-novo hearing. The Committee accepted the request of the Respondents and accordingly, hearing in the matter was initiated afresh. The Respondent No. 1 who was present in person was put on oath. Thereafter, the Committee asked whether the charges to be read out or these could be taken as read. The Counsel for the Respondents stated before the Committee that they were aware of the allegations raised against them and the same might be taken as read. On being asked, as to whether they pleaded guilty, they pleaded Not Guilty and opted to defend the case. The Committee noted that during its one of the hearing held on 11th April 2017, the then Committee had sought from the Respondent No. 2, the details of verification procedure adopted by him for issuing certificate which was submitted by him vide his letter dated 26th May, 2017. The Respondents had also given their submission in context of hearing held on 16th July, 2018 vide their letter dated 30th July, 2018. Thereafter, the Counsel for the Respondents made his

submissions. Further, after hearing the matter, the Committee asked the Respondents to file, alongwith their final submissions, within next 15 days the following facts/documents:

(i) List of the opinions produced in tabular form highlighting the date of opinion, paragraph number of the opinion which was relied upon by the party. In case if date of opinion is not available, the Respondent was asked to provide date of payment of fees for said opinion.

(ii) Case laws along with the citation on which the Respondent defend the case stating the paragraph number and page number of the same.

Based on oral and written submission received from the Respondents and upon consideration of all facts, the Committee concluded the hearing.

4. The Committee noted that the Respondent No 1 and the Respondent No 2 vide their letter dated 30th July 2018 made further submissions wherein inter-alia they also pointed out that the manner in which the complaint was filed was not as per the requirement of Rule 3(3) of the (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 i.e. the complaint had not been authorized by an individual holding an office equivalent to that of a Joint Secretary nor had been signed by an individual holding an office equivalent to that of an Under Secretary of Central and/or State Government. It was further stated that the complaint was filed by Sri S. Vijayarangam on 11th April, 2014 as evident from Pages C3 & C4 of the PFO under authorization by Sri A. Sunil Kumar (as Chief General Manager) which was accorded on 22nd April 2014 as evident by the document attached on Page C2 of the PFO. Thus, the Respondents pleaded that the complainant had not been authorized on the date of his verifying and filing the complaint. Accordingly, the Respondents had questioned the entire process followed for filing the complaint with the Institute.

5. The Committee noted that the issues raised by the Respondents regarding the issue of authorization was referred to the SEBI which vide its letter dated 12th September 2018 stated as follows:

- SEBI is a statutory body established by the Act of Parliament for the purpose of protecting the interest of investors in securities and to promote the development of and to regulate the securities market and for matters

connected there with or incidental there to and in order to achieve the said objectives, SEBI recruits officers at various grades.

- The officers so recruited by SEBI are governed under SEBI (Employees Service) Regulation 2001. Whereas the recruitment, functions and duties of officers in Central government are governed under Central Civil Services (Conduct) Rules, 1964. As both of these rules and regulations were framed for different purposes, the designations, functions and duties of these officers cannot be analogous to each other. Further, it stated be noted that there are no norms in SEBI that established a strict/ direct one-to-one equivalence between the designations of its officers and those of Government of lndia.
- As regards the complaint lodged by SEBI with ICAI, it was stated that the Complaint was lodged after due approval of the Competent Authority. The extant matter was duly approved by Shri S. Ravindran, the then Executive Director, who had authorized the complainant to lodge the complaint with ICAI on 11th April 2014.

It was noted by the Committee that the SEBI had informed that in the instant matter, the approval was given by Shri S. Ravindran, the then Executive Director (ED), and authorized by Sri A. Sunil Kumar, the then Chief General Manager (CGM). It was noted that the approval for filing of complaints was given by the Executive Director which was one of the highest Posts in the SEBI and beyond ED there were the posts of Whole Time Member and Chairman who were appointed by the Cabinet Committee on Appointments by the Government of India. Further, considering the hierarchy followed at SEBI, it was noted that the Chief General Manager of SEBI was of the level equivalent in authority to that of Joint Secretary in Central/ State Government. Therefore, ED/CGM of SEBI were undoubtedly competent to authorize to file the complaint in terms of Rule 3 and thus could be considered as equivalent in authority to that of Joint Secretary in Central/ State Government. It was viewed that such authority across organization being governed by different set of rules could be compared only in terms of hierarchy followed in respective organizations rather than following any absolute rules of comparison.

As regard the discrepancy in the date of signing complaint vis-à-vis the date when the Complainant was authorized, the Committee noted that the Form I was signed on 11th April 2014 the date when ED of SEBI had accorded his approval to file the matter with ICAI. In other words, the complaint was being signed after seeking due approvals for filing complaint which was compliance of Rule 3(2) of CA Rules, 2007. Further, an authorization letter in favour of the Complainant was issued on 22nd April, 2014 and the said Form was received by ICAI on 25th April 2014 with due authorization. In any case, the Director(Discipline) had taken due cognizance of the matter and by that time authorization and approval were in place and everything was on record duly complied. It was also noted that the Rule 5 lays down the procedure to register the complaint wherein Rule 5(5) prescribes the procedure to rectify the defective complaint when it stated as follows:

"5. Registration of complaint

(5) If, the complaint, on scrutiny, is found to be defective, including the defects of technical nature, the Director may allow the complainant to rectify the same in his presence or may return the complaint for rectification and resubmission within such time as he may determine."

Thus, the Committee was of the opinion that it was well within the authority of the Director (Discipline) to had the complaint rectified for any procedural defect/lapse if on scrutiny he noticed any defect in the complaint so filed. The authorization being of a date later than the date of signing the complaint would not render the complaint invalid since the post facto authorization would cure the supposed defect and would relate back to the date on which the complaint was signed and presented. Hence such an objection was ruled out by the Committee as non-maintainable. The Committee accordingly decided the case on merits.

Findings:

6. The Committee while giving its findings noted the role of both the Respondent No 1 and Respondent No 2 in the entire episode of issue of OFCD's by **Sahara,** separately.

7. **Alleged role of Respondent No. 1:**

a) The Respondent was the statutory auditor of SIRECL as well as SHICL for the period ending on June 30, 2010 and June 30, 2011. SIRECL and SHICL

had proposed to issue Optionally Fully Convertible Debentures (OFCDs) by way of private placement through Red Herring Prospectuses (RHP) dated 13.03.2008 and 16.10.2009 respectively .

b) During the periods audited by the Respondent, the Companies raised substantial sum of money from the public by issuing OFCDs but the Respondent as auditor was silent about the said issue - in the audit report on the financial statements of the two enterprises ending on June 30, 2010 and June 30, 2011. as well as while reporting under Clause 4(xx) of CARO, 2003

8. The Committee noted that the Respondent in his written submissions had stated as follows:

- that at the time of audit for the periods ended 30th June, 2010 and 30th June, 2011, he could not had concluded that the Company's assertion that the OFCDs had been issued on a private placement basis was without legal basis. It was argued that hindsight could not be used to make such evaluation.
- At the time of audit of respective years, for each Company, there were resolutions of the shareholders authorizing the issue of OFCDs, RHPs filed with ROC, categorically stating that the issue was to be made on private placement basis and that no listing in any stock exchange was intended.
- Further, no objection was received by the Company from ROC with which the RHP's were filed for both the Companies, accordingly, the reports of the auditors for RHP of both the Companies (other than the Respondent no 1) namely CA. Gaurav Gupta of M/s. D.S. Shukla & Co for SIRCEL and CA S N Chaturvedi (M. No. 040479) & CA DSR Murthy (M. No. 018295) of M/s Chaturvedi & Co for SHICL , for inclusion in RHPs of the two Companies were also drawn up by considering the issues as private placements and not as public issues.
- Legal advice obtained by each company from competent and independent legal luminaries, both prior to the issue of the OFCDs and fresh legal advice obtained by the Companies,re-confirmed that issue of OFCDs through red herring prospectus did not constitute a public issue and hence did not attract the legal/regulatory requirements applicable to a public

issue of debentures, including those prescribed by SEBI. Thus, at the time of audit of SIRECL and SHICL for periods ended June 30, 2010 and June 30, 2011, as auditor, the Respondent could not had stated that the issue of OFCDs was a public issue. Subsequently as the Supreme Court took a view in the matter, the Respondents immediately took cognizance of the same and modified their observations.

- With respect to compliance with requirements of clause 4(xx) of CARO, 2003, the Respondent submitted that since the issue of OFCDs was on a private placement basis (as per competent, independent legal advice then with the Company), the requirements of Clause 4(xx) of CARO did not apply. However, once the Supreme Court ordered that the relevant issues were public issues, the Respondent brought out this position clearly in his report under Clause 4(xx) of CARO.

9. With respect to the auditor of RHPs namely, CA. Gaurav Gupta of M/s. D.S. Shukla & Co for SIRCEL and Chaturvedi & Co for SHICL, the Committee noted that separate disciplinary proceedings are under inquiry against them.

10. The Complainant had submitted in his Rejoinder that Para 10 of SA 620 also require that the auditor should had obtained a sufficient understanding of the field of expertise of the auditor's expert (referring to legal advice obtained by the Respondent in context of applicability of provisions of proviso to 67(3) of the Companies Act, 1956) to enable the auditor to evaluate the adequacy of that work for the auditor's purposes. In view of the clarity provided in first proviso to Section 67(3) of the Companies Act, 1956, the absolute responsibility for disclosures in Auditors Report laid with the Respondent as auditor of the two enterprises.

11. The Committee noted during the enquiry that Section 67 of the Companies Act, 1956 extracted below lay down the conditions when an offer or invitation could be construed to have been made to the public:

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

(1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the

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

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

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

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

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

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

(4) Without prejudice to the generality of sub- section (3), a provision in a company' s articles prohibiting invitations to the public to subscribe for shares or debentures shall not be taken as prohibiting the making to members or debenture holders of an invitation

(5) The provisions of this Act relating to private companies shall be construed in accordance with the provisions contained in sub- sections (1) to (4)."

12. From the above, the Committee noted that the Companies Act clearly states that if an offer or invitation to subscribe for shares and debentures is made to fifty persons or more, then despite the fact that such a subscription was not made available to persons other than those receiving the offer or it was made by way of private placement, it would be regarded as an invitation or offer to the public.

13. In the instant case, the Committee noted from the balance sheet of SIRECL & SHICL for period ending 30th June 2010 and 30th June 2011, that outstanding unsecured loans under the head OFCDs were reported at approx. Rs. 11,921 cr and Rs. 17,799 cr respectively **(D-110, D-139)** for SIRECL and at approx. Rs. 2740 cr and Rs. 6375cr for SHICL **(D-40, D-60)** which indicated that substantial money was received during the period audited by the Respondent. It was noted that bonds of such scheme range from Rs. 5000 to Rs.12,000 **(C-11)**. Further, referring to the details regarding total number of investors as at April 13, 2011 and Aug 31, 2011 **(C- 31)** for both the enterprises it was clear that the OFCDs were being subscribed by lakhs of investors. Hence, it was evident from information available on records, that the said offer or invitation was made to persons far more than 50. Accordingly, it was viewed that considering it as a private placement was a violation of Companies Act, 1956.

14. Further, when legal opinions on which the Respondent had relied upon were referred, the Committee noted that in such opinions whether dated or not viz. that of Sh. A. M. Ahmadi, Former Chief Justice of India, Sh. O. N. Khandelwal, Former Judge, High Court of Allahabad, Sh. U P Mathur, Advocate, Department of Legal Affairs, the query was limited to the fact that if offer was made to people exceeding fifty. However, in the instant case, such number were rising to lakhs and this fact was never considered in any of the legal opinions being relied upon **(D-8, D-82, 188, 220).** Hence, the assumptions or facts that were of significance to legal opinions, were not correct. The auditor should had evaluated the reasonableness of legal opinion based on assumption that the offer may exceed fifty whereas in actual practice it had been subscribed by lakhs of investors, and there was no doubt that the offer was made to more than those numbers. Hence, there was violation of SA 620.

15. The Committee further noted that before the period ended on June 30, 2011, the SEBI had, in compliance with the Order and Directions of the Hon'ble Supreme Court, passed an Order dated on June 23, 2011 against SIRECL and SHCIL, directing them to 'refund the monies collected by them' through RHP along with 15% rate of interest **(C-371)**. However, such fact was neither disclosed in the financial statements nor did the Respondent No 1 report the same in the audit report. It was viewed that the impact of such order was significant although subject to further order of Supreme Court. The auditor signed

the Financial Statements of both the enterprises in Dec 2011 as the auditor's report of SIRECL was signed on 3rd Dec, 2011 **(D-132)** and that of SHICL was signed on 5th December 2011 **(D-54A)**. There was sufficient time lapse from the date the order was passed till the date when auditor's report was signed. The company must had received the order in the period of 5 months but the Respondent No 1 being the auditor chose to remain silent on the matter.

16. It is noted that as per paragraph 13 of SA 250, "Consideration of Laws and Regulations in an Audit of Financial Statements", the auditor should obtain sufficient audit evidence regarding compliance with laws and regulations which may had material impact on the financial statements. In case, if the auditor observed that there was non-compliance which had a impact of material misstatement then the auditor was required to express qualification as per SA 705. It was noted that in extant case there was non-compliance of Section 67 of the Companies Act, due to which there were was a judgment that impacted the financials of the companies involved substantially still the auditor remained silent. It was a violation of SA 250 as well as SA 705. It was, accordingly viewed that the Respondent had violated the provisions of SA 250, 620 and 705.

17. Further, the Committee noted that despite such an order, the Respondent as an auditor continued to report in pursuance to clause 4(xx) to CARO, 2003 that the company had not made any public issue. Thus, it was a matter of concealment and misstatement of information in the financial statements audited by the Respondent. He not only failed in discharging his responsibilities as an auditor, but also in a way assisted the Companies to raise huge funds in violation of the Companies Act, SEBI Act and SEBI (ICDR) Regulations without any regulatory approvals from SEBI.

18. The Committee viewed that the claim of the Respondent that he had disclosed the details after the Hon'ble Supreme Court passed the Order on August 31, 2012 was not tenable as there was no change in legal position pursuant to the Supreme Court order and Supreme Court had only confirmed the legal position as it existed pertaining to public issues and upheld observations of SEBI and SAT made in relation to the public issue made by the two Sahara entities.

19. **Alleged role of Respondent No. 2:**

The Committee also noted that the role of the **Respondent No.2** in the entire episode of issue of OFCD'S by **Saharas** was as follows:

a) The Respondent had issued a common certificate dated 12th July 2013 for both the Companies without indicating individual liabilities of these Companies separately. It was alleged that the Respondent had accepted refunds/conversion without proper verification of the proceeds utilized in the process while issuing certificate dated July 12, 2013.

b)

20. The Respondent No 2 vide his certificate dated July 12, 2013 had stated as follows:

" *TO WHOM IT MAY CONCERN*

We M/s DE & Bose, Chartered Accountants, Statutory Auditors of M/s Sahara India Real Estate Corporation Limited, registered office of Sahara India Bhawan, I.Kapoorthala Complex, Aliganj, Lucknow 226021 and M/s Sahara Housing Investment Corporation Limited having registered office at Sahara India Point, CTS -10 & 44 S.V Road, Goregaon (West), Mumbai – 400104, Maharashtra, have performed the following procedures ***in carrying out the Special Assignment****.*

1. We have examined the books and records provided to us and also obtained the relevant information and explanation which to the best of our knowledge and belief were necessary to give this certificate.

2. We have relied upon the system and procedure of the company, books, records, documents, clarification, representation, information and statements made available to us and also done verification and scrutiny of the same.

3. ***We have carried out verification and examination of OFCD redemption accounts*** *as per standard practice and procedure and in respect of OFCD holders redemption accounts where supporting documents are not available with regard to redemption and not produced before us such OFCD holders accounts have been treated as unpaid and outstanding*

Base on the above procedures and verification, we certify that M/s Sahara India Real Estate Corporation Limited and M/s Sahara Housing Investment Corporation Limited had raised funds by issuance of Optionally Fully Convertible Debentures (unsecured) and as on 31.08.2012, ***the total outstanding liability inclusive of interest of the said companies is Rs. 8308.63 Crores (Rupees Eight Thousand Three Hundred and Eight Crores and Sixty Three lacs) (round off)***

"For De & Bose
Chartered Accountants
Firm Regn No. 302175E

"(Durgadas De)
Partner

Membership No.003729

Date : 12.07.2013
Place : Kolkata"

However, contrary to the above, SEBI had been receiving investors claims along with original documents for refund, which had actually been shown as refunded prior to August 31, 2012, in the refund CD provided by **Saharas** to SEBI. Therefore, there appeared a clear discrepancy between the claims of the investors vis-à-vis the claims of the **Saharas** and their Statutory Auditors.

21. The Committee noted that the Respondent in his written submissions dated 24th September 2014 had simply stated that that he was not involved in the audits of SIRECL and SHICL for the years ended 30th June, 2010 and 30th June, 2011 which were the years to which the two specific complaints refer. Therefore, he had nothing further to state in the matter. The Committee also noted the written submissions of the Complainant dated 2nd January, 2015 wherein he had stated that the Respondent No. 2 had issued a common certificate for both the Sahara entities without indicating individual liabilities of these entities separately, and the issues relating to complaint against the Respondent was given in various paras of the Complainant's letter dated August 16, 2013.

22. The Committee noted that the said certificate has been explicitly stated to be issued in context of a 'special assignment' which was then clear to be in response to Supreme Court directions to Saharas to furnish details to establish refunds made to the subscribers of RHPs of two companies. The details of outstanding being provided in the certificate was indirectly indicating the refunds made against such RHPs. It was viewed that when money was collected on separate RHPs, their details should have been maintained sepatarely. So after adopting due procedures of verification and examination as contended by the Respondent in his certificate, he should have stated the liabilities of two companies separately in the certificate. It was viewed that if such information was not available separately for each company then issuing such certificate was defying the purpose of certificate. The Committee accordingly viewed that the Respondent had not exercised due diligence while carrying out the professional duties associated while issuing the Certificate.

23. It was, further, noted that in his written statement dated 26th May, 2017, the Respondent had submitted that he had performed sufficient checks with amount refunded and those remaining outstanding on the date on which the certificate was issued. These checks included verification of the reports relating to the amounts refunded, mode of refund, date of refund and the amounts that continued to remain unpaid.

24. With respect to the details of verification process adopted by the Respondent before issuing the certificates as well as the documents verified by it particularly with reference to bank statements, it was submitted that the money was collected as well as disbursed through the branches of Sahara India. It was further informed that both SIRECL and SHICL had provided to the Respondent, the copy of ledger accounts which were verified on test check basis. It was further submitted by the Respondent that it was humanly not possible to check the details of all accounts across more than 6000 centres. It was noted that the Respondent provided the details in master sheet as well as in a CD submitted vide its letter dated 26th May 2017.

25. It was noted that the Respondent had submitted in paragraph 4(v) of the said submission that the companies operated through 6998 centres. The master sheets contained two statements – Statement of outstanding OFCD and repayment status for each centre as on 31st Aug 2012 for SIRECL and SHICL. Each such statement contains information relating to number of accounts from which amounts were received in each such centre, total amount received there from, total interest due thereon, the number of accounts repaid, the total amount repaid, amount of interest repaid, the balance number of accounts outstanding at each centre, the principal and interest amount due thereon. Thus, each statement contained such information for all 6998 centres for each of the companies. In the end, there was a statement to show the aggregate position of both enterprises. It was further noted that the Respondent had also submitted that he had verified the transactions for the centres where the amounts were received and where the payments were made for OFCDs. The investor wise party ledgers of 48 centres were produced in two CDs for the consideration of the Committee.

26. When the files of CDs were referred, it was noted that it contained the party ledger of depositors from the books of Sahara India and not from any of those two companies. The amounts were being received in small value instalments of Rs. 200 – Rs. 700 over a period of time. There were few depositors that paid the value of debentures in a single instalment. Further, when amount was repaid, the mode through which amounts were repaid viz by cash or cheque was not mentioned. It only mentioned a code. It was viewed that if such amounts were repaid through cheque or cash, the corresponding ledgers of the bank accounts or cash through which OFCDs were redeemed were not produced for the purpose of cross verification by the Committee. There was no separate list of investors which was used as a base of verification. From the records reproduced, it prima facie appeared that the Respondent had only verified the value of amounts received and repaid based on the balances given in party wise ledgers of each depositor at various centres and accordingly, asserted to had applied required skill and exercised due diligence for issuing certificates.

27. On perusal of the certificate dated 12th July 2013**(C-389)** issued by the Respondent No 2, the Committee noted that in the certificate, the Respondent had stated to had examined books and records as well as to obtain the information and explanation which was necessary to issue the certificates. It was also stated to had carried out verification and examination of OFCDs redemption accounts as per standard practice and procedures and where supporting documents were not available with regard to redemption it was treated as unpaid and outstanding **(C-389)**. The Committee reviewed the information submitted by the Respondent no -2 in order to issue the said certificate and noted that:

a. Apart from the party wise ledger of depositors, no working papers or the related books or records were produced before the Committee.

b. No evidence or copies of communication between the Respondent and the management of the two companies were produced through which the Respondent obtained the necessary information and explanation for issuing the certificate.

c. Despite seeking the detailed verification procedure adopted for issuing the certificate, the information produced before the Committee was insufficient to understand these procedures adopted.

d. It was submitted that test checks were applied to verify the transactions for which certificate was issued. However, neither the fact of having conducted test check was explicitly stated in the certificate nor any disclaimer was given.

28. The Committee noted that since a certificate also signified reasonable accuracy of the facts stated therein, therefore, the manner of checking the facts and issuing certificate highlighted non-exercising of the due diligence while carrying out the assignment. The Committee viewed that such certificate was a written confirmation of at least reasonable accuracy of the facts stated therein and was not expected to involve any estimation. The Committee noted that the Respondent in extant case had issued the certificate under question without verifying all the relevant documents. The Committee accordingly viewed that the Respondent had not exercised due diligence while carrying out the professional duties associated while issuing the Certificate.

CONCLUSION :

29. Thus in conclusion, in the considered opinion of the Committee, the Respondent no.1 was **Guilty** of professional misconduct falling within the meaning of Clauses (7) and (8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949 and Respondent no. 2 was also **Guilty** of professional misconduct falling within the meaning of Clause (7) of Part I of the Second Schedule to the said Act.

Sd/-
Sd/-
(CA Naveen N.D Gupta) **(Anita Kapur)**
(Presiding Officer) **Member (Govt. Nominee)**

Sd/-
(CA. Shyam Lal Agarwal)
Member

Date : 29th January, 2019

Place : New Delhi