

# **PKMG** LAW CHAMBERS

## **ADVOCATES AND SOLICITORS MONTHLY LAW REPORT FOR MARCH,2018**

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## REGULATORY UPDATES (Notifications/Circulars)

<b>Notification&amp;Circular No.</b>	<b>Date of Issue</b>	<b>Subject</b>
<b>1. Ministry of Corporate Affairs General Circular No.02/2018</b>	<b>28 /03/2018</b>	<p><b>Subject: Condonation of Delay Scheme, 2018</b></p> <p>In continuation to the Ministry's General Circular No. 16 /2017 dated 29/12/2017 on the subject cited above, the Ministry of Corporate Affairs has, on consideration of requests received from various stakeholders, has decided to extend the Condonation of Delay Scheme, 2018 upto 30th April, 2018. This issue with the approval of the competent authority.</p>
<b>2. Department: SEBI Press Release No. : 09/2018</b>  <b>MANU/SPRL/0009/2018</b>	<b>28 /03/2018</b>	<p><b>Subject: The Securities and Exchange Board of India has taken major reforms for increasing the transparency in Listed Public Companies.</b></p> <p>1. Decision on the Recommendations of Kotak Committee on Corporate Governance:</p> <p>I. Reduction in the maximum number of listed entity directorships from 10 to 8 by April 01, 2019 and to 7 by April 1, 2020</p> <p>II. Expanding the eligibility criteria for independent directors.</p> <p>III. Enhanced role of the Audit Committee, Nomination and Remuneration Committee and Risk Management Committee.</p> <p>IV. Disclosure of utilization of funds from QIP/preferential issue.</p> <p>V. Disclosures of auditor credentials, audit fee, reasons for resignation of auditors, etc.</p>

		<p>VI. Disclosure of expertise/skills of directors.</p> <p>VII. Enhanced disclosure of related party transactions (RPTs) and related parties to be permitted to vote against RPTs .</p> <p>VIII. Mandatory disclosure of consolidated quarterly results with effect from FY 2019-20.</p> <p>IX. Enhanced obligations on the listed entities with respect to subsidiaries.</p> <p>X. Secretarial Audit to be mandatory for listed entities and their material unlisted subsidiaries under SEBI LODR Regulations.</p> <p>XI. Minimum 6 directors in the top 1000 listed entities by market capitalization by April 1, 2019 and in the top 2000 listed entities, by April 1, 2020.</p> <p>XII. At least one woman independent director in the top 500 listed entities by market capitalization by April 1, 2019 and in the top 1000 listed entities, by April 1, 2020.</p> <p>XIII. Separation of CEO/MD and Chairperson (to be initially made applicable to the top 500 listed entities by market capitalization w.e.f. April 1, 2020).</p> <p>XIV. Quorum for Board meetings (1/3rd of the size of the Board or 3 members, whichever is higher) in the top 1000 listed entities by market capitalization by April 1, 2019 and in the top 2000 listed entities, by April 1, 2020.</p>
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		<p>XV. Top 100 entities to hold AGMs within 5 months after the end of FY 2018-19 i.e. by August 31, 2019.</p> <p>[</p> <p>XVI. Webcast of AGMs will be compulsory for top 100 entities by market capitalization w.e.f. FY 2018-19.</p> <p>XVII. Shareholder approval (majority of minority) for Royalty/brand payments to related party exceeding 2% of consolidated turnover (instead of the proposed 5%).</p>
<p><b>3. Notification No. : GSR284(E)</b></p> <p><b>MANU/DCAF/0025/2018</b></p>	<p><b>23 /03/2018</b></p>	<p><b>Subject: Companies (Incorporation) Second Amendment Rules, 2018</b></p> <p>In the Companies (Incorporation) Rules, 2014 (hereinafter referred to as the principal rules), for rule 9, the following rule shall be substituted, namely:-</p> <p>"9. Reservation of name.-</p> <p>An application for reservation of name shall be made through the web service available at <a href="http://www.mca.gov.in">www.mca.gov.in</a> by using form RUN (Reserve Unique Name) along with fee as provided in the Companies (Registration offices and fees) Rules, 2014, which may either be approved or rejected, as the case may be, by the Registrar, Central Registration Centre after allowing re-submission of such application within fifteen days for rectification of the defects, if any."</p>
<p><b>4. Notification No. : GSR S.O. 1316(E)</b></p> <p><b>MANU/DCAF/0024/2018</b></p>	<p><b>21 /03/2018</b></p>	<p><b>Subject: Enforcement date of sub-sections (3) and (11) of section 132 of Companies Act, 2013-</b></p> <p>In exercise of the powers conferred by sub-section (3) of section 1 of the Companies Act, 2013 (18 of 2013), the Central Government hereby appoints the 21st March, 2018 as the date on which the provisions of sub-sections (3) and (11) of section 132 of the Companies Act [i.e,</p>

		Constitution of National Financial Reporting Authority], shall come into force.
<b>5. Notification No. : GSR213(E)  MANU/DCAF/0022/2018</b>	<b>08 /03/2018</b>	<p><b>Subject: Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Amendment Rules, 2018</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>In the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015, rule 3, shall be numbered as sub-rule (1) of rule 3 and after sub-rule (1) as so numbered, the following sub-rules shall be inserted, namely:-</p> <p>"(2) The companies which have filed their financial statements under sub-rule (1) shall continue to file their financial statements and other documents though they may not fall under the class of companies specified therein in succeeding years.</p> <p>(3) The companies which have filed their financial statements under the erstwhile rules, namely the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011, shall continue to file their financial statements and other documents as prescribed in sub-rule (1) though they do not fall under the class of companies specified therein."</p>
<b>6. Department: Public</b>	<b>06 /03/2018</b>	<b>SUBJECT: penalty for non-compliance</b>

<p><b>Information Bureau MANU/PIBU/0393/2018</b></p>		<p><b>of CSR norms</b> The Government has accorded permission for initiating penal action against 199 companies for non-compliance of provisions of section 135 read with section 134 (3) (o) of the Act. The Government has no proposal to review the state of implementation of the provisions of the existing Act related to Corporate Social Responsibility. Whenever violation of Corporate Social Responsibility (CSR) provisions is found, action under section 134 (8) of the Companies Act, 2013 (the 'Act') is initiated.</p>
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**Companies Act, 2013 Case Studies  
By Advocate Pradeep Kumar Mittal, +91-9811044365**

- ✚ Delhi High Court held that it was not open to the single judge to injunct at the interlocutory stage the notice for holding Extra Ordinary General Meeting for removal of plaintiff from directorship, thus the appeal is to be allowed and impugned order shall be set aside. **Jai Kumar Arya vs. Chhaya Devi. MANU/DE/3486/2017**
- ✚ National Company Law Tribunal, Ahmedabad disposes of oppression & mismanagement petition under section 241 read with section 246 of the Companies Act, 2013 on the ground that Annual General Meeting was held without 21 clear day's notice. **LSI-93-NCLT-2018(AHM)**
- ✚ It has been held that where the transfer deed is not entered in the register of members for several years, the transfer of shares is liable to be set aside and held invalid. **Arun kumar goyal and another vs. Aar kay chemicals (P.) Ltd. MANU/NC/2346/2017.**
- ✚ Where the Company Law Board had already held that in absence of substantiation of allegation on a director for not being present at three consecutive board meetings without obtaining Leave of absence, the director shall not be held vacated under section 283(1)(g) of Companies Act, 1956 and continued to be a director, the NCLT cannot accept him to

have ceased to be a director. . **Arun kumar goyal and another vs. Aar kay chemicals (P.) Ltd. MANU/NC/2346/2017.**

- ✚ The National Company Law Appellate Tribunal held that the Scheme of Amalgamation which is not fair to all shareholders and only in the interest of the promoters cannot be sanctioned by the NCLT. **Wiki kids Ltd. and Another vs. RD, South East region and Others. (2018)143 CLA 69(NCLAT)**
- ✚ The National Company Law Appellate Tribunal held that if the petitioner did not object to the appointment of a director at initial stage, then NCLT has no power to set aside such appointment of director thereafter. **Surgi Aid lifecare(P.) Ltd. & Ors. Vs. Rahuldev Vyas. MANU/NL/0223/2017**

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

- ✚ Bombay High court held that the company court has no jurisdiction in relation to proceedings under the code which overrides the provision of Companies Act, 1956 hence, no injunction can be granted by the high court against a Corporate Debtor from institution of Proceedings in the NCLT. **Jotun India (P) Ltd. vs. PSL Ltd. MANU/MH/0005/2018**
- ✚ National Company Law Tribunal, Delhi admits the Corporate insolvency resolution Process application filled under section 9 of the Insolvency and bankruptcy Code, 2016 seeking condonation of delay in filling certificate from banker's under section 9(3)(c) of the Code, given that Default committed by the Corporate Debtor during the course of its business stood established initiates Corporate Insolvency Resolution Process against the Corporate Debtor. **LSI-70-NCLT-2018(NDEL)**
- ✚ National Company Law Tribunal, Mumbai dismisses petition filed under section 7 of the Insolvency and bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process for there being equity and not debt funding, it has been held that there is non compliance of section 7 due to ambiguity appears on record in relation to the character of the transaction ,the bench shall not construe the transaction of advancing short term loan to the corporate debtor which will repaid vide execution of promissory note, which depicts no unconditional undertaking to

repay the same on demand, hence it shall not be construed as "Financial debt". **LSI-70-NCLT-2018(MUM)**

- ✚ The Hon'ble Supreme Court of India held that where NCLT has to perform a statutory function like admitting or rejecting an application under section 7,9 or 10 of Insolvency and bankruptcy code,2016 within a period prescribed,the time period would have to held directory and not mandatory. **P.T. Rajan vs. T.P.M. Sahir and ors. (2003)8SCC 498**
- ✚ Where a loan is given by a consortium of banks and default in repayment of loan has occurred by a corporate debtor, then a financial creditor bank being a member of consortium is allowed to file an application for Initiation of corporate Insolvency Resolution Process against such corporate debtor under section 7 of the Insolvency and Bankruptcy Code,2016.the application can be filled by a single bank or on behalf of other banks also being a member of such consortium. **ICICI Bank Ltd. vs. Tirupati inks ltd. (2018)142 CLA 68(NCLT)**
- ✚ The National Company Law Appellate Tribunal set aside the order of initiation of Corporate Insolvency Resolution Process passed by the NCLT on the mere ground of violation of the rules of natural justice.it has been held that the notice of date of hearing was issued on the respondent but returned unserved will render the petition not maintainable under section 7 of insolvency and bankruptcy code,2016.**Ranjeet karnal Vs. Bell Finvest (INDIA)Ltd. MANU/NL/0035/2018**
- ✚ It has been held that "Authorised Representative" can act on behalf of 'financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' to do needful in legal proceedings. 'The Power of Attorney' is also considered as a reliable mode for delegation of authority for the purpose of filling any application under section 7,9 or 10 of Insolvency and bankruptcy Code,2016. **Vijay kumar jain vs. DBS bank ltd. & Ors. MANU/NL/0050/2018.**

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

### **E-Assessment: CBDT Notifies Centralised Communication Scheme, 2018**

In furtherance of Instruction No. 01/2018 dated 12th of February, 2018 issued by the CBDT regarding the conduct of electronic assessment proceedings, the CBDT has now notified the Centralized Communication Scheme 2018. The Centralized Communication Scheme 2018 contains provisions for the electronic issuance of notices to taxpayers and prescribes the format in which the information and documents have to be furnished. The notices to taxpayers will be issued by the centralized communication centre under Section 133C of the Income-tax Act, 1961 through email or by placing a copy in the registered account on the portal, followed by an intimation by short messaging service (SMS)

### **CBDT Instruction Reg Conduct Of E-Assessment Proceedings**

The CBDT has issued Instruction No. 01/2018 dated 12th of February, 2018 by which it has issued important instructions with regard to the conduct of assessment proceedings in scrutiny cases electronically

### **CBDT Directive Reg Determination Of FMV Of 'Start Up' Companies' Shares U/s 56(2)(viib) And Rule 11UA(2)**

The CBDT has issued an important directive dated 6th of February, 2018 relating to the determination of fair market value of unquoted equity shares of 'Start Up' companies under section 56(2)(viib) of the Income-tax Act read with Rule 11UA(2) of Income-tax Rules

### **CBDT Issues FAQs On Taxation Of LTCG As Per Finance Bill 2018**

The Finance Bill 2018 has reintroduced the taxation of Long-term capital gains (LTCG) on stocks. The CBDT has issued a detailed FAQ dated 4th February 2018 in which it has addressed numerous questions relating to the method for calculation of long-term capital gains, the cost of acquisition, the fair market value, availability of inflation index, TDS obligations etc. The CBDT has also clarified the law applicable to capital gains earned by Foreign Institutional Investors (FIIs)

## **CBDT Clarifies Law On 'Grandfathering' Clause Of Long-Term Capital Gains To Non-Resident And FII Assesseees**

In an article titled "Grandfather clause in LTCG: Why it may be time to call up your tax lawyer", it was pointed out that the grandfathering of past returns promised by Finance Minister Arun Jaitley in his budget speech is missing from the fine print of the bill in the context of foreign investors. The drafting error created an uproar amongst taxpayers at the shoddy drafting of the Finance Bill 2018. Pursuant thereto, the CBDT has provided important clarification

### **CBDT issued explanatory notes to the finance act 2017**

The CBDT issued vide circular no 2/2017 dated 15.02.2018 explanatory note on finance act 2017

### **Central govt notifies India-Kenyya DTAA**

The Central Govt has notified on 19.02.2018 [Notification No. 11/2018/F. No. 503/01/2005/FTD-II all the provisions of India-Kenyya DTAA and shall be given effect to in the Union of India.

### **Rule 17A relating to application for registration of charitable trust substituted**

Vide Finance Act, 2017, a new clause (ab) was inserted in sub-section (1) of section 12A the Income-tax Act, 1961 ('the Act') w.e.f 01.04.2018 to the effect that where a trust or an institution, which has been granted registration under sections 12A or 12AA of the Act has subsequently adopted or undertaken modification of the objects and such modification does not conform to the conditions of such registration, then such trust or institution shall be required to obtain registration again by making an application within a period of thirty days from the date of such adoption or modification of the objects.

In view of this amendments, the CBDT vide notification dated 19.02.2018 no10/2018/F. No. 370142/14/2017-TPL has substituted form 10A and rule 17A.

# Income Tax Case Studies

By CA Manoj Kumar Mittal, +91-9810764620

## Case Laws

### Domestic Case Laws

#### **Domestic Taxation ITO vs Venkatesh Premises Co-operative Society Ltd, 91 taxmann.com 137 (SC)**

Non-occupancy charges received by assessee-co-operative societies from its members which were used for mutual benefits towards maintenance of premises, repairs, infrastructure and provision of common amenities, would be governed by doctrine of mutuality and, thus, same were not exigible to tax.

#### **Virag Tiwari vs PCIT, 91 taxmann.com 172 (Delhi)**

Pradhan Mantri Garib Kalyan Yojna, 2016 (PMGK) Scheme in the form of sections 199A to 199R is a self-contained complete code. The scheme did not envisage grant of benefit or credit of advance tax paid at any stage; before, during the pendency of the Scheme or thereafter advance tax is treated as tax paid under the Act, whereas undisclosed income declared under the PMGK scheme is not to be taxed under the Income Tax Act.

#### **Emami Infrastructure Ltd. Vs ITO, 91 taxmann.com 62 (Kolkata - Trib.)**

A second step down 100 percent subsidiary company is also regarded as subsidiary of assessee company under Companies Act 1956 as term 'subsidiary company' has not been defined under Act and, therefore, where assessee transferred shares owned in a company to its second step down subsidiary, said transaction could not be regarded as 'transfer' in view of provisions of section 47(iv) of Act.

#### **Rajat B Mehta vs ITO, 90 taxmann.com 176 (Ahmedabad - Trib.)**

Cost of residential house purchased is entire cost of house, hence where there were separate agreements for sale of house and sale of furniture, assessee's claim for deduction under section 54 would be allowable in entirety.

**ACIT vs M. Raghuraman, 91 taxmann.com 11 (Chennai - Trib.)**

Even where new flat in which assessee had invested entire capital gain was not completed and possession was not given, assessee could not be denied exemption under section 54.

**Mrs. Seema Sabharwal VS ITO, 91 taxmann.com 2 (Chandigarh - Trib.)**

If assessee at time of assessment proves that he has already invested capital gains to purchase/construct a new residential house within stipulated period, exemption under section 54 cannot be denied to assessee even if amount was not deposited by assessee in capital gain account scheme before filing of Income-tax return as required by section 54(2)

**International Tax Laws**

**Bengal Tea & Fabrics Ltd. Vs DCIT, 91 taxmann.com 38 (Kolkata - Trib.)**

Where assessee paid commission to foreign agents on account of export made to parties referred by them, in view of fact that those agents received income abroad for rendering services in their respective countries and, moreover, it was not case of revenue that payment was made by assessee on account of technical services rendered by foreign agents, it could be concluded that income did not accrue or arise in India and, therefore, assessee was not liable to deduct tax at source while making payments in question.

**ADIT vs Bay Lines (Mauritius)91 taxmann.com 110 (Mumbai - Trib.),**

Where sole agent of assessee a Mauritian resident in India also did work on behalf of other principals and earned a substantial part of its income from them, it did not constitute assessee's dependent agent PE and accordingly assessee's business profits were non-taxable in India as per article 7 of India-Mauritius DTAA

Where effective place of management of assessee a Mauritius based company was neither in India nor in Mauritius but in a third state (UAE), assessee would not be entitled to benefit of article 8 of India-Mauritius DTAA.

**DCIT vs Credit Suisse AG, 90 taxmann.com 181 (Mumbai - Trib.)**

Where dubai branch of assessee-swiss company received fee from an Indian company for referring an Indian resident client for bringing out issue of convertible bonds, impugned fee was in nature of 'commission' to be taxed as 'business income' and not as 'fees for technical services'.

**Honda Motor Co. Ltd., In Re, 90 taxmann.com 180 (AAR - New Delhi)**

Benefit of lesser rate of tax under section 112(1) could not be denied to foreign companies

Expenses incurred towards fee for computerization of share certificates in order to transfer them to escrow account allowable under section 48

**DDIT vs Reliance Communication Ltd, 90 taxmann.com 358 (Mumbai - Trib.)**

Where consideration paid by assessee to non-resident suppliers for acquiring software was actually made for 'copyrighted article' and not for 'use of copyright or transfer of right to use of copyright', payment made by assessee to vendors of software could not be taxed as royalty.

**Transfer Pricing Case Laws**

**Johnson Matthey India (P.) Ltd. Vs DCIT, 91 taxmann.com 200 (Delhi - Trib.)**

Where assessee, engaged in manufacturing of auto exhaust catalyst, entered into technology collaboration agreement with AE for use of technology, trademarks and patent for carrying out its manufacturing activities, it could not be concluded that no benefit was derived by assessee by entering into said agreement with AE and, therefore, CUP method would be most appropriate method for determining ALP of payment of royalty made to AE in pursuance of technology collaboration agreement.

**ACIT vs Max New York Life Insurance Company Ltd, 86 taxmann.com 239 (Delhi - Trib.)**

There being no specific reference to section 92 under section 44, provisions relating to transfer pricing under section 92 would apply to assessee carrying on insurance business

Where TPO rejected CUP and made additions to assessee's ALP under TNMM by drawing a list comparables deletion of TP-addition by Commissioner (Appeals) without dealing with objections of TPO being in complete disregard of TPO's elaborate findings could not have been approved

Where methodology adopted by TPO for determining arm's length price under TNMM did not conform to methods prescribed under rule 10B(1)(e), it could not have been approved.

**Symantec Software & Services India (P.) Ltd. Vs DCIT, 79 taxmann.com 208 (Chennai - Trib.)**

Company engaged in product development and product design services would not be comparable to assessee engaged in providing software development and technical support services to its AE.

**CIT vs Haworth (India) (P.) Ltd, 76 taxmann.com 123 (Bombay)**

Assessee can sought exclusion of comparable on basis of Director's report available before prescribed date as per section 92(F)(iv)

**Hyper Quality India (P.) Ltd. Vs ACIT, 45 taxmann.com 102 (Delhi - Trib.)**

TP adjustments made to assesses ALP were not justified as assessee had earned profit in India whereas its AE had continuously sustained losses FAR.

**DISCLAIMERS**

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