

# PKMG LAW CHAMBERS

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**MONTHLY LAW REPORT FOR APRIL, 2016**  
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## CIVIL LAWS

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**CIRCULARS AND NOTIFICATIONS ISSUED BY THE MINISTRY OF CORPORATE AFFAIRS (MCA).**

**Companies (Share Capital and Debentures) Amendment Rules, 2016**

The Central Government amended Companies (Share Capital and Debentures) Rules, 2014 by Companies (Share Capital and Debentures) Rules, 2016 where under Rule 17(1)(n)(iii) of the aforesaid Rules, a proviso is inserted which provides where audited accounts are more than six months old, the buy-back shall be on the basis of unaudited accounts not older than six months from the date of their document.

**Companies (Share Capital and Debentures) Second Amendment Rules, 2016**

In Companies (Share Capital and Debentures) Rules, 2014, after sub-rule (5) of Rule 17, a proviso is inserted which provides that where all members agree, the offer for buy-back shall remain open for a period less than 15 days.

**Central Registration Centre (CRC ) to exercise functional jurisdiction of processing and disposal of e-forms**

The CRC shall process forms pertaining to registration of companies i.e. e-forms INC-2, INC-7, and INC-29 along with linked forms INC-22, DIR-12, and URC-1 and the jurisdiction, processing and approval of names shall be exercised by Registrar, CRC.

**COMPANIES ACT 1956 AND 2013 - BY SHRI PRADEEP K. MITTAL-9811044365**

- ✚ Ex-managing director in his individual capacity cannot cancel company's resolution for w-up, withdraw company petition, assail w-up proceedings and apply for a scheme of arrangement to be sanctioned. **M Rama Bhushanam, Ex Md v. Commercial Agro Products (P.) Ltd.rep. by Official Liquidator and another, [2016] 131 CLA 339 9 (T&AP).**

- ✚ Where the transfer of shares is occasioned by the scheme of amalgamation, it is not a transfer within the meaning of relevant Articles but a case of transmission of shares. The transferee can be registered as a member only with the consent of directors, and if directors refuse to give such consent, the transferee can invoke the Articles and the CLB has to give an option to the BOD to register transferee as a member or to purchase the shares through any purchasing member at a fair value determined by the auditors. **Shakti Insulated Wire (P.) Ltd. and Ors. v. Great View Properties (P.) Ltd. and Ors., [2016] 131 CLA 378 (Bom.)**
  
- ✚ Where shares in Indian Private Limited Company held by its English Holding Company and on liquidation shares are sold by receiver in UK, the CLB has jurisdiction to test the fairness of the procedure adopted under Indian laws and articles of association of the company. **N R Harikumar v. WW Apparels (India) (P.) Ltd., [2016] 131 CLA 301 (Mad.)**
  
- ✚ Where the Company Judge has given approval to the respondent company for reduction of share capital as contemplated u/s 100-104 of Companies Act, 1956 and SEBI has already initiated proceedings against company for non-compliance of regulations in respect of minimum public shareholding. The two proceedings being different and distinct, SEBI has jurisdiction to deal with matter of non-compliance irrespective of sanction so granted for reduction of share capital. **SEBI v. Khoday India Ltd., [2016] 131 CLA 315 (Kar.)**
  
- ✚ The High Court sanctioned the scheme of arrangement u/s 391-394 of Companies Act, 1956. The Regd. Office of the company situated in two states, one in Maharashtra and the other one is Gujarat respectively; orders submitted for the adjudication of stamp duty. Orders of High Court liable to stamp duty as it resulted in transferring the property and the order of the court is an instrument and it includes every document. Transferor company did not pay stamp duty in either of the states; Transferee company is liable to pay full stamp duty. The contentions of transferee company that it is entitled to rebate u/s 19 of Stamp Act is held to be legally unsustainable by High Court. **Chief Controlling Revenue Authority and Ors. v. Reliance Industries Ltd. and Ors. MANU/MH/0426/2016.**

- ✚ The Petitioner being the initial subscriber to the MOA and AOA filed a petition against Respondent Company for calling of the AGM. The Company last held its AGM in 2011 and filed Annual Returns on 30 Sep 2011. ROC made an enquiry u/s 560(2) of Companies Act, 1956 as to whether company is in operation to which no appeared despite notices. The CLB directed Company to convene, hold and conduct AGM as per Section 166 of Companies Act, 1956 or 96 of Companies Act, 2013 for F.Y. 2012, 2013, 2014, 2015 at the earliest. **Internet Valley Limited and Ors. v. Tamil Nadu Mega Food Park Ltd. MANU/CL/0004/2016.**
  
- ✚ Pursuant to Section 196 (3) of Companies Act, 2013 corresponding to Section 269 (2) of Companies Act, 1956 a person who has attained the age of 70 years cannot be appointed as a Director or Managing Director on account of disqualification, subject to the fulfillment of the proviso, that a special resolution is being passed by the company. On the other hand if a person was already appointed prior to 1<sup>st</sup> April, 2014, disqualifications whenever incurred would operate prospectively, subject to proviso that special resolution is being passed by the company. **Sridhar Sundararajan v. Ultramarine & Pigments Ltd. and Another, [2016] 131 CLA 203 (Bom.)**
  
- ✚ Where petitioners were trying to dispose of their shares, and were planning to exit from the company, it is presumed and that reveals their frame of mind that they might not be interested in acquiring further shares and moreover, it is a settled law that if further allotment of shares has been made by the company for the benefit and for the right purpose, the same cannot be said to be an act of oppression. Petition u/s 397/ 398 cannot be filed for collateral purpose to enforce the terms of Memorandum of Understanding arrived at between the parties. **State Bank of India v. Jagdish Singh Saini and Ors. [2016] 131 CLA 215 (CLB).**

**INCOME TAX CIRCULAR, NOTIFICATION AND PRESS RELEASE -  
BY SHRI MANOJ KUMAR MITTAL CA - 9810764620**

- ✚ The CBDT vide notification dated 29.04.2016 inserted rule 26C which provides that the assessee being salaried employee shall submit its

claim for deduction from salary under various section to his employer in form 12BB. Further, rule 31 amended providing for one month time instead of 15 days for submission of quarterly TDS statement after end of quarter.

✚ The CBDT has issued Circular No. 11/2016 dated 26.04.2016 stating that in accordance with the judgement of the Supreme Court in UOI vs. Tata Chemical Limited 363 ITR 658 it is settled that if resident deductor is entitled for the refund of tax deposited under Section 195 of the Act, then it has to be refunded with interest under section 244A of the Act, from the date of payment of such tax. The CBDT has directed that no appeals may henceforth be filed on this ground by the officers of the department and appeals already filed on this issue may not be pressed

✚ The CBDT has issued Circular No. 09/DV/2016 dated 26th April 2016 in which it has expressed the view, by relying on the judgement dated dated 8.7.15 of the Kerala High Court in Grihalaxmi Vision vs. ACIT that the limitation for imposition of penalty under sections 271D and 271E of the Income tax Act, 1961 does not commence at the level of the Assessing Officer (below the rank of Joint Commissioner of Income Tax) but commences at the level of the Range authority i.e. the Joint Commissioner of Income Tax./Addl. Commissioner of Income Tax. The CBDT has advised Assessing Officers (below the rank of Joint Commissioner of Income) to make a reference to the Range Head regarding any violation of the provisions of section 269SS and section 269T of the Act, as the case may be, in the course of the assessment proceedings (or any other proceedings under the Act). It has directed that the Assessing Officer, (below the rank of Joint Commissioner of Income Tax) shall not issue the notice in this regard. The Range Head will issue the penalty notice and shall dispose/ complete the proceedings within the limitation prescribed u/s 275(1)(c) of the Act.

✚ CBDT Report regarding framework for computation of book profit for the purposes of levy of Minimum Alternate Tax (MAT) under section

115JB of the Income-tax Act 1961 for Indian Accounting Standards (Ind AS) compliant companies in the year of adoption and thereafter-

- ✚ The Central Board of Direct Taxes (CBDT) vide order dated 8th June 2015 constituted a Committee to inter alia suggest the framework for computation of book profit for the purposes of levy of Minimum Alternate Tax (MAT) under section 115JB of the Income-tax Act, 1961 ('the Act') for Indian Accounting Standards (Ind AS) compliant companies in the year of adoption and thereafter. After a detailed discussion of the provisions of section 115JB of the Act, Ind AS and relevant sections of the Companies Act, 2013, the Committee has suggested a framework for computation of books profit of Ind AS compliant companies.
  
- ✚ The CBDT has issued a directive dated 2nd May 2016 in which it has been directed that the income arising from transfer of unlisted shares would be considered under the head 'Capital Gain', irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach
  
- ✚ The CBDT has issued a press release dated 18.04.2016 stating that the Income-tax Act, 1961 (the Act) provides that the Central Board of Direct Taxes may prescribe rules specifying the procedure for grant of relief or deduction of income-tax paid in any country or specified territory outside India, under section 90/ 90A/ 91 of the Act against the income-tax payable under the Act. Accordingly, the CBDT has framed the draft rules for grant of Foreign Tax Credit. The CBDT has invited comments from stakeholders and general public by 02.05.2016 at the email address dirtpl4@nic.in or by post at Director (TPL-IV), Central Board of Direct Taxes, Room No. 147-F, North Block, New Delhi.

## **Domestic Case Laws**

- ✚ IT: Where assessee-builder paid advance money to buy a land for construction of residential flats thereupon and said money was forfeited, such loss was to be treated as revenue loss as it was incurred to acquire stock-in-trade i.e. land. **69 taxmann.com 31 (Chennai - Trib.)**
- ✚ IT: Where assessee-builder made payment to labourers for construction activity on basis of self-made vouchers obtaining proper voucher from such kind of unorganized labourers was beyond control of assessee, action of Assessing Officer to disallow said payment without showing that assessee had inflated expenditure was not justified **69 taxmann.com 31 (Chennai - Trib.)**
- ✚ IT: Where assessee-builder incurred interest on funds borrowed for a new project, same was to be allowed as revenue expenditure even though said new project was not commenced as there was no restriction for assessee to use borrowed funds for other projects **69 taxmann.com 31 (Chennai - Trib.)**
- ✚ IT: Where Assessing Officer issued notice for reassessment on ground that assessee-trust accumulated amount for future application but did not intimate department, said action of Assessing Officer was not justified as no amount could be said to have been accumulated if requirement for accumulation i.e. intimating to department, was not fulfilled. **69 taxmann.com 44 (Gujarat)**
- ✚ IT: Income from derivative trading being of nature of income from speculative business can be set off from loss incurred by assessee on own trading in shares. **68 taxmann.com 375 (Kolkata - Trib.)**
- ✚ IT : Any sum exceeding Rs. 50,000/- can fall within ambit of section 56(2)(vi) only if it is received by an individual or HUF; where assessee was an AOP sum of Rs. 1.60 crore received by it without consideration could not be included in its total income within framework of section 56(2)(vi) **[2016] 68 taxmann.com 376 (Delhi - Trib.)**

- ✚ IT : Where assessee, by transferring shares held as long-term capital assets through off market transactions resulting into genuine loss, escaped rigor of exemption provision contained in section 10(38), which would have otherwise disentitled it to claim set-off and carry forward of such a loss, this was a case of tax planning rather than tax avoidance and such genuine loss could not be disallowed as it did not fall within ambit of section 10(38) because of non-payment of STT **[2016] 68 taxmann.com 376 (Delhi - Trib.)**

**TRANSFER PRICING CASE LAWS - BY SHRI MANOJ KUMAR  
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- ✚ IT/ILT : In case of assessee rendering BPO services to its AE, company rendering KPO services and a company earning high profit margin on account of its brand value, could not be accepted as comparables while determining ALP. **[2016] 68 taxmann.com 378 (Hyderabad - Trib.)**
- ✚ IT/ILT : At any stage of proceedings, either before TPO or appellate proceedings, a new comparable can be considered. **[2016] 69 taxmann.com 7 (Bangalore - Trib.)**
- ✚ IT/ILT: A gigantic company owning intangibles and having substantial brand value could not be compared with assessee providing back office support services **[2016] 68 taxmann.com 371 (Bangalore - Trib.)**
- ✚ IT/ILT: Where Commissioner (Appeals) excluded communication charges from turnover of assessee which provided back office support service to its AE by following judgment of jurisdictional High Court against which SLP had already been filed, action of Commissioner (Appeals) was justified as mere filing of SLP does not finish off precedential value of decision of jurisdictional High Court **[2016] 68 taxmann.com 371 (Bangalore - Trib.)**

## **INTERNATIONAL TAXATION**

- ✚ IT/ILT: In order to determine as to whether assessee, a German company, rendering services in field of exploration, mining and extraction to Indian companies, had PE in India, it was continuous period of stay of its employees in India which had to be taken into consideration and not entire contract period. **[2016] 68 taxmann.com 34 (Mumbai - Trib.)**
- ✚ IT/ILT : Where assessee provided design and engineering for laying pipelines, prepared welding procedure, reviewed work procedure and deputed expertised manpower for site review, assessee's income was taxable at rate of 10 per cent only as technical supervision. **[2014] 44 taxmann.com 429 (Ahmedabad - Trib.)**
- ✚ IT/ILT: Requirement of article 24 of India-Singapore DTAA to receive amount of interest in Singapore can't be established by proving that amount was not received in India: it must be proved that amount was received in Singapore. **[2013] 34 taxmann.com 21 (Mumbai - Trib.)**
- ✚ IT/ILT : Where role of assessee's Indian subsidiary was only to market assessee's products in India and expenses in nature of lease line charges, installation, service charges and other expenses were incurred by assessee in providing services to end customers, amount received for such expenses could not be treated as reimbursement of expenses by Indian subsidiary. **[2013] 34 taxmann.com 21 (Mumbai - Trib.)**

**CORPORATE LAWS - BY SHRI PRADEEP K MITTAL ADVOCATE - 9811044365**

### ✚ **Sick Industrial Companies (Special Provisions) Act, 1985:**

- ♣ Section 22 of SICA provides, where an inquiry is pending u/s 16 or any scheme is under implementation u/s 17 or where an appeal is pending u/s 25, then notwithstanding anything contained in Companies Act or MOA or AOA or any other law,

no suit for the recovery of money or for the enforcement of security interest or for the appointment of receiver shall lie against sick industrial company except with the consent of BIFR or AAIFR. The Bombay High Court, following SC observed that with the consent of BIFR, the court can attach the properties of the sick company. **Sai Accumulator Industries Sangamner v. Sethi Brothers Aurangabad, MANU/MH/0577/2016.**

- ♣ Relying on the decision in case of KSL Industries Ltd. v. Arihant Threads Ltd. & Ors., the Delhi High Court held that protection u/s 22 of SICA is not available to the guarantors of sick company in the nature of 'Recovery Proceedings'. The appellants, who are the guarantors, can obtain the protection of Section 22(1) of SICA only if the action filed by the bank comes within the ambit of the term 'suit'. If the action filed by the respondent bank is in the nature of 'proceedings' and not a 'suit', protection under Section 22(1) would not be available, especially, when the appellants are guarantors. **Om Prakash Parasrampuria & Ors. v. Union of India , MANU/DE/0514/2016.**

#### ✚ **SARFAESI Act, 2002:**

- ♣ Section 13 and 35 of SARFAESI Act, 2002 read with Maharashtra Rent Control Act, 1991- Enforcement of Security Interest- Provisions of SARFAESI cannot be allowed to override the provisions of Rent Controls Act and thereby rendering the entire scheme of Rent as useless and nugatory, as that would leave the tenants wholly to the mercy of the landlords and in the fear that landlord might use the tenanted premises as 'security interest' while taking a loan from the bank and subsequently making a default on it. **Vishal N Kalsaria v. Bank of India, [2016] 131 CLA 277 (SC).**
- ♣ Any person aggrieved by the order of DRT u/s 17 of SARFAESI prefer an appeal within 30 days , for that he has to make a deposit of 50% of amount due from him as claimed by secured creditor. The Supreme Court held that pre-deposit by SBS Organics Pvt Ltd being a borrower, before DRAT u/s 18 of

SARFAESI Act, is not a 'secured asset' in hands of Axis Bank, being a secured creditor. It's not a secured debt either, since the borrower or the aggrieved person has not created any security interest on pre-deposit in favour of assessee. The right to appeal u/s 18 of SARFAESI is not with Bank but with Tribunal. **2016-TIOL-46-SC-MISC.**

## **SEBI LAWS - BY SHRI PRADEEP K. MITTAL-9811044365**

### **Clarification regarding applicability of Indian Accounting Standards to disclosures in offer documents under SEBI (ICDR) Regulations, 2009.**

- ✚ SEBI issued a circular in accordance with Section 11 and 11A of SEBI Act, 1992 regarding the applicability of Indian Accounting Standards (IAS) which provides for disclosure of financial information in accordance with Ind AS in the offer document under SEBI (ICDR) Regulations, 2009. The issuer company shall explain the difference between Ind AS and previously applicable AS and explain the impact of such transition. **Circular No. SEBI/HO/CFD/DIL/CIR/P/2016/47**

### **JUDGMENTS & ORDERS:**

- ✚ **SEBI Takeover Regulations:** Reg.7 read with Reg. 11 of SEBI (SAST) Regulations, 1997 provides an acquirer who together with person acting in concert with him, has acquired 15 per cent or more but less than 55 per cent of shares of target company, shall disclose purchase or sale aggregating 2% or more of the share capital of the target company. Since Reg. 7 (1A) does not contemplate disclosure relating to sale of shares in excess of the limits as set out under Reg. 7(1A), the penalty u/s 15 A (b) of SEBI Act, 1992 cannot be imposed on failure to make disclosure of sale within two days. **Ravi Mohan v. SEBI, [2016] 131 CLA 321 (SAT).**
- ✚ The Company was engaged in fund mobilizing activity through issuance of Redeemable Preference Shares to more than 49 persons, without complying with Companies Act, 1956 read with Companies Act, 2013. SEBI passed following orders in respect of the same:

i) The company and its directors are directed to refund money along with interest @15% p.a and not to garner more money from investors through the issuance of securities;

ii) The company and its promoters are restrained from dealing in securities market and also restrained from associated themselves with any listed public company or any intermediary. **Order in the matter of M/s Progress Cultivation Ltd. MANU/SPRL/0071/2016.**

**CIVIL LAWS - BY SHRI PRAVEEN K. MITTAL- 9810826436**

- ✚ License cannot be converted into leasehold merely because the licencees over stayed in the public premises for long. Licence does not create any interest or right in the property and merely allows licensee right to enter and use property. If licencees are desirous of same premises they may participate in the bids when invited for allotment on leasehold basis of the public premises. **228 (2016) DLT 395**
- ✚ The **reason for the delay 100 days was that the instruction file sent by the DDA to the Counsel got tied with some other case bundle which could** be identified only later on are the reasons, sufficient to explain the delay and the delay is condonable under Section 5 Limitation Act,. **228 (2016) DLT 405**
- ✚ **After expiry of Agreement, no renewal took place. The party filed a petition under Section 9 of Arbitration & conciliation Act for interim relief of renewal of Agreement and the Court declined on the contention that it is otherwise not permissible under Section 14(1)(e) of Specific Relief Act. MANU/DE/0957/2016**

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@gmail.com](mailto:pkmittal171@gmail.com)

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