

# **MONTHLY LAW REPORT FOR DECEMBER, 2017**

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**MONTHLY LAW REPORT FOR DECEMBER, 2017**  
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## Circulars and Notifications Issued by Ministry Of Corporate Affairs (MCA)

<b>Notification &amp; Circular No.</b>	<b>Date of Issue</b>	<b>Subject</b>
<b>1. General Circular No. : 16/2017 MANU/DCAF/0112/2017</b>	<b>29 December, 2017</b>	<p><b>Subject: Condonation of Delay Scheme, 2018</b> - Whereas, companies registered under the Companies Act, 2013 (or its predecessor Act) are inter-alia required to file their Annual Financial statements and Annual Returns with the Registrar of Companies and non-filing of such reports is an offence under the said Act.</p> <p>Whereas, section 164(2) of the Act read with section 167 of the Companies Act, 2013 [the Act], which provisions were commenced with effect from 01.04.2014, provide for disqualification of a director on account of default by a company in filing an annual return or a financial statement for a continuous period of three years.</p> <p>Whereas, Rule 14 of the Companies (Appointment and Qualification of Directors) Rules, 2014 further prescribes that every director shall inform to the company concerned about his disqualification, if any, under section 164(2), in form DIR-8.</p> <p>Whereas, consequent upon notification of provisions of section 164(2), Ministry of Corporate Affairs (MCA) had launched a Company Law Settlement Scheme 2014 providing an opportunity to the defaulting companies to clear their defaults within the time period specified therein and following the due process as notified.</p> <p>Whereas, MCA in September 2017, identified 3,09,614 directors associated with the companies that had failed to file financial statements or annual returns in the MCA21 online registry for a continuous period of three financial years 2013-14 to</p>

		<p>2015-16 in terms of provisions of section 164(2) r/w 167(1)(a) of the Act and they were barred from accessing the online registry and a list of such directors was published on the website of MCA.</p> <p>Whereas, as a result of above action, there have been a spate of representations from industry, defaulting companies and their directors seeking an opportunity for the defaulting companies to become compliant and normalize operations.</p> <p>Whereas, certain affected persons have also filed writ petitions before various High Courts seeking relief from the disqualification.</p> <p>Whereas, with a view to giving an opportunity for the non-compliant, defaulting companies to rectify the default, in exercise of its powers conferred under sections 403, 459 and 460 of the Companies Act, 2013, the Central Government has decided to introduce a Scheme namely "Condonation of Delay Scheme 2018" [CODS-2018].</p>
<p><b>2. Notification No. : GSR1526(E) MANU/DCAF/0111/2017</b></p>	<p><b>20<sup>th</sup> December, 2017</b></p>	<p><b>Subject: Companies (cost records and audit) Second Amendment Rules, 2017 -</b> In exercise of the powers conferred by sub-sections (1) and (2) of section 469 and section 148 of the Companies Act, 2013 (hereinafter referred as the Act), the Central Government hereby makes the following rules further to amend the Companies (cost records and audit) Rules, 2014, namely:-</p> <ol style="list-style-type: none"> <li>1. These rules may be called the Companies (cost records and audit) Second Amendment Rules, 2017.</li> <li>2. In the Companies (cost records and audit) Rules, 2014 (hereinafter referred to as the principal rules), in rule 2, for clause (aa) the following clause shall be</li> </ol>

		<p>substituted and shall be deemed to have been substituted with effect from the 1st day of July, 2017, namely:-</p> <p>(aa) "Customs Tariff Act Heading" means the heading as referred to in the Additional Notes in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).</p> <p>3. In the principal rules, in rule 3, for the words "Central Excise Tariff Act Heading", occurring at both the places, the words "Customs Tariff Act Heading" shall be substituted and shall be deemed to have been substituted with effect from the 1st day of July, 2017.</p> <p>4. In the principal rules, in the Annexure, in Form CRA-2, Form CRA-3 and Form CRA-4, for the words "CETA Heading", wherever it occurs, the words "CTA Heading" shall be substituted and shall be deemed to have been substituted with effect from the 1st day of July, 2017.</p>
<p><b>3. Notification No. : SO3804(E) MANU/DCAF/0105/2017</b></p>	<p><b>4<sup>th</sup> December, 2017</b></p>	<p><b>Subject: Designation of LIX Additional City Civil and Sessions Judge, Bengaluru City as Special Court for the purposes of providing speedy trial of offences punishable with imprisonment of two years or more under sub-section (1) of Section 435 of the Companies Act, 2013</b></p> <p>- In exercise of the powers conferred by sub-section (1) of Section 435 of the Companies Act, 2013 (18 of 2013), the Central Government, with the concurrence of the Chief Justice of the High Court of Karnataka, hereby designates the following Court mentioned in column (1) of the Table below as Special Court for the purposes of providing speedy trial of offences punishable with imprisonment of two years or more under the said sub-section, namely:-</p>

		<table border="1"> <tr> <td data-bbox="854 197 1143 285"><b>Court</b></td> <td data-bbox="1143 197 1430 285"><b>Jurisdiction as Special Court</b></td> </tr> <tr> <td data-bbox="854 285 1143 457"><b>LIX Additional City Civil and Sessions Judge, Bengaluru City</b></td> <td data-bbox="1143 285 1430 457"><b>State of Karnataka</b></td> </tr> </table>	<b>Court</b>	<b>Jurisdiction as Special Court</b>	<b>LIX Additional City Civil and Sessions Judge, Bengaluru City</b>	<b>State of Karnataka</b>
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<b>LIX Additional City Civil and Sessions Judge, Bengaluru City</b>	<b>State of Karnataka</b>					
<p><b>4. Notification No. : GSR1480(E) MANU/DCAF/0106/2017</b></p>	<p><b>4<sup>th</sup> December, 2017</b></p>	<p><b>Subject: Companies (Filing of Documents and Forms in Extensible Business Reporting Language), Second Amendment, Rules, 2017 -</b></p> <p>In exercise of the powers conferred by sub-sections (1) and (2) of section 469 read with section 398 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015, namely:-</p> <p>1. Short title and commencement.- (1) These rules may be called the Companies (Filing of Documents and Forms in Extensible Business Reporting Language), Second Amendment, Rules, 2017. (2) They shall come into force from the date of their publication in the Official Gazette.</p> <p>2. In the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015, for Annexure-III, the amended Annexure-III shall be substituted.</p>				
<p><b>5. General Circular No. : 15/2017 MANU/DCAF/0107/2017</b></p>	<p><b>4<sup>th</sup> December, 2017</b></p>	<p><b>Subject: Relaxation of additional fees and extension of last date of filing of Form CRA-4 under the Companies Act, 2013 -</b> The Ministry of Corporate Affairs has received several representations about extension of the last date for filing of Form CRA-4 without additional fees on account of Companies (Cost Records and Audit) Amendment Rules, 2017 and other reasons. The matter has been examined and it has been decided to extend the last</p>				

		<p>date for filing of Form CRA-4, for the financial years starting on or after 1st April, 2016, without additional fees till 31st December, 2017.</p> <p>2. This issues with the approval of competent authority.</p>
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## Companies Act, 2013 Case Laws

### By Advocate P.K. Mittal, +91-9811044365

- ✚ Objections, if any, to the scheme of amalgamation contemplated by the authorities to whom notices have been given, may file their objections on or before the date fixed for hearing, failing of which, it will be considered that there is no objection on the part of the authorities to the approval of the scheme by the Tribunal, subject to other conditions being satisfied as may be applicable under the Companies Act, 2013 and the relevant rules thereunder. **Millennium Automation & Systems Limited and Millennium Automation Private Limited C.P. No. (CAA) - 442 (ND) 2017**
- ✚ Where it can be seen from the documents available on record that - (i) the company was carrying on its business and was operative at the time of its name being struck off, (ii) no SCN was issued by the ROC to the petitioner company or its directors before striking off as required u/s 248(1) of Companies Act, 2013, (iii) Appeal has been filed within stipulated time, (iv) Income Tax Dept. and ROC have not raised any specific objection, it is held that even if the management of the company entrusted with the responsibility of filing of statutory returns had failed to do so, yet, based on the the above reasons and interest of the company as a whole, the Tribunal has power to restore the name of the company. **M/s Garnish Electronics Pvt. Ltd. vs. ROC, NCT of Delhi and Haryana. C.P. No. 308/ (ND)/2017**
- ✚ On a petition under section 252 of the Companies Act, 2013 for restoration of name, Ahmedabad Bench of NCLT, till the decision of petition, allowed operation of bank account(which was freezed) for payment of salaries of employees and also for the purpose of receiving the amount. **Shinde Human Resources Pvt. Ltd. vs. ROC. MANU/NC/2343/2017**

- ✚ The Calcutta bench of NCLT has passed specific orders that if the RD, OL and Income Tax Officer does not file their affidavit within one month, it shall be presumed that they have no objection in the case of merger under section 230 of the Companies Act, 2013. **Satyatej Commercial Company Ltd. MANU/NC/2342/2017**
- ✚ The NCLT has allowed petition under section 14(1) seeking permission allowing conversion from public to private in view of the fact that there are only seven shareholders and company does not wish to go public and company completing procedural formalities, allowed the company to convert from public to private. **In Re: Mgrm Medicare Limited MANU/NC/1835/2017**
- ✚ It is held that an application which is barred by limitation cannot be held to be res judicata for the purpose of subsequent claim and once a claim has been dismissed on the ground of limitation or on the ground of delay and laches, such prayer cannot be made thereafter, in the absence of fresh cause of action. **Vijay Vasant Dhavle vs. Dolce Pharmaceuticals Private Limited and Ors. MANU/NL/0179/2017**
- ✚ Where transferor-companies are wholly owned subsidiaries of transferee-company and the financial position of the transferee is highly positive, and the merger is not affecting the rights of the applicant shareholders or creditors, then allowing the transferee-company to obtain approval without taking the shareholders' approval is permissible under law, and the transferee-company need not hold any meeting either with its creditors or members. **In Re: Housing Development Finance Corporation Ltd. MANU/NC/1116/2017**
- ✚ A registered partnership firm, though a body corporate, is not a company within the meaning of the Act and, therefore, it cannot participate in the amalgamation proceedings that are initiated under the provisions of section 230 to 232 of Companies Act, 2013. **In Re: Kediya Ceramics MANU/NC/1003/2017**

## Insolvency and Bankruptcy Code, 2016 Judgments By Advocate P.K. Mittal, +91-9811044365

- ✚ The Delhi High Court has held that if a moratorium under section 14 of IBC, 2016 has been granted in favour of Corporate Debtor, the order under section 14 shall not prohibit or bar continuation of proceedings under section 34 of arbitration and conciliation Act, 1996 for setting aside of Arbitration award in which corporate Debtor is a party. The Court further held that proceedings under section 34 are not a step prior to execution of Award which is prohibited under section 14 of IBC. **Power Grid Corporation Ltd. vs. Jyoti Structure Ltd. MANU/DL/5126/2017**
- ✚ The Supreme Court in landmark judgment has held that – (i) the notice under section 8 of IBC can be given by a lawyer or any other authorized agent including PCS also, (ii) the certificate under section 9(3)(c) from bank is not mandatory but only directory and existence of debt could be proved by some other documents (personal opinion-a CA certificate or some other personal certificate could be an ideal substitute). **Macquarie Bank Ltd. vs. Shilpi Cable Technology Ltd. MANU/SC/1609/2017**
- ✚ The NCLAT allowed the appeal of a company by holding that if the petition under section 10 of IBC, 2016 is complete in all respects, the same cannot be dismissed on the ground that secured creditors (banks) had invoked the provisions of SARFAESI Act for recovery of debts due. **Leo Duct Engineers Ltd. LSI-2185-NCLAT-2017**
- ✚ The NCLT has observed that pendency of notice under section 13(2) of SARFAESI Act by the bank for takeover of assets of borrower company and proceedings under section 138 of Negotiable Instruments Act is no bar to filing of petition under section 10 of IBC, 2016 by the company itself. **Dreamland Realtor Pvt. Ltd. MANU/NC/1827/2017**
- ✚ In a petition under Section 10 of IBC, 2016, the NCLT sanctioned a Scheme holding that the scheme shall be binding on Corporate Debtor, employees, members, creditors, guarantors and other stake holders. Reinstatement of employees pay 5% to all corporate debtors, payment of electricity dues in installments and payment to financial creditors and court vacated moratorium. The three dissenting banks in resolving the bad debts required to be scrutinized by Banking Sector Regulator for which reference was ordered



to be made by NCLT. **K vs. Panini Steel & Power Ltd. MANU/NC/1688/2017**

- ✚ Since Code of Civil Procedure, 1908 is not applicable for filing application under Insolvency and Bankruptcy Code, 2016, Order 3 of the CPC which provides for recognized agents and pleaders, cannot be invoked. **Palogix Infrastructure Pvt. Ltd. vs. ICICI Bank Ltd. MANU/NL/0095/2017**
- ✚ Where the bank assigns debt due from Corporate Debtor to reconstruction company by assignment deed, the assignee becomes the financial creditor as the borrower agrees while borrowing to repay outstanding loan either to bank or to its assignee or transferee. The contention of the borrower that no privity of contract exists between applicant and borrower is not tenable. **Edelweiss Asset Reconstruction Co. Ltd. vs. Kalptaru Alloys (P.) Ltd. MANU/NC/0971/2017**
- ✚ Where the financial creditors having largest percentage of stake are most familiar with nature of business and have knowledge of handling the resolution process, they should be given preference in proposing the Insolvency Resolution Professional over other creditors. **In Re: Raj Oil Mills Ltd. MANU/NC/1569/2017**

**Income Tax Circulars, Notifications and Press Release  
By CA Manoj Kumar Mittal, +91-9810764620**

**The CBDT issued notification specifying the conditions to be fulfilled by the conversion of Indian Branch of Foreign Bank into Indian Subsidiary Co.**

The Central Board of Direct Taxes (CBDT) has issued draft notification under section 115JG(1) specifying the conditions to be fulfilled by the conversion of Indian Branch of Foreign Bank into Indian Subsidiary Co. and also specifying modifications, exceptions, in applicability of certain provisions of the Act to such conversion. The stakeholders are requested to send their comments/suggestions on the draft notification by 30-11-2017 at [dirtpl2@nic.in](mailto:dirtpl2@nic.in).

**CBDT Circular Clarifies Law On Cash Sale Of Agricultural Produce By Cultivators/Agriculturists**

The CBDT has issued Circular No. 27/2017 dated 3rd November 2017 in which it has provided clear-cut clarification to queries relating to the applicability of

income-tax provision (such as s. 40A(3), s. 269T and Rule 114B) to cash sale of agricultural produce by cultivators/agriculturists to traders

**CBDT Circular Of Clarification On Indirect Transfer Provisions In Case Of Redemption Of Share Or Interest Outside India**

The CBDT has issued Circular No.28/2017 dated 7th of November 2017 in which it has provided important clarification on Indirect Transfer provisions in case of redemption of share or interest outside India under the Income-tax Act, 1961.

**Third protocol to DTAA between Republic of India and New Zealand signed Notification No. 93/2017/F. No. 501/1/83-FTD.II] dated 2<sup>nd</sup> November , 2017**—Whereas, the Third Protocol to the Convention between the Government of the Republic of India and the Government of New Zealand for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (hereinafter referred to as the said Protocol) as set out in the Annexure to this notification, was signed at New Delhi on the 26 th day of October, 2016 ; And whereas , the said Protocol entered into force on the 7th September, 2017 being the date of the later of the notifications of the completion of the procedures required by the respective laws for bringing into force the said Protocol, in accordance with Article 3 of the said Protocol; Now, therefore, in exercise of the powers conferred by sub-section (1) of section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that all the provisions of said Protocol, as annexed hereto, shall be given effect to in the Union of India.

**Income Tax Case Laws**  
**By CA Manoj Kumar Mittal, +91-9810764620**

**Domestic Case Laws**

**Prem Castings (P.) Ltd. , [2017] 88 taxmann.com 189 (Allahabad)**

Where assessee company had received share capital from various contributors and admitted that alleged investors were close friends and business associates of its directors, burden was upon assessee to disclose true and correct details of said investors and since identity of alleged investors was never established additions made under section 68 was justified.

**Hunumesh Realtors (P.) Ltd., [2017] 88 taxmann.com 185 (Mumbai - Trib.)**

Where assessee company incurred expenditure on education of its director at abroad, in absence of commitment/bond executed by said Director to serve

assessee company post his education so that assessee could reap benefits of his education for com business, expenditure was not allowable as business expenditure.

**Nirma Ltd., 88 taxmann.com 188 (Gujarat)**

Where Tribunal had rejected assessee's claim of deduction under section 36(1)(iii) after talking into consideration facts on record and finding recorded by authorities below in detail, rectification order passed by it subsequently under sec. 254 deserved to be said aside.

**Randstad India (P.) Ltd, 88 taxmann.com 184 (Madras)**

IT : Refund to assessee could not be denied merely due to issuance of notice for scrutiny under section 143(2)

Section 237, read with section 143, of the Income-tax Act, 1961 - Refund - General (Effect of notice u/s 143(2)) - Assessment years 2015-16 and 2016-17 - Assessee filed its return of income - Assessing Officer issued scrutiny notice under section 143(2) - Assessee requested Assessing Officer to process its return under section 143(1) and grant consequent refund due as per section 143(1D) - Deputy Commissioner denied refund to assessee for reason that case was pending for scrutiny and that in light of section 143(1D) and Instructions of CBDT, refund could not be processed - Whether Assessing Officer could not fall back on instructions given by CBDT, and refuse to process return under section 143(1) - Held, yes - Whether as per citizen's charter issued by Income Tax Department, in its vision statement, published in 2014, department should issue refund along with interest under section 143(1) within six months from date of electronically filing returns - Held, yes - Whether, therefore, Assessing Officer was directed to consider and process assessee's representation and dispose of same as expeditiously as possible and same could not be denied/withheld merely because issuance of notice under section 143(2) - Held, yes

**Maruti Udyog Ltd, 88 taxmann.com 98 (Delhi)**

As per AS-2 issued by the ICAI, MODVAT Credit is treated as a separate account where appropriate accounting entries will be made to adjust the excise duty paid out of the said account. It is clear that the debit balance in MODVAT/CENVAT Credit Receivable (Inputs) has to be shown on the assets side, under the head 'advances'. According to the accrual concept of accounting (mercantile system), credit is taken even after the documents evidencing payment of specific duty on inputs are received later than the physical receipt of the goods. The assessee has two options. One, to claim excise duty paid, and other is to claim it under MODVAT credit for utilization at a subsequent point in time. The assessee not having exercised the first option, deduction under section 43B for unutilized

MODVAT credit representing excise duty paid on raw material/input that remained unutilized at end of year would not be allowable.

**ACE Multi Axes Systems Ltd., 88 taxmann.com 69 (SC)**

IT : Even though eligible business of an assessee is given benefit of deduction under section 80-IB on assessee satisfying conditions mentioned in sub-section (2) of section 80-IB, yet benefit of said deduction can be denied subsequently on ground that during 10 consecutive years, it ceases to be a small scale industry.

**International Tax Laws**

**ONGC as Representative Assessee of University of Calgary, Alberta, Canada 81 taxmann.com 419 (Delhi - Trib.),**

Where assessee-company had made payments to Foreign entity in terms of contract for long term collaboration, participation, training, maintenance of air injection equipment for increasing recovery of oil, said payment was to be treated as 'fees for technical services' as per provisions contained in section 9(1)(vii) Section 44BB applies in a case where consideration is for services relating to exploration activity which are not in nature of technical services; if consideration is in nature of fee for technical services, provisions of either section 44DA or section 115A will be applicable.

**MSC Mediterranean Shipping Company, S.A., 59 taxmann.com 264 (Mumbai - Trib.)**

Since international shipping profits earned by assessee did not fall or was not dealt with any other articles of Indo-Swiss Treaty, it was governed by residuary article 22 of DTAA and, therefore, applying article 22 of DTAA, income from shipping was not taxable in India

In view of decision of Asstt. CIT v. Clough Engineering Ltd. [2011] 130 ITD 137/11 taxmann.com 70, (Delhi), interest income received from Income-tax Department on refund could not be said to be connected with assessee's permanent establishment in India, thus, interest would be assessed as per article 11 and not article 7 of DTAA between Indian and Switzerland.

**Invensys Process Systems (S), 88 taxmann.com 17 (Uttarakhand)**

Where assessee company, incorporated in Singapore, had also conducted business in India during year and did not bifurcate receipts into inside and outside India, reassessment was justified.

**Whessoe Oil & Gas Ltd., 87 taxmann.com 342 (Mumbai - Trib.)**

Where assessee, a UK company was awarded a contract by RGPPL, an Indian company, and received certain sum for design and engineering service, import of equipments and procurements from within India and assessee did not offer income arising out of procurement of offshore equipments for taxation under section 44BBB, contractual revenue on account of offshore procurement could not be brought to tax under section 44BBB.

**ONGC as Representative Assessee of University of Calgary, Alberta, Canada, 81taxmann.com419(Delhi-Trib.)**

Where assessee-company had made payments to Foreign entity in terms of contract for long term collaboration, participation, training, maintenance of air injection equipment for increasing recovery of oil, said payment was to be treated as 'fees for technical services' as per provisions contained in section 9(1)(vii) Section 44BB applies in a case where consideration is for services relating to exploration activity which are not in nature of technical services; if consideration is in nature of fee for technical services, provisions of either section 44DA or section 115A will be applicable

**Transfer Pricing Case Laws**

**Avaya India (P.) Ltd., 88 taxmann.com 191 (Delhi - Trib.)**

Where TPO applied wages to sales ratio, for determining ALP of software development services, in such a case, employee cost had to be computed by taking into consideration not only expenditure incurred on providing software development services but also in respect of research and development expenses, selling and marketing expenses and administrative and general expenses While determining ALP on basis of ratio of 'wages to sale', once Personnel cost has been taken on entity level, as sequitur, amount of 'Sales' should also be taken at entity level without exclusion of revenue from 'Training course' and 'Others'

**Element K India (P.) Ltd., 88 taxmann.com 193 (Delhi - Trib.)**

A company engaged into development of hardware and software for embedded products, such as multi media and some other electronic cannot be a suitable comparable to low end IT service provider.

**BMW India (P.) Ltd.,88 taxmann.com 26 (Delhi - Trib.)**

Where in determining ALP of AMP expenses and benchmarking, neither assessee nor TPO had followed prescription of judgment in case of Sony Ericsson 231 Taxman 113, matter was to be remanded for fresh adjudication International transaction of 'Receipt of IT support Services' is required to be separately benchmarked, it being distinct from international transactions of purchase, etc.

There being functional differences between 'procurement' and 'training' services and use of separate work force by assessee for their rendition, their aggregation could not be accepted.

**Maruti Suzuki India Ltd, 87 taxmann.com 119 (Delhi - Trib.)**

Where there was a payment of inseparable royalty for use of both licensed information and licensed trademarks, no addition could be made on account of transfer pricing adjustment of royalty for use of licensed trademark only

In absence of an agreement between assessee and its foreign AE to incur AMP expenditure to promote brand value of its products on behalf of foreign AE, AMP expenses incurred by assessee could not be treated as an international transaction under section 92B

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