

# **PKMG** LAW CHAMBERS

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**MONTHLY LAW REPORT FOR NOVEMBER,2018**

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**B.COM,L.L.B(3<sup>rd</sup> YEAR)**

## REGULATORY UPDATES (Notifications/Circulars)

| Notification&Circular No.   | Date of issue | Subject   |
|---|---------------|---|
| <p>1. MINISTRY OF CORPORATE AFFAIRS</p> <p>NOTIFICATION –S.O. 5099(E).</p>  | 1.10.2018     | <p><b><u>Constitution of National Financial Reporting Authority</u></b></p> <p>In exercise of the powers conferred by sub-section (1) of section 132 of the Companies Act, 2013, the Central Government hereby appoints the 1st October, 2018 as the date of constitution of National Financial Reporting Authority.</p>  |
| <p>2. MINISTRY OF CORPORATE AFFAIRS</p> <p>NOTIFICATION – S.O. 5098(E).</p> | 1.10.2018     | <p><b><u>Enforcement of Section 132(1) and (12) of The Companies Act,2013</u></b></p> <p>In exercise of the powers conferred by sub-section (3) of Section 1 of the Companies Act, 2013, the Central Government hereby appoints the 1st October, 2018 as the date on which the provisions of sub-sections (1) and (12) of Section 132 of the Companies Act,2013 shall come into force.</p> <p><b><u>NOTES:</u></b><br/><i>SECTION 132- Constitution of National Financial Reporting Authority</i></p> |
| <p>4. MINISTRY OF CORPORATE AFFAIRS</p> <p>NOTIFICATION- S.O. 5385(E)</p>   | 24.10.2018    | <p><b><u>Enforcement of section 132 (2), (4), (5), (10), (13), (14) and (15) of the Companies Act, 2013.</u></b></p> <p>In exercise of the powers conferred by sub-section (3) of section 1 of the Companies Act, 2013, the Central Government hereby appoints the 24th October, 2018 as the date on which the sub-sections (2), (4), (5), (10), (13), (14) and (15) of section 132 of the said Act shall come into force.</p> <p><b><u>NOTES:</u></b></p>  |

|   |                   |  |
|---|-------------------|--|
|   |                   | <b>SECTION 132- Constitution of National Financial Reporting Authority</b>   |
| <b>3. MINISTRY OF CORPORATE AFFAIRS</b><br><b>NOTIFICATION- S.O.5457 (E).</b> | <b>26.10.2018</b> | <p><b><u>Constitution of Registrar of Companies at Vijayawada, Andhra Pradesh</u></b></p> <p>In exercise of the powers conferred by sub-sections (1) and (2) of section 396 of the Companies Act, 2013 (herein after referred to as the said Act), the Central Government hereby establishes the office of the <b>Registrar of Companies at Vijayawada</b>, having territorial jurisdiction in the <b>whole State of Andhra Pradesh</b> for discharging the functions of the Registrar of Companies under the various provisions of the said Act and appoints the Registrar of Companies, Vijayawada as Registrar of Companies for the purpose of registration of companies and discharging the functions under the said Act in the State of Andhra Pradesh.</p> <p><b>2.</b> This notification shall come into force with effect from 29.10.2018.</p> |
| <b>4. MINISTRY OF CORPORATE AFFAIRS</b><br><b>NOTIFICATION- S.O.5458 (E).</b> | <b>26.10.2018</b> | <p><b><u>Constitution of the office of the Registrar of Companies cum Official Liquidator at Dehradun, having territorial jurisdiction in the whole State of Uttarakhand</u></b></p> <p>In exercise of the powers conferred by sub-sections (1) and (2) of section 396 of the Companies Act, 2013 (herein after referred to as the said Act), the Central Government hereby establishes the office of the Registrar of Companies cum Official Liquidator at <b>Dehradun</b>, having territorial jurisdiction in the <b>whole State of Uttarakhand</b> for discharging the</p>  |

|  |                   |  |
|--|-------------------|--|
|  |                   | <p>functions of the Registrar of Companies under the various provisions of the said Act and appoints the Registrar of Companies cum Official Liquidator at Dehradun for the purpose of registration of companies and discharging the functions under the said Act in the State of Uttarakhand.</p> <p>2. This notification shall come into force with effect from 29.10.2018.</p>  |
| <p>5.MINISTRY OF CORPORATE AFFAIRS</p> <p>NOTIFICATION-S.O. 5459(E).</p> | <p>26.10.2018</p> | <p><b><u>Amendment in the notification number S.O.831 (E) dated the 24th March, 2015</u></b></p> <p>In exercise of the powers conferred by section 454 of the Companies Act, 2013 read with the Companies (Adjudication of Penalties) Rules, 2014, the Central Government hereby makes the following amendment in the notification number S.O.831 (E) dated the 24th March, 2015, namely:—</p> <p>in the said notification, —</p> <p>(a) against serial number 4, under the heading “Designation” for the word “Nainital” the word “Dehradun” shall be substituted</p> <p>(b) for serial number 16, the following shall be substituted, namely;\—</p> <p>“16. Registrar of Companies, Hyderabad Whole State of Telangana”;</p> <p>(c) after serial number 24, the following shall be inserted, namely;—</p> <p>“25. Registrar of Companies, Vijayawada Whole State of Andhra Pradesh”</p> <p>2. This notification shall come into force with effect from 29.10.2018.</p> |

**Companies Act, 2013 Case Studies**  
**By Advocate P.K Mittal, +91-9811044365**

- Where Company denied registering the shares of transferee on the ground other than stated under its Articles of Association. It has been held that under the Companies Act, the shares are transferable like any other movable property. The restriction, if any, shall have to specifically specified in the Articles of association. Any restriction which is not specified in the Articles shall not be binding either on the company or on the shareholders. Thus, Supreme Court directed the respondent Company to register the shares of the transferee.

**V.B. Rangaraj Vs. V.B. Gopalakrishnan & Ors.**  
**MANU/SC/0076/1992**

- Delhi High court rejected the plaint filed by plaintiff alleged transfer of shares and allotment of further shares to defendant by the Company in violation of the Companies Act. It held that the Court doesn't have appropriate jurisdiction, thus the plaintiff being aggrieved has to file the petition for claiming remedies such as rectification of register of members, cancellation of shares issued in violation u/s 62 of Companies Act,2013 etc. , in accordance with law before the NCLT.

**SAS HOSPITALITY PVT. LTD. & ORS. VS. SURYA**  
**CONSTRUCTIONS PVT. LTD. & ORS.**  
**MANU/DE/3791/2018**

- Supreme Court held that the order issued by the NCLT accepting the sanction of Scheme of amalgamation itself

becomes an instrument of transfer and no separate documentation is required.

**Hindustan lever & ors. Vs. State of Maharashtra  
MANU/SC/0934/2003**

- NCLAT held that when the scheme of amalgamation is approved and the orders approving scheme of amalgamation are passed, the Appellant have to pay the necessary stamp duty to the state treating the order of NCLT approving scheme as the 'instrument' if the Stamp Act of the state includes that the NCLT order approving the scheme also covered under the definition of 'Instrument'.

**Pipeline Infrastructure Pvt. Ltd MANU/NL/0262/2018**

- NCLAT set aside Nclt order in which NCLT granted waiver to the shareholder holding less than 10% shareholding in the respondent Company for filing petition u/s 241 of Companies Act,2013. It held that there are no exceptional circumstances in the case to grant waiver. NCLT granted waiver merely on the ground that their is only two shareholder in the company holding less than 10% shareholding is not a valid exceptional circumstance.

**S. Ahamed Meeran Vs. Ronny George and Ors.  
MANU/NL/0287/2018**

- NCLAT set aside Nclt order in the petition filed u/s 230 of Companies Act in which the NCLT ordered that for reduction of share capital separate procedure was required u/s 66 to be complied with. NCLAT held that it is evident from explanation below sec.230 that for passing an order u/s 230, the whole procedure of sec.66 shall not required to comply, such order can be passed by the NCLT u/s 230. Hence the order was liable to be set aside.

**R Systems International Ltd. (2018) 147 CLA 65 (NCLAT)**

**Insolvency and Bankruptcy Code, 2016 Judgments  
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➤ High Court held that where the petition of winding up has been admitted by it and proceedings has been initiated, then there is no question of filing of any application u/s 10 of IBC or initiate Insolvency Resolution Process by the applicant against the Corporate Debtor. **Rajni Anand Vs. Cosmic Structures Ltd. MANU/DE/3831/2018**

➤ NCLAT dismissed appeal filed u/s 7 of IBC with cost of Rs. 1lakh, holding that the contention given by the Corporate debtor that there is existing dispute between the directors of the company and the application is pending u/s 241 and 242 of Companies Act,2013, due to which moratorium could not be initiated , is not a valid ground to dismiss initiation of insolvency resolution process against the Corporate debtor.

**Jagmohan bajaj v. Shivam fragrances (P.) Ltd. And another  
MANU/NL/0197/2018**

➤ NCLAT held that where a petition is filed u/s 7 or 9 or 10 of IBC for initiation of corporate insolvency resolution process against corporate debtor, it has been well settled principal that any person ie., financial creditor, operational creditor, secured creditor and unsecured creditor all are entitled to file the claim. Even if the debt has not been matured to file claim, still the creditor is entitled to file such claim.

**Exim bank of India v. Resolution Professional JEKPL (P.) Ltd.  
(2018)146CLA246(NCLAT)**

➤ It has been held that once a company petition for winding up is admitted, it ceases to be a petition on behalf of one petitioner only,

but it becomes a petition on behalf of several creditors in representative capacity.

**Ganesh Benzoplast Ltd. Vs. Kedia Distilleries Ltd.**  
**MANU/MP/0076/2004**

- High Court held that where a petition of winding up is filed u/s 433 and 439 of Companies Act, 1956, it has to be in compliance of provisions of rules 96, 99, 24 and form no. 48 of Companies rules, 1959. The petition shall be advertised so that concerned authorities may file their objections. The court while ordering winding up shall give directions for advertisement to be published in accordance with rule 96, however, if required advertisement still not published for winding up of company, then the said order of winding up shall stand set aside.

**Ahmadur Rahman & Ors. Vs. ROC MANU/GH/0002/1972**

- SUPREME COURT held that in the case of operational creditors, the petition filed by a foreign company need not observe such requirements of a statute which are impossible of compliance, such as requirement u/s 7(3)(a) of IBC, 2016 and getting a certificate from Indian Financial Institution evidencing default in repayment of a debt.

**Sunrise 14 A/S Denmark vs. Ravi Mahajan MANU/SC/1052/2018**

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

**Central Govt notifies Commodity Exchange Market as recognised association**

In exercise of powers conferred under clause (iii) of Explanation to clause (e) of the proviso to sub-section (5) of Section 43 of the Income-tax Act,



1961 (43 of 1961) read with sub-rule (4) of Rule 6000 of the Income-tax Rules, 1962, the Central Government hereby notifies Indian commodity Exchange Limited(PAN:AABCI9479D) as a 'recognised association' for the purpose of said clause with effect from 01.11.2018.

**Notification No.ii' /2 18 (F. No. 225/261/2018 ITA-II)**

**“Application for grant of certificates for deduction of income-tax at any lower rates or no deduction of income-tax. electronically**

—In exercise of the powers conferred by sections 197 and 206C read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes, the central govt has amended rule 28 to apply for certification for lower tds electronically.

**Notification No.74/2018/F. No. 370142/10/2018-TPL] dated 25.10.2018**

**Amendment in appeal form 36 to ITAT**

In exercise of the powers conferred by section 253 read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes amended rule 47, after sub rule 1 and 2, sub-rule-3 has been substituted thereby new form 36 of filling appeal to itat has been introduced.

**[Notification No. 72/2018] [F. No. 370142/8/2018-TPL] 23<sup>rd</sup> Oct,2018**

**Central Govt specifies the situation where requirement of payment of STT at the time of purchase and sale will not be required**

In exercise of the powers conferred by sub-section (4) of section 112A of the Income-tax Act, 1961 (43 of 1961) hereinafter referred to as the Income-tax Act, the Central Government, with a view to specify the nature of acquisition in respect of which the provision of sub-clause (a) of clause (iii) of sub-section (1) of section 112A of the Income-tax Act shall not apply, hereby notifies the transactions of acquisition of equity share entered into:-

- (I) before the 1st day of October, 2004; or
- (II) (II) on or after the 1st day of October, 2004 which are not chargeable to securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004 (23 of 2004), other than the following, namely: [Notification No. 60/2018/F. No.370142/9/2017-TPL] dated 01.10.2018

**Case Laws**

**Domestic Case Laws**

**Swati Malove Divetia vs ITO, [2018] 98 taxmann.com 447 (Gujarat)**

Where before issuing reassessment notice Assessing Officer had asked assessee to explain source of cash deposit post-demonetization and assessee disclosed such source being her own bank accounts and their withdrawals matching quite closely to deposits, issuance of notice discarding such disclosure was not justified.

**PCIT vs Adamine Construction (P.) Ltd, vs PCIT, 99 taxmann.com 45 (SC)**

Where High Court confirmed Tribunal's order deleting addition made to assessee's income under sec. 68 on ground that assessee had discharged initial burden cast upon it by providing necessary details, SLP filed against said decision of High Court was to be dismissed.

**PCIT vs Vinita Chaurasia, 98 taxmann.com 414 (SC)**

Where Assessing Officer made addition to assessee's income by invoking provisions of section 153C on basis of document seized in course of search carried out in case of 'L', in view of fact that subsequently 'L' retracted his statement that said document belonged to assessee and, therefore, Tribunal as well as High Court set aside said addition, SLP filed against decision of High Court was to be dismissed.

**Madhav Govind Dhulshete vs ITO, 99 taxmann.com 56 (Bombay)**

Where assessee, engaged in business of sale of Kerosene, purchased it from notified dealer by making payment in cash on ground that said payment was made as per guidance of District Civil Supply Officer, in view of fact that District Supply Officer's order did not mandate any mode of payment either in cash or by cheque, and, moreover, there were banking channels available even when supplies had been effected, impugned disallowance was rightly made by authorities below under sec. 40A(3).

**PCIT vs Reebok India Company, 98 taxmann.com 413 (Delhi)**

Money borrowed by assessee even when advanced to its subsidiary for some business purpose would qualify for deduction of interest paid on such borrowings.

## **INTERNATIONAL TAXATION**

### **GIL Mauritius Holdings Ltd vs ddit, 99 taxmann.com 21 (Delhi - Trib.)**

Where assessee, a company incorporated in Mauritius, was acting as a sub contractor with HHI and valentine Consortium for certain specialized job of extraction or mineral oil in India on ONGC Mumbai Uran terminal water projects, decision of Commissioner (Appeals) that assessee had a PE under article 5(2)(f) of DTAA between India and Mauritius was incorrect as Commissioner (Appeals) had not at all examined that whether oil well or gas was fixed place available to assessee for carrying on its business and unless that was proved first by revenue, income could not be charged under that article.

### **PCIT vs Ferromatic Milacron India (P.) Ltd., 99 taxmann.com 154 (Gujarat)**

Where non-resident agent appointed by assessee for procuring export orders did not have permanent establishment in India and their activities as commission agents were being carried out outside India, there was no liability on assessee to deduct tax at source on payment made to said agents.

### **Endemol South Africa (Proprietary) Ltd. vs DCIT, 98 taxmann.com 227 (Mumbai - Trib.)**

Where various coordination/facilitation services rendered by assessee, South African Company, for Indian company viz., arranging for locational crew, transportation, paper work for various stunts to be performed and other requirements for setting up and filming series etc, were in nature of Line Production Services, same could not be termed as technical, managerial or consultancy services.

### **Ciena Communications India (P.) Ltd Vs ACIT, 98 taxmann.com 458 (Delhi - Trib.)**

Where services provided by US based AE to assessee's customers were in nature of on-call advisory services in trouble-shooting and such services were provided remotely and no on-site support services was provided, revenue received by US AE from assessee was not taxable in India.

### **ACIT, Circle- 3 (TDS), Kolkata vs SDV International Logistics Ltd**

Where lease line charges were paid by assessee-company to internet service provider for faster internet access on dedicated lease line, said payment had been made for use of telecommunication services/connectivity for transmission of voice/data facility and not for use of any asset involved in provision of such facility/service covered in section 194-I, and, thus, assessee was not liable to deduct TDS under section 194-I on said payment.

### **TRANSFER PRICING**

#### **ITO vs Transcend MT Services (P.) Ltd, 99 taxmann.com 156 (Delhi - Trib.)**

Where assessee-company was providing ITeS itself while comparable company outsourced significant part of its activities, they could not be compared

Merely because assessee was carrying on its business of ITeS through different software tools, same would not make it non-comparable, if functions performed by comparable company was similar

Where assessee-company, engaged in providing ITeS, had undertaken a process of continuous R&D, such activity would not make it not comparable when functions performed by comparable company were similar

Where turnover of comparable was 30 times higher than turnover of assessee, they could not be comparables

Even if comparable company provided services to single customer, unless it was shown that said buyer had controlled prices, this company was to be accepted as comparable

Only because in one of years, sales of comparable company was less than INR 1 crore, said company cannot be rejected as comparable, if it is otherwise a functionally comparable company

Where TPO had accepted comparable company in subsequent years even when there were losses incurred by said company, following principle consistency said comparable was to be included in list of comparables

Non-utilization of assets or under-utilization thereof may be internal inefficiency built in comparable company; however, when it is functionally comparable, it cannot be rejected

**Moserbaer India Ltd vs ACIT, 98 taxmann.com 457 (Delhi - Trib.)**

Foreign AE could be a tested party, provided complete financials of said AE along with complete financials of relevant comparables required to benchmark international transaction were made available before TPO. Arm's length interest rate in respect of loan advanced to foreign AE should be computed based on interest rate applicable to currency in which loan has to be repaid

DRP rightly directed Assessing Officer that no interests need to be charged on share application money pending with its foreign subsidiaries as transaction of assessee-company with its AE involving payment of share application money did not fall within purview of international transaction.

**Renault Nissan Automotive India (P.) Ltd vs Secretary, 99 taxmann.com 4 (Madras)**

Order passed by DRP under section 144C (5) must contain discussion of facts and independent findings on those facts by DRP; mere extraction of rival contentions will not satisfy requirement of consideration.

**Jaso India (P.) Ltd. vs DCIT, 98 taxmann.com 469 (Kolkata - Trib.)**

Where assessee having imported cranes and mechanical equipments from AE, supplied same to Indian customers, in view of fact that apart from import of cranes from AE, assessee also performed various other functions such as market research, requirement analysis, quality checks, etc., RPM method could not be used to determine ALP of international transactions entered into with AE

**Ericsson India (P.) Ltd. vs ACIT, 98 taxmann.com 395 (Delhi)**

Where assessee failed to produce requisite documents under section 92D(3) in response to notice issued by TPO, in view of fact that said event of default occurred in March, 2014 i.e. prior to amendment dated 1-10-2014, when power to impose penalty under section 271G was with AO, impugned penalty order passed by TPO being without Jurisdiction, deserved to be set aside

#### COMPLIANCE CALENDER DURING THE MONTH OF NOVEMBER 2018

| S.NO | DATE               | ACT            | FORM                                | PARTICULARS   |
|------|--------------------|----------------|-------------------------------------|---|
| 1    | 7th November 2018  | Income Tax     | Form No. 27C (TCS)                  | Monthly filing of forms as received in October 2018   |
| 2    | 7th November 2018  | Income Tax     | Challan No. ITNS-281                | Monthly payment of TDS/TCS deducted/collected in October 2018                                     |
| 3    | 11th November 2018 | GST            | GSTR -1                             | Monthly Return of Outward Suppliers in October 2018   |
| 4    | 14th November 2018 | Income Tax     | Form No. 16 C                       | Monthly issue of TDS Certificate - Section 194-IB for September 2018                              |
| 5    | 14th November 2018 | Income Tax     | Form No. 16 B                       | Monthly issue of TDS Certificate - Section 194-IA for September 2018                              |
| 6    | 15th November 2018 | Income Tax     | Form No. 16 B                       | Monthly issue of TDS Certificate - for purchase of property payment/credit made in September 2018 |
| 7    | 15th November 2018 | ESI            | ESI Challan                         | Monthly payment of ESI for October 2018   |
| 8    | 15th November 2018 | Provident Fund | Electronic Challan cum Return (ECR) | Monthly E-Payment for PF for October 2018   |
| 9    | 20th November 2018 | GST            | GSTR - 3B                           | Monthly payment of GST for October 2018   |
| 10   | 20th November 2018 | GST            | GSTR - 5                            | Monthly return for Nonresident for October 2018   |
| 11   | 20th November 2018 | GST            | GSTR - 5A                           | Monthly return for OIDAR services to unregistered recipients for October 2018                     |
| 12   | 30th November 2018 | Income Tax     | Form No. 26QB                       | Monthly filing challan-cum-statement for TDS - Section 194-IA for October 2018                    |
| 13   | 30th November 2018 | Income Tax     | Form No. 26QB                       | Monthly payment of TDS for Purchase of property for October 2018                                  |
| 14   | 30th November 2018 | Income Tax     | Form No. 26QC                       | Monthly filing challan-cum-statement for TDS Section 194-IB for October 2018                      |

**BY: PRADEEP K. MITTAL**

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