RESOLÜT PARTNERS

Analysis

Indirect Acquisitions-Promoter Exemption: SEBI's Yes-No-Yes To Open Offers



Indirect Acquisitions-Promoter Exemption: SEBI's Yes-No-Yes To Open Offers

Click here to listen to our podcast for further insights

Key Takeaways

- Exemption from open offers triggered by indirect acquisitions by promoters has had a chequered past
- We examine:
  - Does the exemption extend to only direct acquisitions given that the term 'shares' refers to only listed companies?
  - Is the inter-se promoter exemption applicable to indirect acquisitions as well. If yes, under what circumstances?
  - What is SEBI's approach in granting open offer exemption to indirect acquisitions where transfer is between relatives, where the immediate promoter of the target entity is unlisted, and where the acquisition is via a Trust?
  - Informal guidance v Exemption application?

Family settlement agreements and succession planning by corporate India often involves the transfer of promoter holdings among family members. In principle, subject to specific conditions, SEBI's Takeover Code treats such transactions as exempt from triggering an open offer.

The language of the promoter exemption suggests that it applies to only direct acquisitions. But over time, through informal guidance and orders, SEBI has applied it to indirect acquisitions[1] as well. Unfortunately, the regulator's approach has not been consistent. In this piece, we'll dissect the various cases where indirection acquisition – promoter exemption was at play, and the insights they hold for deal makers.

What's The Promoter Exemption?

Acquisition of voting rights or control that cross the prescribed thresholds[2] is exempt[3] from open offer obligation if that acquisition involves inter se transfer of **shares** amongst qualifying persons, which could be (i) immediate relatives or (ii) persons named as promoters in the shareholding pattern filed by the target company for not less than 3 years prior to the proposed acquisition (**3-year test**).

Since shares[4] has been defined to mean shares of the target company[5], the automatic exemption is available only when an acquisition amongst qualifying persons involves the listed entity.

The provision, on a strict reading, does not contemplate an exemption when voting rights/control is indirectly acquired in the target listed company by way of inter-se transfer amongst qualifying persons.

But the regulator has granted the exemption in certain cases of indirect acquisition, while denying it others- leading to inconsistent views.

How Has The Exemption Been Applied?

The earliest cases that tested the promoter exemption vis-a-vis immediate relatives were DB Corp[6] (Annexure 2) and OCL Iron and Steel[7] (**OCL**) (Annexure 3). In both, SEBI granted the exemption from the open offer obligation.

---

[1] Reg 5: Annexure 1.
[2] Reg 3(1): Acquisition of shares or voting rights entitling the acquirer and PAC to exercise 25% or more of voting rights in the target company
Reg 3(2): Acquisition of additional shares or voting rights entitling the acquirer and PAC to exercise more than 5% of voting rights in a financial year by an acquirer who together with PAC already holds 25% or more but less than 75% of the capital in the target company [Creeping acquisition].
Reg 4: Acquisition of control
[3] Reg 10. (1) The following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfillment of the conditions stipulated therefor,— (a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being,— (i) immediate relatives; (ii) persons named as promoters in the shareholding pattern filed by the target company in terms of the listing regulations for not less than three years prior to the proposed acquisition;
[4] shares" means shares in the equity share capital of a target company carrying voting rights, and includes any security which entitles the holder thereof to exercise voting rights.
[5] "target company" means a company and includes a body corporate or corporation established under a Central legislation, State legislation or Provincial legislation for the time being in force, whose shares are listed on a stock exchange;
[6] DB Corp Informal Guidance, 2012: *https://www.sebi.gov.in/enforcement/informal-guidance/mar-2013/informal-guidance-in-the-matter-of-d-b-corp-limited_24504.html*
[7] OCL Iron & Steel Informal Guidance, 2013: *https://www.sebi.gov.in/enforcement/informal-guidance/mar-2013/informal-guidance-in-the-matter-of-m-s-ocl-iron-and-steel-limited_24462.html*

The Cases of Yes: It said in DB Corp that inter-se transfer of shares among the existing promoters of the promoter group companies qualifies for the open offer exemption since the transfer is between entities who are immediate relatives.

The same principle was applied in OCL where the brother, along with persons acting in concert who were relatives, sought to acquire indirect control over the target listed company from the sisters.

The Case of No: The principle changed in 2023 when, via an informal guidance in the case of Vidhi Restaurants[8] (**Vidhi**) (Annexure 4), SEBI denied the exemption when the indirect acquisition involved spouses. SEBI's reasoning was curious and a first here. It said that the exemption isn't available since the transaction doesn't involve transfer of shares in the target company. And that shares/voting rights in the target are being acquired through transfer of shares in the promoter entity of the target.

In doing so, the regulator signaled to the market that it will now take a strict interpretation of the automatic exemption. But in Vidhi, it also gave an important message. That if the acquirer were to make an application under the provision[9] that gives power to the SEBI Board to grant exemption from open offer obligation, it can consider it.

The Case of Yes: Something that Nuvoco Vistas Corporation[10] (**Nuvoco**) (Annexure 5) bet on last year. It applied to SEBI seeking exemption from a transaction involving inter-se transfer of shares via gift of promoter entity of Nuvoco among immediate relatives. The regulator granted the exemption saying (i) the acquirer along with persons acting in concert would continue to hold 72.02% shares in Nuvoco (ii) acquisition will not result in any change in the shareholding pattern of the promoters/promoter group in Nuvoco, there is no change in control and (iii) the transaction would not affect or prejudice the interests of the public shareholders.

The Case of No: For a similar fact pattern, back in 2018, in an informal guidance to Navkar Builders[11] (**Navkar)** (Annexure 6), the regulator had denied the exemption.

The reason for denial was confounding. The regulator said that the inter-se transfer was between promoters (who were not relatives) of Navkar Fiscal – the unlisted promoter entity of Navkar. And since the promoters of Navkar Fiscal weren't disclosed to the stock exchange, the exemption can't be granted. In saying so, the regulator applied the 3-year promoter disclosure condition to the unlisted promoter entity of the target company. Interestingly, in Navkar, the two shareholders of the unlisted promoter entity also held a direct stake in the listed entity.

Curiously, it's unclear where and how the shareholding of an unlisted promoter entity should be disclosed to avail the exemption.

---

[8] Vidhi Restaurants Informal Guidance, 2023: *https://www.sebi.gov.in/enforcement/informal-guidance/jun-2023/informal-guidance-letter-to-vidli-restaurants-ltd-with-regard-to-regulation-10-1-a-i-of-sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011-takeover-regulations-_73059.html*.

[9] Reg 11(1): Exemptions by the Board. 11.(1) The Board may for reasons recorded in writing, grant exemption from the obligation to make an open offer for acquiring shares under these regulations subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market.

[10] Nuvoco Vistas WTM Order, 2024: *https://www.sebi.gov.in/enforcement/orders/jul-2024/exemption-order-under-regulation-11-of-sebi-sast-regulations-2011-in-the-matter-of-nuvoco-vistas-corporation-limited_85297.html.*

[11] Navkar Builders Informal Guidance, 2018: *https://www.sebi.gov.in/enforcement/informal-guidance/mar-2018/informal-guidance-in-the-matter-of-navkar-builders-limited_38101.html.*

In Trusts, We Trust

Besides inter-se transfers among relatives/promoter entities, transactions involving indirect acquisitions by trusts[12] have also knocked on SEBI's doors to avail the exemption from open offer obligation. This prompted SEBI to codify[13] the exemption conditions when the transfer of shares from promoters to Trusts triggered an open offer. These include an undertaking that, for instance, (i) the acquirer Trust in substance is only a mirror image of the promoters' holdings and consequently there is no change of ownership/control of the shares or voting rights in the target company; (ii) only individual promoters or their immediate relatives or lineal descendants are Trustees and beneficiaries of the acquirer Trusts; (iii) the Trustees will not be entitled to transfer or delegate any of their powers to any person other than one or more of themselves, etc.

To be clear, fulfillment of all the conditions does not guarantee automatic exemption. SEBI will continue to scrutinize the exemption applications basis the conditions enumerated.

But the processing time of applications where the conditions are met could be significantly faster.

Conclusion

SEBI's approach to inter-se promoter exemption under the Takeover Code remains largely consistent barring Vidhi where transfer between spouses was considered a trigger for open offer. While the Code explicitly suggests the exemption applies only to direct acquisitions involving qualifying parties, SEBI has extended the exemption to indirect acquisitions as well on a case-to-case basis. In the regulator's mind, the construct of 'shares' extends to indirect acquisitions as well, as long as either the immediate relative condition or the 3-year promoter shareholding disclosure requirement is met with.

SEBI has shown a willingness to grant exemptions when an application is made to it as against informal guidance, for instance Vidhi. Dealmakers should be able to take comfort in the most recent order in the case of Nuvoco to conclude transactions as long as the exemption requirements are met.

---

[12] Exemption order in Indian Metals & Ferro Alloys Ltd, 2018: *https://www.sebi.gov.in/enforcement/orders/mar-2018/exemption-order-under-regulation-11-of-sebi-sast-regulations-2011-in-the-matter-of-indian-metals-and-ferro-alloys-ltd_38463.html* ; Amara Raja Energy & Mobility: *https://www.sebi.gov.in/enforcement/orders/jan-2025/exemption-order-under-regulation-11-of-sebi-sast-regulations-2011-in-the-matter-of-amara-raja-energy-and-mobility-limited_91162.html*

[13] Master Circular for Substantial Acquisition of Shares and Takeovers: *https://www.sebi.gov.in/legal/master-circulars/feb-2023/master-circular-for-substantial-acquisition-of-shares-and-takeovers_68091.html*

Annexure 1

Indirect acquisition of shares or control.

5. (1) For the purposes of regulation 3 and regulation 4, acquisition of shares or voting rights in, or control over, any company or other entity, that would enable any person and persons acting in concert with him to exercise or direct the exercise of such percentage of voting rights in, or control over, a target company, the acquisition of which would otherwise attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations, shall be considered as an indirect acquisition of shares or voting rights in, or control over the target company.

(2) Notwithstanding anything contained in these regulations, in the case of an indirect acquisition attracting the provisions of sub-regulation (1) where,—

(a) the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;

(b) the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or

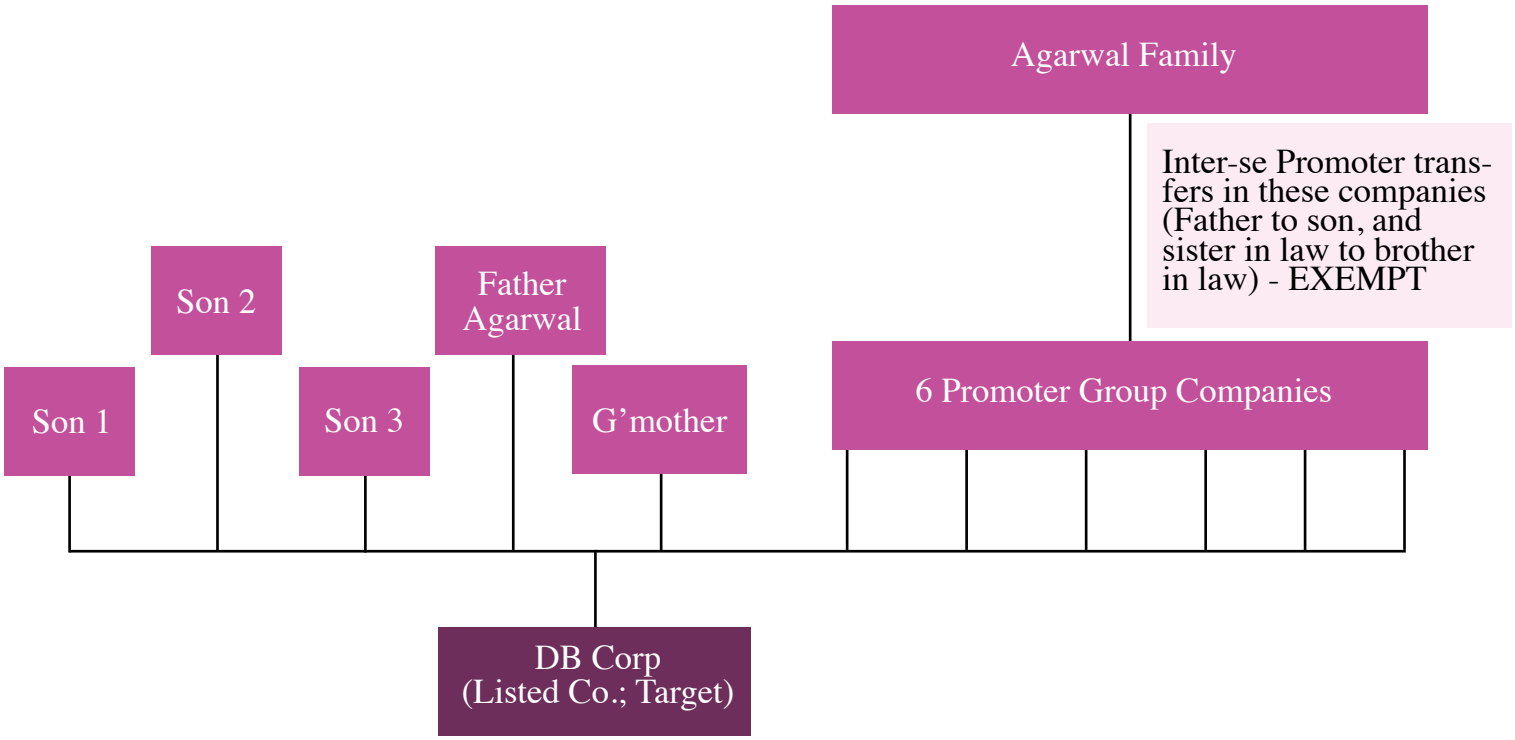
(c) the proportionate market capitalisation of the target company as a percentage of the enterprise value for the entity or business being acquired;

is in excess of eighty per cent, on the basis of the most recent audited annual financial statements, such indirect acquisition shall be regarded as a direct acquisition of the target company for all purposes of these regulations including without limitation, the obligations relating to timing, pricing and other compliance requirements for the open offer.

Explanation.— For the purposes of computing the percentage referred to in clause (c) of this sub-regulation, the market capitalisation of the target company shall be taken into account on the basis of the volume-weighted average market price of such shares on the stock exchange for a period of sixty trading days preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period.

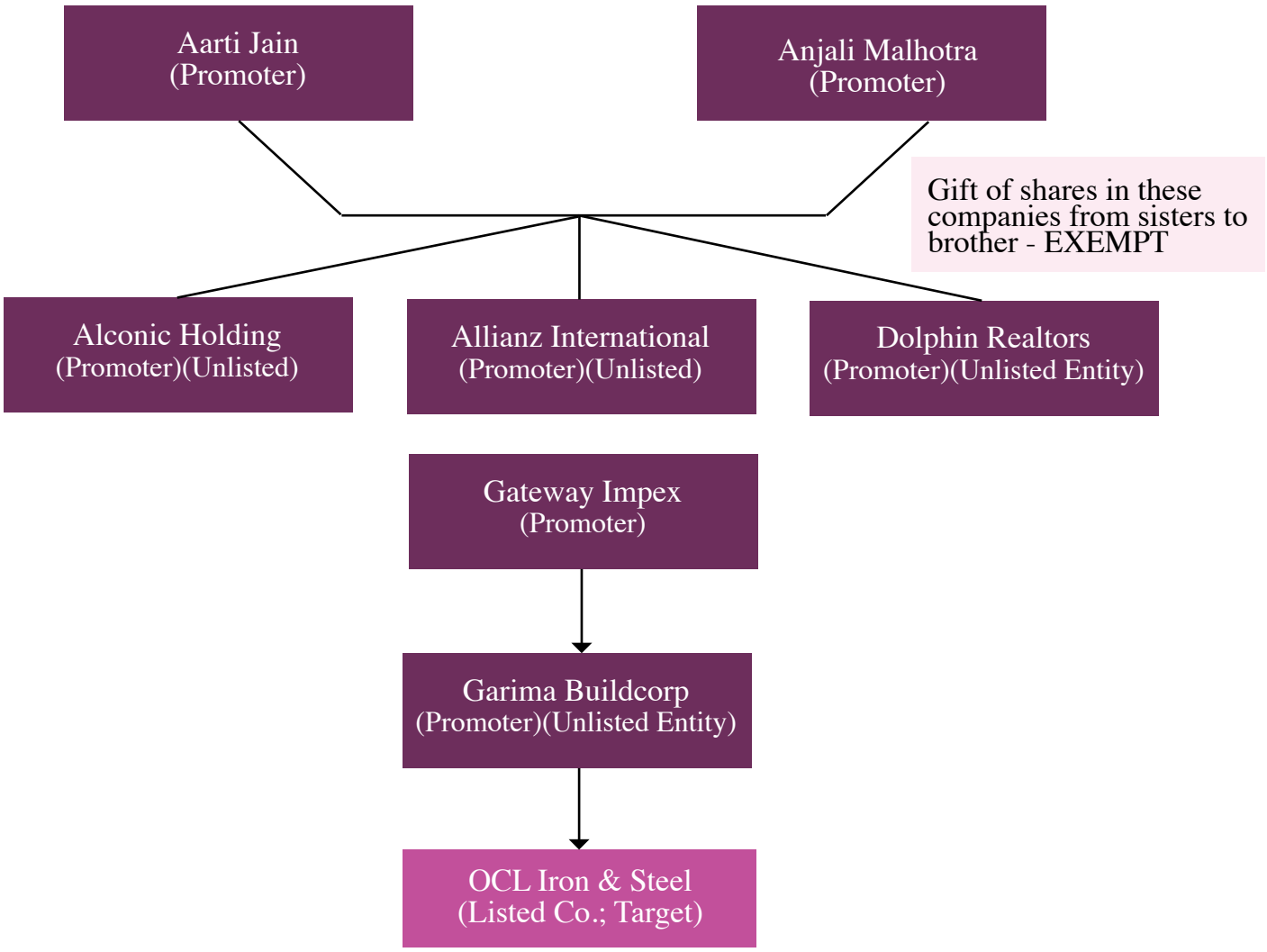
Annexure 2

DB Corp - Informal Guidance (2012)



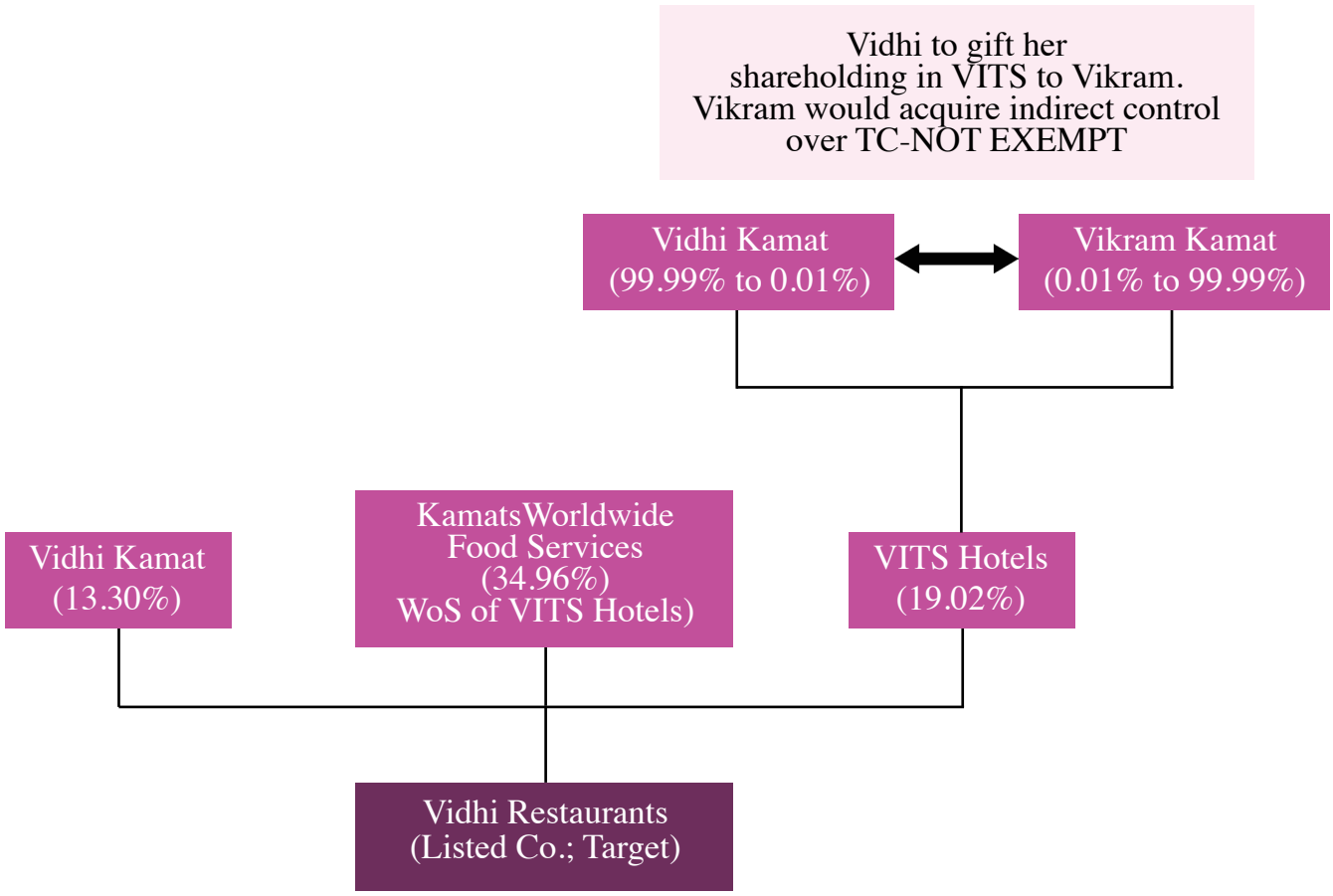
Annexure 3

OCL Iron & Steel - Informal Guidance (2013)



Annexure 4

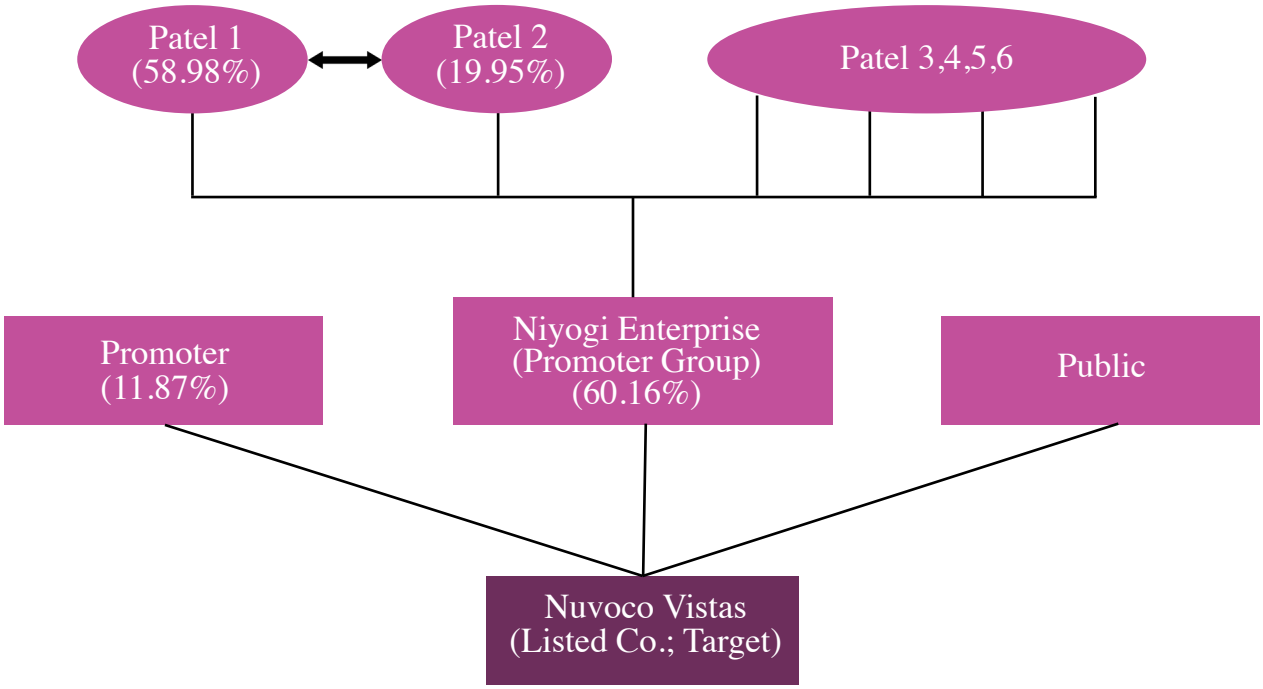
Vidhi Restaurants - Informal Guidance (2023)



Annexure 5

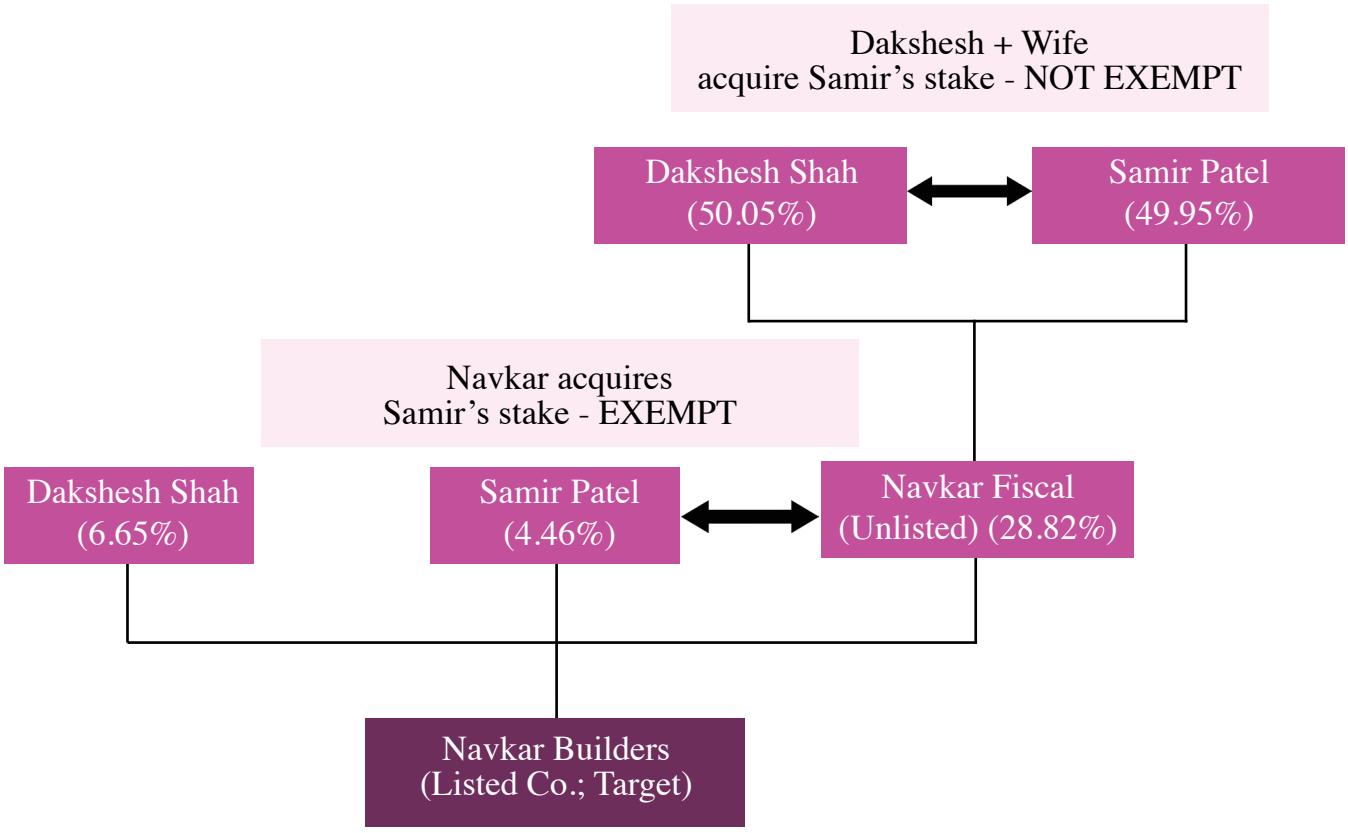
Nuvoco Vistas - WTM Order (2024)

Patel 2 (son) acquiring Patel 1 (father) shareholding in Niyogi. Inter-se transfer of shares (via gift) of promoter entity of TC among immediate relatives
*(*Vidhi cited)*



Annexure 6

Navkar Builders - Informal Guidance (2018)



Author



Payaswini Upadhyay

About our Public M&A Practice

Public M&A / PE is arguably the most nuanced field of deal-making in India, considering the myriad legislations and constantly evolving corporate governance practices. Over the last decade, India's public markets have successfully attracted some of the largest financial and strategic investors, both domestic and foreign. While the legal framework and the regulators are....*read more*

About Resolüt Partners

We are a transactional law firm built on four main foundations:

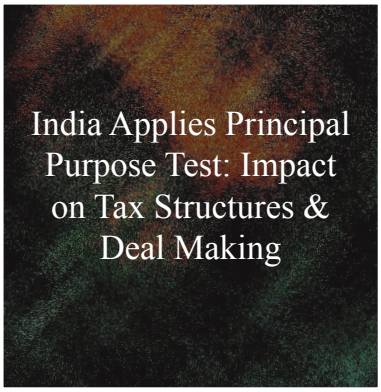
1. *Mathematically sharp commercial lawyers*
2. *Integrated Legal and Tax advice*
3. *Multi-jurisdictional understanding*
4. *Eliminating choices...read more*

Join our Whatsapp Community

*Please click **here** or scan the QR code to join the WhatsApp community of Resolüt Partners*

Recent Analyses







Recent Bottom Line/ NewsWire







Recent Research



