

MONTHLY LAW REPORT FOR JANUARY, 2018

PKMG LAW CHAMBERS

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MONTHLY LAW REPORT FOR JANUARY, 2018
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Circulars and Notifications Issued by Ministry Of Corporate Affairs (MCA)

Notification & Circular No.	Date of Issue	Subject
<p>1. Notification From File No. : 01/22/2013-CL-V-Part-III MANU/DCAF/0006/2018</p>	<p style="text-align: center;">26th January, 2018</p>	<p>Subject: Companies (Appointment and Qualification of Directors) Amendment Rules, 2018 – In exercise of the powers conferred by sub-sections (1) and (2) of section 469 of the Companies Act, 2013, the Central Government hereby makes the following rules further to amend the Companies (Appointment and Qualification of Directors) Rules, 2014, namely: -</p> <p>1. (1) These rules may be called the Companies (Appointment and Qualification of Directors) Amendment Rules, 2018.</p> <p>(2) They shall come into force on the date of their publication in the Official Gazette.</p> <p>2. In the Companies (Appointment and Qualification of Directors) Rules, 2014 (hereinafter referred to as the principal rules), in rule 9,</p> <p>(A) for the marginal heading, the following marginal heading shall be substituted, namely:-</p> <p>"Application for allotment of Director Identification Number before appointment in an existing company";</p> <p>(B) for sub-rule (1), the following shall be substituted, namely:-</p> <p>" (1) Every applicant, who intends to be appointed as director of an existing company shall make an application electronically in Form DIR-3, to the Central Government for allotment of a Director Identification Number (DIN) along with such fees as provided under the Companies (Registration Offices and Fees) Rules, 2014. Provided that in case of proposed directors not having approved DIN, the particulars of maximum three directors shall be</p>

		<p>mentioned in Form No.INC-32 (SPICe) and DIN may be allotted to maximum three proposed directors through Form INC-32 (SPICe)";</p> <p>(C) in sub-rule (3),</p> <p>(I) In sub-clause (a), after sub-clause (iii), the following sub-clause shall be inserted, namely:-</p> <p>"(iiia) board resolution proposing his appointment as director in an existing company";</p> <p>(II) for clause (b), the following clause shall be substituted, namely:-</p> <p>"(b) Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified digitally by a company secretary in full time employment of the company or by the managing director or director or CEO or CFO of the company in which the applicant is intended to be appointed as director in an existing company,".</p> <p>3. In annexure to the principal rules,</p> <p>(A) for Form No. DIR-3 the following form shall be substituted, namely:- Form No. DIR-3</p> <p>(B) for Form No. DIR-12, the following form shall be substituted, namely:- Form No. DIR-12</p>
<p>2. Notification No. : S0351(E) MANU/DCAF/0002/2018</p>	<p>23rd January, 2018</p>	<p>Subject: Enforcement date of Companies (Amendment) Act, 2017 – In exercise of the powers conferred by sub-section (2) of section 1 of the Companies (Amendment) Act, 2017 (1 of 2018), the Central Government hereby appoints the 26th January, 2018 as the date on which the provisions of section 1 and section 4 of the said Act shall come into force.</p>
<p>3. Notification No. : GSR48(E)</p>	<p>22nd</p>	<p>Subject: Companies (Registration Offices and Fees) Amendment Rules,</p>

<p>MANU/DCAF/0003/2018</p>	<p>January, 2018</p>	<p>2018 – In exercise of the powers conferred by sections 396, 398, 399, 403 and 404 read with sub-sections (1) and (2) of section 469 of the Companies Act, 2013, the Central Government hereby makes the following rules further to amend the Companies (Registration Offices and Fees) Rules, 2014, namely:-</p> <p>1. (1) These rules may be called the Companies (Registration Offices and Fees) Amendment Rules, 2018.</p> <p>(2) They shall come into force from the 26th January 2018</p> <p>2. In the Companies (Registration Offices and Fees) Rules, 2014, (herein after refer to as the principal rules), in rule 10, in sub-rule (3), the following proviso shall be inserted, namely:-</p> <p>"provided that no re-submission of the application is allowed in the case of reservation of a name through web service - RUN".</p> <p>3. in the principal Act, in the Annexure, in item I (Fee for filings etc. under section 403 of the Companies Act, 2013), for the Table of Fees to be paid to the Registrar, the following shall be substituted namely:-</p> <p>(1)A. Table of Fees to be paid to the Registrar -</p> <p>(1) The above table prescribed for small companies (as defined under section 2 and one person companies defined under Rule related to Chapter II read with section 2(62) of the Act shall be applicable provided the said company shall remain as said class of company for a period not less than one year from its incorporation.</p> <p>(2) The above table of fee shall be applicable for any such intimation to be furnished to the Registrar or any other officer or authority under section 159 of</p>
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		<p>the Act, filing of notice of appointment of auditors or Secretarial Auditor or Cost Auditor.</p> <p>(3) The above table of fee and calculation of fee as applicable for increase in authorised capital shall be applicable for revised capital in accordance with sub-section (11) of 233 of the Act, (after setting off fee paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company).</p> <p>(4) The above table of fee shall be applicable for filing revised financial statement or board report under section 130 and 131 of the Act.</p>
<p>4. Notification From File No. : 01/13/2013-CL-V- Part-I-Vol.II MANU/DCAF/0005/2018</p>	<p>20th January, 2018</p>	<p>Subject: Companies (Incorporation) Amendment Rules, 2018 – In exercise of the powers conferred by sub-sections (1) and (2) of section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Incorporation) Rules, 2014, namely: -</p> <p>1. (1) These rules may be called the Companies (Incorporation) Amendment Rules, 2018.</p> <p>(2) They shall come into force from the 26th day of January, 2018.</p> <p>2. 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.- An application for reservation of name shall be made through the web service available at www.mca.gov.in by using 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".</p> <p>3. In the Principal rules, in rule 10, the</p>

	<p>words, letters and figure "Form No.INC-7" shall be omitted.</p> <p>4. In the principal rules, for rule 12, the following rule shall be substituted, namely:- "12. Application for incorporation of companies. An application for registration of a company shall be filed, with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated, in Form No.INC-32 (SPICe) along with the fee as provided under the Companies (Registration offices and fees) Rules, 2014; Provided that in case pursuing of any of the objects of a company requires registration or approval from sectoral regulators such as the Reserve Bank of India, the Securities and Exchange Board, registration or approval, as the case may be, from such regulator shall be obtained by the proposed company before pursuing such objects and a declaration in this behalf shall be submitted at the stage of incorporation of the company".</p> <p>5. In the principal rules, in sub-rule (1) of rule 38, the following proviso shall be inserted.- (i) in sub-rule (1), after the proviso, the following proviso shall be inserted, namely:- "provided further that in case of incorporation of a company having more than seven subscribers or where any of the subscriber to the MOA/AOA is signing at a place outside India, MOA/AOA shall be filed with INC-32 (SPICe) in the respective formats as specified in Table A to J in Schedule I without filing form INC-33 and INC-34"; (ii) In sub-rule (2), after the proviso, the following proviso shall be inserted, namely:- 'Provided further that in case of companies incorporated, with effect from the 26th day of January, 2018, with a nominal capital of less than or equal to rupees ten lakhs or in</p>
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	<p>respect of companies not having a share capital whose number of members as stated in the articles of association does not exceed twenty, fee on INC-32 (SPICe) shall not be applicable".</p> <p>6. In the annexure to the principal rules,-</p> <p>(i) for Form No. INC-1, the following form shall be substituted, namely:- Form No. INC-1</p> <p>(ii) for Form No. INC-3, the following form shall be substituted, namely:- Form No. INC-3</p> <p>(iii) for Form No. INC-7 shall be omitted;</p> <p>(iv) for Form No. INC-12, the following form shall be substituted, namely:- Form No. INC-12</p> <p>(v) for Form No. INC-22, the following form shall be substituted, namely:- Form No. INC-22</p> <p>(vi) for Form No. INC-24, the following form shall be substituted, namely:- Form No. INC-24</p> <p>(vii) for Form No. INC-32, the following form shall be substituted, namely:- Form No. INC-32</p> <p>(viii) in form No. INC-33 and in Form no. INC-34, for the words and figures 'INC-1' the word 'RUN' shall be substituted.</p>
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Companies Act, 2013 Case Laws
By Advocate P.K. Mittal, +91-9811044365

- ✚ It is held that if the question is of title in whose favour the shares ought to be transferred, adjudication power under Section 58 of Companies Act, 2013 is not available to the Tribunal. Moreover, where the section of law under which the petition is filed and the reliefs sought are totally different, the petition is liable to be dismissed. **Smt. Kasturi Bai vs. Lupin Ltd. MANU/NC/0282/2018**
- ✚ Where the shares transferred has been registered in the register of members and all other requirements of transfer of shares have been fulfilled, the

allegation that there is no transfer deed is not maintainable. **Pawan Kumar Kanodia vs. Kanodia Tex Industries MANU/NC/0428/2017** (The above judgment has been upheld by the Hon'ble NCLAT)

- ✚ The NCLT allows petition under section 59 of the Companies Act, 2013 for rectification of Register of Members of respondent company and held that transfer of shares with forged transfer deed and NOC without petitioner's knowledge is null and void. **[LSI-2203-NCLT-2017(CHE)]**
- ✚ The order of admission or the order of appointment of Provisional Liquidator, will not create any bar on filing of petition and passing of orders by NCLT as the order of admission is merely commencement of proceedings and not final order of winding up which is passed under section 481 of the Companies Act, 1956. Till the final order of winding up is passed, NCLT can entertain a petition or an application regarding the company. **Jotun India Pvt. Ltd. and Ors. vs. PSL Limited MANU/MH/0005/2018**
- ✚ If the share of a member is reduced below 1/10th of the total share capital of the company without information and knowledge to the member, the application u/s 397/398 of the Companies Act, 1956(section 241 of the Companies Act, 2013) cannot be opposed on the ground that the member has less than 1/10th of share capital. **Therm Flow Engineers Private Limited and Ors. vs. Bhavesh Narumalani and Ors. MANU/NL/0216/2017**
- ✚ It is held that while affirming order of the Tribunal containing finding of 'Oppression and Mismanagement', the Tribunal has no jurisdiction to direct sale of shares to an outsider, particularly while there were other shareholders who might agree to purchase the shares. **Adbhut Vincom (P.) Ltd. vs. Hotel Birsa (P.) Ltd. MANU/NL/0061/2017**
- ✚ Under the provisions of section 97 of the Companies Act, 2013, the Tribunal can call or direct the calling of the Annual General Meeting (AGM) of the company on the application of any member of the company, but the said section is not at all attracted where only extension of time for holding AGM is sought by resolution professional in view of the difficulties coming in the way of holding AGM. **Punjab National Bank vs. James Hotels Ltd. MANU/NC/1807/2017**

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

- ✚ It is held that the winding up proceedings before the Hon'ble High Court u/s 433(e) of the 1956 Act against the same Corporate Debtor would not be hit by the non-obstante clause envisaged u/s 238 of the IBC, because winding up proceedings are saved u/s 255 of IBC read with Sch. 11. Effect of non-obstante clause in section 238 of IBC would be significant only if there is conflict between the provisions. **Superways Enterprises Pvt. Ltd. vs. Topworth Steel & Power Pvt. Ltd. [LSI-13-NCLT-2018(MUM)]**

- ✚ The Hon'ble NCLAT has held that the NCLT while considering company petition under section 10 of IBC, 2016 by the company itself, cannot consider any other facts as may be raised by Financial or Operational Creditor. Once requirement of section 10 is satisfied and Company is not disqualified u/s 11, i.e. (i) corporate debtor is not undergoing corporate insolvency resolution process, (ii) corporate debtor having completed corporate insolvency resolution process more than 12 months from the date of making an application before NCLT, (iii) corporate debtor has not violated terms of insolvency resolution plan which was approved more than 12 months before the date of making application, (iv) no liquidation order has been passed against corporate debtor. However mere pendency of winding up petition before High Court shall not disqualify (winding up order has been passed) the corporate debtor to make an application u/s 10 of IBC and such application shall be admitted by the NCLT. **In Re : Antrix Diamond Exports Pvt. Ltd. MANU/NL/0003/2018**

- ✚ The NCLT dismissed the petition holding that, since the petitioner has admitted that the remittances made are with reference to a contract between the respondent and a third party, there exists no direct contract between the petitioner and the respondent, and so the petitioner does not have any locus standi to initiate CIRP against the respondent. **Z-Trontics Infratel Pvt. Ltd. vs. Wipro Enterprises Pvt. Ltd. [LSI-6-NCLT-2018(BAN)]**

- ✚ Where there is a long standing dispute regarding the quality of goods supplied before the issuance of notice, and moreover the notice issued u/s 8(1) is not sustainable, the application for initiation of Corporate Insolvency Resolution Process is liable to be rejected. **Shaw Traders vs. Balaji Paper & Newsprint (P.) Ltd. MANU/NC/1167/2017**

- ✚ NCLT Calcutta has held that 284 employees of operational debtors cannot file one petition as joint petitions as more than one creditor cannot file joint petition under section 9 of IBC, 2016. **S. N. Singh vs. Tayo Rolls Ltd. MANU/NC/0009/2018**
- ✚ Where a party had provided finance and there is element of profit sharing as well, it cannot be argued that it is pure transaction of loan and the financial creditor cannot claim that there is debt due and petition is liable to be dismissed. **Bravo Builders Pvt. Ltd. vs. Crosstown Fashions Ltd. MANU/NC/0005/2018**
- ✚ Where loan for a project yet to be implemented has been advanced to the corporate debtor by the financial creditor only and not by other members of Joint Lender Forum, any decision made by the Forum not to proceed against the corporate debtor is not binding on the financial creditor. **Indian Bank vs. Athena Demwe Power Ltd. MANU/NC/1053/2017**
- ✚ Where no debt is outstanding against corporate debtor and the committee of creditors recommended closing insolvency proceeding, the resolution plan submitted by the Insolvency Resolution Professional is to be accepted and insolvency proceeding is to be closed. **In Re: Parker Hannifin India Pvt. Ltd. and Ors. MANU/NC/1217/2017**

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

CBDT Amends Rule 127 Reg Mode Of Service Of Notices, Orders & Other Communications By Dept To Assesseees

The CBDT has issued a Notification dated 20th December 2017 by which it has amended Rule 127 of the Income-tax Rules with regard to the delivery and transmission of communications by the department to the assesseees

CBDT, After Rap By High Court, Bans Adjournments By DRs In ITAT Without Substantial Cause

The Delhi High Court in Showa Corporation vs. Dy. Commissioner of Income Tax passed strictures against the practice of the Departmental Representatives seeking adjournment before the Tribunal on frivolous grounds even in high demand cases. Pursuant to that, the CBDT has issued a directive dated 14th December 2017 stating that Department Representatives should not seek adjournments in cases listed before ITAT without substantial cause or reason

CBDT Prescribes Procedure For Assessment Of Defective Returns Of Income Selected For Scrutiny Under CASS

The CBDT has issued a directive dated 12.12.2017 in which it has prescribed in detail the procedure to be followed by Assessing Officers for the assessment of defective returns in the context of section 139(9) of the Income-tax Act, 1961

Press Release + S. 119 Order Reg Extension By CBDT Of Due Date For Linking Of Aadhaar With PAN

The Ministry of Finance has issued a press release dated 8th December 2017 together with an order of the same date issued u/s 119 of the Income-tax Act, 1961 (the Act) stating that the due date under section 139AA for taxpayers having Aadhaar Number or Enrolment Number to link the same with Permanent Account Number (PAN) has been extended till 31.03.2018.

Circular No. 29/2017 : Income-tax deduction from salaries during the financial year 2017-18 under section 192 of the Income-tax Act, 1961

CBDT issued circular dated 5th December 2017 no 29/2017 stating the process of deducting tds on salary.

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

Case Laws

Domestic Case Laws

Vikram Singh vs UOI, 89 taxmann.com 327 (Delhi)

Non-payment of tax amounts, which are determined to be offences under Act and delay by petitioner in depositing same is non-condonable in any manner whatsoever. Further, compounding fee is in nature of a payment made to avoid punishment for a criminal offence. Thus, where petitioner had by seeking compounding, consciously and voluntarily opted for: (a) Compounding of criminal offence; (b) Undertaking to withdraw appeal; (c) Undertaking to pay compounding charges determined, petitioner could not have wriggled out of his obligations to pay compounding charges by alleging that same were exorbitant. The amount of compounding charges is not to be merely compared with principal and interest charged but has to be adjudged from point of view of long duration during which there was wilful non-payment of taxes. Therefore, petitioner having voluntarily agreed and undertaken to department to pay compounding charges and to withdraw his appeal, ought to be directed to be bound down by same.

National Travel Services vs Commissioner of Income-tax, Delhi, VIII, 89 taxmann.com 332 (SC)

After amendment of year 1988 carried out in section 2(22)(e), in order to invoke provisions of said section, 'shareholder' has only to be a person who is beneficial owner of shares. One cannot be a registered owner and beneficial owner in sense of a beneficiary of a trust or otherwise at same time. It is clear therefore that moment there is a shareholder, who need not necessarily be a member of company on its register, who is beneficial owner of shares, section gets attracted without anything more. To state, therefore, that two conditions have to be satisfied, namely, that shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect. Also, what is important is addition, by way of amendment, of such beneficial owner holding not less than 10 per cent of voting power. This is another indicator that amendment speaks only of a beneficial shareholder who can compel registered owner to vote in a particular way.

Ms. Priyanka Chopra vs DCIT, 89 taxmann.com 286 (Mumbai - Trib.)

Where assessee-actress has done promotional activity on being brand ambassador of NDTV Toyota Greenathon campaign and has clearly promoted the brand Toyota, receipt of Toyota car in this connection has rightly been added in her hands as perquisites under section 28(iv).

Ms. Priyanka Chopra vs DCIT, central circle, 89 taxmann.com 288 (Mumbai - Trib.)

Where Assessing Officer made addition of Rs. 10 lakhs to assessee's income being amount paid for purchase of property in respect of cash payment made for property at Bandra, based upon incriminating material found during search pursuant to which assessee's mother and assessee herself gave statements accepting investment of Rs.10 lakhs out of books in purchase of property to clear encumbrances, additions so made were to be upheld.

Gowthami Associates vs ITO Ward 2(2), 89 taxmann.com 192 (Bangalore - Trib.)

Where miscellaneous petition filed by assessee was seeking a review of earlier order of Tribunal by reconsidering application of principles laid down by superior Courts to facts of case or by reconsidering its findings recorded, such a course being not permissible under section 254(2), petition filed by assessee was to be dismissed.

International Tax Laws

Michelin Tamil Nadu Tyres (P.) Ltd., In re, 89 taxmann.com 217 (AAR - New Delhi)

Explanation 1 to section 9(1)(i) specifies that only that part of income which was due to operations in India would be deemed to accrue or arise in India. It necessarily follows that in case where a contract is only a part of the operations to be carried out in India, the assessee would not be liable for part of income that arises from operations conducted outside India. Thus, where Applicant an Indian company entered into two agreements with a French company MFPM namely (i) Umbrella Agreement for design, engineering, manufacturing and supply of machinery and equipment from outside India; and (ii) Services agreement, in relation to supervision of installation services rendered by different external suppliers and to coordinate the start-up and ramp-up services rendered by those suppliers no income from off shore supply of equipment would be taxable in India, however, payments made for services of supervision rendered by MFPM to Applicant as per services agreement shall be chargeable to tax in India, because the point at which property is passed to the Applicant, on the shore of the supplier country, the taxable event in respect of such supply of equipment is over, there itself. Business connection through supervision on the Indian premises later has no connection with this supply, and there is no justification to mix up the considerations received by MFPM from its offshore supplies and onshore services.

Johnson Matthey Public Ltd. Company DCIT, vs 88 taxmann.com 127 (Delhi - Trib.)

Where assessee provided guarantee to various banks to extend credit facilities to its Indian subsidiaries, guarantee fee charged by it would not fall within expression of 'interest' and in view of clause 3 of article 23 India-UK treaty, in absence of any specific provision dealing with corporate/bank guarantee recharge, same had to be taxed in India as 'Income from other sources'

Where Assessing Officer took a view that amount paid to AE for seconding its employee was taxable in India as he was rendering specialised consultancy services, since secondment agreement was not brought on record so as to determine nature of services rendered, matter was to be remanded back for disposal afresh.

BP Singapore Pte Ltd. VS acit, 88 taxmann.com 226 (Rajkot - Trib.)

In order to invoke article 24 of India - Singapore DTAA, as important aspect to be considered is whether even if income was actually exempt from tax in residence jurisdiction, given unambiguous thrust of treaty on income being subjected to tax in one contracting State to be able to claim treaty protection in other contracting State, and avoidance of double non-taxation being a clear objective of the Indo

Singapore tax treaty, such an exempt income would also be eligible to get treaty protection in source State

ITO vs Martrade Gulf Logistics FZCO-UAE, 88 taxmann.com 102 (Rajkot - Trib.)

A company registered in UAE but having effective control and management situated in Germany could not claim benefit of India-UAE tax treaty, though it could claim benefit under India-Germany tax treaty.

Principal Officer LG Electronics India (P.) Ltd. Vs ACIT, 89 taxmann.com 39 (SC)

SLP granted against High Court ruling that where at time of making assessment, assessee did not disclose about existence of PE of its parent company in India and as a result, Assessing Officer could not examine as to whether tax was deductible at source while making remittances to parent company located abroad, it was to be regarded as a valid ground for reopening of assessment.

Transfer Pricing Case Laws

Vodafone India Services (P.) Ltd vs DCIT taxmann.com 299 (Ahmedabad - Trib.)

Even where there is a zero consideration in fact but application of arm's length principle results in a consideration being assigned, the income, is to be computed on the basis of arm's length consideration

As long as an asset meets the test in *Explanation* to Sec 2(14), it is a 'Capital Asset' whether or not it is a 'property' as per the main provisions of section 2(14)

Any arrangement, understanding or action in concert cant be kept outside the ambit of 'international transaction' under section 92B just because it does not give legal rights to the parties to arrangement, understanding or action in concert.

Dabur India Ltd vs PCIT, 89 taxmann.com 78 (Delhi)

Where assessee charged royalty from foreign entity by allowing it to use its brand name, in such a case, even though assessee acquired entire shareholding of said company subsequently, yet unless at entity level there was a complete re-organization so as to result in a complete identity of two concerns, royalty arising out of use of brand name had to be treated as an international transaction.

KGK Enterprises vs ACIT, 88 taxmann.com 264 (Jaipur - Trib.)

Explanation to section 92B enhancing its scope is applicable from assessment year 2013-14 onwards.

Affinity Global Advertising (P.) Ltd. Vs 89 taxmann.com 228 (Mumbai - Trib.)

Where no functions had been performed and no value had been added in relation to unutilised capacity, assessee could not be asked to add any markup for services which were never received by assessee, but all this was to be verified by Assessing Officer viz-a-viz additional evidences

TS Tech Sun India (P.) Ltd. Vs DCIT, 88 taxmann.com 318 (Delhi - Trib.)

Emphasis under CUP method is on comparison of price paid for availing services; price paid for availing services in a comparable uncontrolled transaction is to be compared with price paid in an international transaction

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