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MONTHLY REPORT FOR January, 2012

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REPORT ON SEBI-SECURITIES LAWS:

NOTIFICATIONS/CIRCULARS/REGULATIONS/RULES:

- Uniform know your client (KYC) requirements for the securities markets. MIRSD/SE/Cir-21/2011 dated 5th October, 2011.
- Reporting format under regulation 11 of Securities Contracts (Regulation) (Manner of Increasing and Maintaining Public Shareholding in Recognised Stock Exchanges) Regulations, 2006. CIR/MRD/DSA/12/2011 dated 24th October, 2011.
- Participation of mutual funds in repo in corporate debt securities. CIR/IMD/DF/19/2011 dated 11th November, 2011.

PRESS NEWS ON SEBI MATTERS:

- SEBI imposed a penalty of Rs. 5 lakh on Anand Rathi Financial Services for alleged deficiencies, including absence of adequate system to check receipt of third party cheques and discrepancies in KYC account opening form, etc. (B.S.- 6-12-11).
- SEBI imposed a penalty of Rs.5 lakh on Compliance Officer of erstwhile Satyam Computer Services Ltd. for failure to adhere to market regulations under section 15HB of the SEBI Act. (B.S. 30-11-11).

SOME KEY FEATURES OF COMPANIES BILL, 2011 (PLACED BEFORE THE LOK SABHA ON 14-12-2011) :-

- **DIRECTORS:** A body to maintain data bank of independent directors. Immunity to independent directors and non-executive directors. Mandatory to have at least one woman director in the board as may be prescribed. Provision for a director representing small shareholders. No. of directorship restricted to 20 companies- of which 10 could be public cos.
- **CORPORATE SOCIAL RESPONSIBILITY (CSR):** At least 2% of average net profits in three preceding years to be spent on CSR. Companies with net worth of Rs.500 crore or more, or turnover of

Rs.1000 crore or more, or net profit of Rs. 5 crore or more during any financial year to be covered under CSR norms. Will be required to give reasons for non-compliance.

- **TRANSPARENCY & ACCOUNTABILITY:** Key Managerial Personnel (KMP) to ensure enhanced accountability. Consolidation of accounts mandatory for companies with subsidiaries. Govt. to prescribe restrictions in respect of layers of subsidiaries. Board's report to include details in respect of related party transactions, statement on directors' remuneration and adverse remarks made in auditor's report. Specific disclosures regarding effect of a merger on creditors, KMP, promoters and non-promoter shareholders. Concept of cost auditing standard recognized. Mechanism to regulate Related party transactions.
- **RESTRUCTURING:** Short form of merger and summary liquidation. Equity shares with differential voting rights. Not for profit – can be converted to an ordinary company. Exit option for dissenting shareholders. Recognition for private professional liquidators. Provision for mediation and conciliation panel. Elaborate provision for private placement. Introduction of One-person Company.

CENTRAL EXCISE - BY SHRI PRADEEP K MITTAL 9811044365

- Once it has been established that there was an intent to defraud the Department by non-payment of excise duty, the adjudicating authority has no discretion except to impose penalty equal to the amount of duty. In other words, the penalty cannot be reduced under any circumstances U/s 11 AC of the Central Excise Act. CCE Vs. Prabhat Zarda Factory Pvt.Ltd. 2011 (183) DLT659 DB.
- Where the consignment has been imported and the value has been declared by the importer, the Department cannot question the transaction value merely on the basis of suspicion and cannot question the correctness of the invoice of the imported consignment. U/s 14 of the Customs Act, the onus is upon the Department to prove that there is under valuation. CCE Vs. Agrawal Electricals Ltd. 2011 (272) ELT 641 SC.
- When the assessee failed to satisfy the officers of the Central Excise Department during their visit to the factory about the discrepancy in raw material and finished goods but later on in their reply to the Show Cause Notice full and detailed reconciliation has been

submitted, the Department cannot allege clandestine removal of goods. The clandestine removal can be established on the basis of strong evidence. Central Cables Ltd. Vs. CCE 2011 (272) ELT 735.

- When there is a delay in reversal of Cenvat Credit (which has not been utilized), the Department cannot seek interest from the assessee as interest payable is always compensatory in nature. When there is no loss to the Department, no interest is payable. CCE Vs. Arvind Brands Ltd. 2011 (273) ELT 439 Karnataka DB.
- The Service Tax paid on repair and maintenance on Windmill, which generated electricity, and the electricity has been used in the manufacture of dutiable finished goods, the Cenvat Credit on such repair and maintenance of Windmill is allowable although the Windmill are located outside the factory. Endurance Technologies Pvt.Ltd. Vs. CCE 2011 (273) ELT 248.
- Where the goods have been cleared for captive consumption to another unit of the Company and part of the goods have been cleared for sale to independent buyers, the excise duty payable on the captive consumption would be at the same rate at which the goods have been cleared to the independent buyers and not at the lesser value. VACMAT India Ltd. Vs. CCE 2011 (273) ELT 275.
- Since no time is prescribed under the Cenvat Credit Rules, 2004, for availment of Cenvat Credit, Department cannot deny such availment to the assessee. CCE Vs. Pierlita India (P) Ltd 2011 (273) ELT 535.
- The repair, recondition and re-making of old defective industrial valves does not amount to manufacture unless it results in production in new articles. Tela Equipmentes (P) Ltd Vs. CCE 2011(273) ELT 454 (Tri).
- The assessee is entitled to seek refund of unutilized accumulated cenvat credit when he decided to opt out, out of the scheme of Cenvat Credit Scheme. Raymond Ltd Vs. CCE 2011(273) ELT 582 (Tri).
- When a manufacturer has charged Optional Service Charges and Rust Proof Protection Charges in addition to the MRP Charges, such amount are liable to be included in the Assessable Value and the excise duty is liable to be paid. Godrej & Boyce Mfg Co Ltd Vs. CCE 2011(273) ELT 585 (Tri).

SERVICE TAX - SHRI PRADEEP K MITTAL, 9811044365

- The invoice does not contain the registration no of input service provider, cannot be ground to deny the cenvat credit on such invoices. Rosvar Steels (P) Ltd Vs. CCE. 2011(24) STR 418 (Tri).
- The cenvat credit on telephone services would be eligible when the services have been used for promotion of business. Agsar Paintgs (P) ltd Vs. CCE 2011(24)STR 422 (Tri).
- When the transportation of sugar cane takes from sugarcane field/collection centres by availing the services of transport contractors – although no formal contract note has been prepared, yet the service tax payable when the name of consignor and consignee is written on a document accompanying such consignment and such documents would be deemed to be a consignment note. UP State Sugar Corporation Ltd Vs. CCE 2011(24) STR 423. (Tri).
- The transport of export goods would also include transport of empty containers from yard to the stock for stuffing of goods which are to be exported as the words used are “ in or in relation to the manufacture of final goods”. The party would be entitled to seek refund of service tax on the aforesaid activity. Balkrishna Industries Ltd Vs. CCE 2011(24) STR 433 (Tri).
- The Foreign Currency Bonds were issued by utilizing the services of a Bank of New York and the service tax has been demanded on the fees payable to the bank. The services have been received by the recipient located in India and, therefore, prima-facie service tax is payable. Paramount Communication Ltd Vs. CCE 2011(24) STR 443 (Tri).
- The discounts and incentives received by an advertising agency from the newspapers are not for consideration towards some services rendered and, therefore, question of payment of service tax does not arise. P Gautam & Co Vs. CCE 2011(24) STR 447 (Tri).
- In the absence of a contract to the contrary, the service provider (lessor) has a right to pass on the amount of service tax paid by the service provider in respect of a premises rent out to the service receiver i.e. tenant. The service tax, being an indirect tax, the landlord has a right to claim the amount of service tax paid by them

to the Government. Kishore KS Vs. Cherthala Municipality 2011(24) STR 538 (Kera HC).

- In case the assessee has shown the amount of credit of service tax availed by them in their monthly return, it could not be said that there was a positive act of suppression or mis-statement on their part. In the monthly return, there is no column to show the nature of service for which cenvat credit has been filed and in the absence of any such column, the department cannot allege that the assessee has not disclosed. CCE Vs. Medicaps Limited 2011(24) STR 572 (Tri).
- The assessee is a manufacturer of aerated water (cold drinks) and has constructed the rain water harvesting system to augment the ground water supply, such activity has close nexus with the manufacturing activity and, therefore, the assessee is entitled to cenvat credit of service tax paid to contractor who constructed such “system”. Pepsico India Holdings (P) Ltd Vs. CCE 2011(24)STR 491 (Tri).
- In case advances have been received from the prospective buyer by the builder – though the ownership of land still vests with the builder and permission to carry out construction has been received by the builder, in this circumstances, it cannot be said that advance would tantamount to sale consideration. G Chandrababu Vs. CCE 2011(24)STR 492.
- The construction of dormitory accommodation within the factory premises and the party sought to avail cenvat credit of the service tax paid to the contractor who has constructed “dormitory”, such cenvat credit is not allowable as the “residential premises” and has not relation with the factory. Therefore, Cenvat Credit to the assessee dis-allowed CCE Vs. Bajaj Hindusthan Limited 2011(24) STR 497 (Tri).

COMPANIES ACT 1956 BY SHRI PRADEEP K MITTAL, 9811044365

- The Scheme of Section 391 to 394 provide for “Single Window Clearance” for the purposes of the Act. No need to file separate application under the Act, for instance, for change of name of company, or alteration of memorandum/articles of association except for reduction of share capital because it requires special

procedure. If all the procedure is insisted upon in a petition under Section 391 to 394, it would result in duplication of applications and would be cumbersome. However, if a permission is required under a statute or licence, then the court, while sanctioning the scheme, can always stipulate that the scheme will come into effect only when other statutory and contractual permissions have been obtained. Spice Communications Ltd 2011(105)CLA 106 (Delhi).

- Where a Scheme of Amalgamation provides for transfer of authorized share capital of the transferor company with the transferee company, the transferee company is not required to pay “Registration Fee” for the increased share capital. Lifesize Communications India (P) Ltd Vs. Logitech Engineering & Deisgns India (P) Ltd 2011 (105)CLA 133 (Madras).
- If the complaint filed by the Registrar of Companies against the company and its directors and other accused person is barred by law of limitation (i.e. Section 468 of Cr PC), then the company court, on a petition under Section 633 of the Companies Act, 1956, is entitled to quash the criminal complaint on the ground of limitation. Sanjay Somani Vs. ROC 2011(105)CLA 135 (CLA).
- In case the Company fails to increase the Share Capital within the prescribed limit specified U/s 3(3) of the Companies Act, 1956, it is deemed to have become defunct within the meaning of Section 560 of the Companies Act, 1956 and the name is liable to be struck off from the Register of Companies. Such Company, on petition being filed for restoration of its name U/s 560, is not entitled to have its name restored even on the undertaking that it will increase the paid-up share capital. Value Advisory Services Pvt.Ltd. Vs. ROC 2011 (105) CLA 214(Delhi).
- Even though the Memorandum of Association of the demerged or transferor company does not have the requisite provision for arrangement, on this ground alone, the petition cannot be dismissed and is liable to be sanctioned. Under Section 391, the Company Court has the powers to sanction the scheme. KTM Jewellery Ltd. 2011 (105) CLA 217 Madras.

- Once the Registrar of Companies has asked for information U/s 209A of the Companies Act, 1956, the Company is bound to furnish the same. Once the Company having furnished the information and the ROC is not satisfied, the ROC must communicate to the Company about the reason of its dissatisfaction and cannot straightaway file prosecution of the Company and its Directors. S.Santosh Vs. AROC 2011 (104) CLA 220 Madras.
- In a windingup petition U/s 433 of the Companies Act, 1956, the Petitioner cannot claim damages since these are not ascertained debt and the damages are required to be adjudicated upon and such adjudication is possible by way of Civil Suit before the Civil Court and not before the Company Court, which has only summary jurisdiction. ITC Ltd. Vs. Oberoi Malls Pvt.Ltd. 2011 (105) CLA 231, Kolkata.
- The contentious and complicated law of evidence and facts cannot be decided by the Company Law Board in the summary jurisdiction U/s 111 of the Companies Act, 1956 where there is serious dispute about succession of the estate of the deceased shareholder, the title to the shares to be decided only by the Civil Court after lodging evidence by the parties. Maharaj Devraj Vs. Jalmahal Hotel Pvt.Ltd. 2011 (105) CLA 353 CLB.

ARBITRATION & CONCILIATION ACT, 1996 BY SHRI PRADEEP K MITTAL, 9811044365

The Arbitrator cannot be removed merely on the basis of vague allegation of biasness

CORPORATE LAWS -- BY SHRI PRADEEP K.MITTAL ,9811044365

- As per Section 14 of Limitation Act, the period undergone for conducting the proceedings before a wrong court or wrong forum, is liable to be excluded automatically, for filing the case before appropriate court or forum and the said appropriate court or forum has not to consider as to whether the said court or forum is entitled to condone the delay so undergone. Under Section 5 of Limitation Act, the court has the discretion either to condone the delay or not in

case of delay in filing of petition - whereas under Section 14 of Limitation Act, condonation of delay is automatic. Rajkumar Shivhare Vs. UOI 2011(105) CLA 147 Bom.

- The philosophy of Section 138 of the NI Act is that the aggrieved party should be duly and fully compensated by the person who has issued the cheque and whose cheque has been dishonoured and, therefore, the Court should invariably adopt liberal and compensatory approach and impose fine double the amount of the cheque. R. Vijayan Vs. Baby and Others. 2011 (105) CLA 205 SC.
- There is a heavy burden upon the person who has issued a cheque to prove that there was no debt when he issued the cheque to enable him to get out the prosecution under Section 138 of NI Act for dishonour of cheque. Investor Plaza Vs. Vijay Sachdeva 2011(181) DLT 675. Delhi.

CIVIL LAW - BY SHRI PRADEEP K MITTAL,9811044365

- The natural guardian of a minor cannot, without the prior consent of the court, sell, alienate and dispose off, the assets of the minor and such disposal of the property shall be voidable at the instance of the minor. Braham Singh Vs. Sumitra 2011(182) DLT 350.
- Once the tenant has been paying the rent to the landlord continuously for a long time, the tenant is estopped from challenging the title of landlord U/s 115 of Evidence Act. When the premises are located in a commercial area, the tenant is liable to pay increased rent of 10% per annum from the date of termination of tenancy. Gyan Chand Gupta Vs. Coir Board 2011 (183) Delhi Law Times 675.
- Where the landlord is not able to prove the market rent of the area where the property of which the eviction is sought from the tenant, the landlord is entitled to 10% compound increase each year as per Division Bench Judgment of the Hon'ble Delhi High Court in the case of S.Kumar Vs. G.R.Kathpalia 1999 (77) DLT 266 Delhi.
- Once the lease deed has expired and the tenant becomes tenant on month to month basis, even if the tenancy has not been terminated, once suit has been filed and summons have been served upon the tenant, the service of summons for suit for possession can itself be treated as termination of tenancy. Jeevan Diesel and Electronics Vs. J.S.Chadha 2011 (183) DLT 712.

- Incorporation of a clause in a subsequent tender documents, cannot be used as a tool of interpretation of earlier tender document which does not contain such clause. Pahapur Cooling Towers Lt dVs. NTPC Ltd 2011(181) DLT 683 Delhi DB.
- The trial in a civil suit is deemed to have commenced where either the affidavit-in-evidence of the witness has been filed or witness has appeared for the purpose of cross examination for the purpose of deciding the application under Order 6 Rule 17 CPC seeking amendment of the pleadings. Rajesh Sharma Vs. Krishan Pal 2011(183) DLT 791.
- Where the permission of the Lessor for handing over the possession is mandatory and there is refusal to accord such permission, the suit for specific performance would not be maintainable in the absence of such permission, the suit for specific performance is liable to be dismissed. Asman Investment Ltd Vs. K L Suneja 2011(181) DLT 156.
- Any immoveable property which is a subject matter of suit or litigation, cannot be transferred or sold without the authorization from the court and any transaction, so entered into without the authorization, would be subject to the outcome of the suit or litigation. Prakash Khattar Vs. Shanta Jindal 2011(181) DIT 138.

TRADE MARK - BY SHRI PRADEEP K MITTAL,9811044365

- The Philips is well known trade mark of a foreign company for the more than fifty years. The Respondent started selling their “pressure cooker” under the trade mark of “Philips” and if allowed to do so, would be a “commercial dishonesty” and, therefore, required to be enjoined by an order of injunction. Kunj Aluminium (P) Ltd Vs. Koninklijke Phillips Electricity NV 2011(183) DLT 322 (Delhi DB).
- Every mortgagor had a right to redeem mortgage even prior to time fixed under the Agreement. The limitation to file suit for recovery of money given as a loan, is three years from the date money has been lent and become due. Every borrower has a inherent right to pre-payment of loan and he cannot be saddled with pre-payment charges in case there is no specific provision for payment of such charges. DLF Ltd Vs. PNB 2011(180) DLT 435.

- The owner of trade mark is entitled to file a suit for injunction seeking injunction against a party who is threatening to use his registered trade and mark and need not wait till the actual user by the unscrupulous party. South African Breweries Int Vs. Mohan Goldweater Breweries Ltd 2011(184) DLT 252. Delhi.
- The domain name “TATAHIRE.COM” cannot be used by a person when the name “Tata” is well known name and is registered as a trade mark by the house of “TATA”. The defendant is liable to be enjoined from using the domain name “TATAHIRE.COM”. Tata Sons Limited Vs. D Sharma 2011(180) DLT 421.

CRIMINAL LAW BY SHRI PRADEEP K MITTAL,9811044365

- Under criminal law, anyone who is aware of the commission of the offence could be complainant and is entitled to file complaint and he may not be aggrieved party. Formosa Plastics Corpn Vs. Lt Governor 2011(183) DLT 747. Delhi.
- In a complaint under Section 138 of NI Act for dishonour of cheque, if the managing director of the company has not been made a party to the complaint, yet the court can on its own or the application, in exercise of powers under Section 319 of the Cr PC, at any stage of the proceedings, make any one as a accused, if in the opinion of the court, that person appears to have committed offence. The managing director, by virtue of his office, is deemed to have committed the offence and could be arrayed as an accused even if he is not made a party. V K Aggarwal Vs. United Phosphrus Ltd 2011(184) DLT 247.Delhi.

Your suggestions and contributions are of great importance to us. Please give us your FEEDBACK, so that this Bulletin may be made of real use to you. Please write to us with your views and contributions at: **pkmittal171@yahoo.com or pkmittal171@gmail.com**

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