



Edition 173

September 2018

Mysore Chapter

eMagazine



Directors' CRIMINAL LIABILITY

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Chairman
Mysore Chapter

Dear Professional Colleagues,

I am so happy to meet you all through our e-magazine.

We wish to inform you that during the month of August 2018, two career awareness programs and two investor awareness programs were successfully conducted in Mysore city and we look forward to conduct more programs for students and members in the month of September.

Further, we also conducted another program in Association with ICWAI on "MCA E-filings" The session was presided by CS. Bhaskar, who leads the Domain for MCA 21 Project. Professional friends from both CS and CWA institutes participated in the event.

We are planning to organize more programs in future.

Thank You

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Chapter Activities

1. CAREER AWARENESS PROGRAM

Chapter conducted 02 Career Awareness Programs during August 2018. The details are as follows.

| S No. | Date | College Name | No. of Participants |
|-------|------------|-------------------------------------|---------------------|
| 1 | 14.08.2018 | MMK & SDM College for Women | 125 |
| 2 | 28.08.2018 | Maharani Commerce College for Women | 100 |

2. INVESTOR AWARENESS PROGRAM

Chapter conducted 02 Investor Awareness Programs during August 2018. The details are as follows.

| S No. | Date | College Name | No. of Participants |
|-------|------------|------------------------------|---------------------|
| 1 | 04.08.2018 | Marimallappa Women's College | 90 |
| 2 | 14.08.2018 | MMK & SDM College for Women | 125 |

3. INDEPENDENCE DAY CELEBRATIONS

On 15th August, 2018 Chapter celebrated Independence Day in Chapter Premises. Chairman hoisted the National Flag and delivered the Independence Day address to the participants. Secretary of the chapter delivered the vote of thanks. Managing Committee Members & Students of the chapter participated in the event.

4. JOINT SESSION ON MCA21 e-filings & Changes

The Chapter in association with The Institute of Cost Accountants of India-Mysore Chapter organized a session in the topic "MCA 21 e-filings & Changes" on 28th August, 2018. CSBhasker S, Principal Consultant, Infosys Ltd., was the speaker for the session. In his address he explained the various initiatives taken by the government to simplify the filings and returns. Chairman welcomed the gathering. CMA Ashok Kumar M., Past Chairman, ICAI-Mysore Chapter delivered the vote of thanks. Members and students of ICS & ICAI participated in the event.





Criminal Liability of the Directors under Companies Act, 2013



Company is an artificial person created by law. It has all the powers of natural man but it lacks various characters like giving of directions, ordering someone to get things done, planning the operational structure to achieve the objective etc... Therefore to overcome those drawbacks and for smooth functioning of the Company, Directors are appointed.

Directors enjoy a *fiduciary relationship* (i.e. based on trust) with the Company. A fiduciary duty is the highest standard of care expected from a person. This applies when he/she is in a position of power. So, the Directors, in this case are exposed to both civil and criminal liability for breach of duties by them.

In cases of civil liabilities, the liability is set off by making payment or compensating the affected party whereas criminal liabilities, mentioned under various statutes, attract punishments for the person responsible for such breach. In this article, the discussion is based on the criminal liability of directors under the Companies Act, 2013.

How the Companies Act determines 'person in default'?

When a breach of the provision of the Act has been done, someone has to be made liable. Therefore, Section 2(60) of the Companies Act, 2013 defines the term "Officer who is in default". According to which, "officer who is in default", for the purpose of any provision in Companies Act, 2013 which enacts that an officer of the company who is in default

shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:—

- a. whole-time director;
- b. key managerial personnel;
- c. where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;
- d. any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
- e. any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
- f. every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where

such contravention had taken place with his consent or connivance;

- g. in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer;

Various sections that impose Criminal Liability under Companies Act, 2013

1. Section 34 Issue of Prospectus with untrue or misleading statements

According to this section, where a prospectus is issued, circulated or distributed which includes any statement which is untrue or misleading in any form or context thereby inducing a person to buy shares, then in such cases person responsible for issue of such prospectus shall be punishable with imprisonment for a term not less than 6 months but which may extend to 10 years and additionally shall also be liable for a penalty for not less than the amount involved in the fraud but may extend to three times the amount involved in the fraud.

2. Section 53 Issue of Shares at Discount

Companies Act, 2013 prohibits issue of shares at discount. If a company contravenes the provisions of Section 53, then every officer in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than Rs. 1 Lakhs which may extend to Rs. 5 Lakhs, or with both.

3. Section 68 Buyback of shares by a Company

Section 68 of the Companies Act, 2013 gives detailed prescription about the power of the Company to purchase its own shares. So if any default is made in complying with provisions of this section or any regulation made by SEBI (in case of listed entity), every officer of the Company who is in default shall be liable for an imprisonment for a term which may extend to three years or with a fine not less than Rs. 1 Lakhs which may extend to Rs. 3 Lakhs or with both.

4. Section 71 Issue of Debentures by the Company

This section deals with issue of Debentures by the Company to raise funds with an option to convert to such debentures into shares either

wholly or partly at the time of redemption. As per the provisions of this section Company has to create a Debenture Redemption Reserve and has to appoint a Debenture Trustee. In case the debenture holders feels that the assets of the Company is not sufficient enough to discharge the principal amount or when the company fails to redeem the debentures when it is due or when the Company fails to pay the interest when it is due, the debenture holders have an option to file a petition with NCLT and the Tribunal can pass relevant order in this regard.

If a default is made in complying with the order of the Tribunal or with any of the provisions of this section, then every officer in default shall be punishable with imprisonment for a term which may extend to 3 years or with a fine which shall not be less than Rs. 2 Lakhs but may extend to Rs. 5 Lakhs or with both.

5. Section 92 Annual Return of the Company

As per the provisions of Section 92 of the Companies Act, 2013 every company shall file with the Registrar a copy of annual return within 60 days from the date on which AGM is held or if no AGM is held then 60 days from the date on which AGM should have held. If the Company fails to comply with the provisions of this section, then, every officer in default shall be liable for an imprisonment for a term which may extend to 6 months or with a fine which shall not be less than Rs. 50,000 but may extend to Rs. 5,00,000/- or with both.

6. Section 118 Preservation of Minutes of the Meetings of the Company

Minutes of the meeting refers to the documents which contain brief description of the transactions carried out in that particular meeting. So they are of high importance to any company. If any person is found to be guilty of tampering with the minutes of proceedings of the meeting, he shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than Rs. 25,000 / - but may extend to Rs. 1,00,000/ -.

7. Section 128 Maintenance of proper Books of Accounts of the Company

This section speaks about maintenance of relevant books of accounts and financial statements for every year which shall give true and fair view of the operations of the Company.

It also mentions that these books may be kept in electronic form and be provided for investigating agencies as and when it is asked or requested.

In case of the breach of the provisions of this section then, the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person of a company charged by the Board with the duty of complying with the provisions of this section, then they shall be liable for imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.

8. Section 129 Preparation of Financial Statements in prescribed format

This section provides the reference to Schedule III where in the format for preparation of the financial statements are given. As per this the financial statements prepared to give fair picture of the actual financial position of the company. Further if the company has a subsidiary then the consolidated financial statements have to be prepared. So Section 129(7) of the Act, provides that the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person charged by the Board with the duty of complying with the requirements of this section and in the absence of any of the officers mentioned above, all the directors shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

9. Section 134 Approval of Financial Statements, Board Reports etc :

According to the provisions of Section 134 the financial statements including consolidated financial statements has to be approved by the Board of Directors and has to be signed by the Chairperson on behalf of the Board where he is authorised by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor for his report thereon. In case of violation of any of the

provision of this section then every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

10. Section 167 Vacation of the office of Director of the Company

Pursuant to the provisions of Section 167 of the Companies Act, 2013 the office of the Directors is said to be vacant in following circumstances:

- a. If the Director incurs any of the disqualifications specified in Section 164;
- b. If the Director absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board;
- c. If the Directors acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;
- d. If the Director fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;
- e. If the Director becomes disqualified by an order of a court or the Tribunal;
- f. If the Director is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months, Provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court;
- g. If the Director is removed in pursuance of the provisions of this Act;
- h. If the Director, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

Sub section 2 of Section 167 provides that if a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in subsection (1), he shall be punishable with imprisonment for a

term which may extend to 1 (One) year or with fine which shall not be less than Rs. 1 lakh but which may extend to Rs. 5 lakh, or with both.

11. Section 185 Advancement of Loan to Directors

Section 185 of the Act, provides that no company shall advance any kind of loan or give guarantee to Director except as provided in the Act. So according Section 185 (4) if any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section then:

- a. every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 (six) months or with fine which shall not be less than Rs. 5 Lakhs but which may extend to Rs. 25 Lakhs;
- b. the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to 6 (six) months or with fine which shall not be less than Rs. 5 Lakhs but which may extend to Rs. 25 Lakhs, or with both.

12. Section 188 Related Party Transaction

There is a prohibition on entering into related party transaction by the Board. However, if a related party transaction has to be entered then the provisions of Section 188 of the Act must be followed. This section provides for the limits, procedures and requirement of prior approval by way of Special Resolution or Board resolution, as the case may be, for entering into related party transaction. If a director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall, in case of listed company, be punishable with imprisonment for a term which may extend to 1 (one) year or with fine which shall not be less than Rs. 25,000/- but which may extend to Rs. 5 Lakhs, or with both;

13. Section 229 Penalty for furnishing False Statement, Mutilation and Destruction of Documents

As per the provisions of Section 229 of the Act, where a person who is required to furnish the documents during an investigation mutilates or

destroys those documents or makes false statements or is a party to making such false statements or provides an explanation which is false or is known to be false, then he shall be liable for fraud as per the provisions of Section 447 of the Act.

14. Section 242 Power of the Tribunal in case of Oppression and Mismanagement

Section 242 of the Act, empowers the Tribunal to pass relevant orders, as it thinks fit, for the application received by it under the provision of Section 241 regarding Oppression and mismanagement. Further, Section 242(5) of the Act provides that if the Tribunal passes an order as to alteration of memorandum or articles of the Company, in such case the Company will not have the power to alter the MOA or AOA without the permission of the Tribunal. If a company contravenes the provisions of sub-section (5) of Section 242 of the Act, then the company shall be punishable with fine which shall not be less than Rs. 1,00,000/- but which may extend to Rs. 25,00,000/- and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 (six) months or with fine which shall not be less than Rs. 25,000/- but which may extend to Rs. 1,00,000/- or with both.

15. Section 243 Consequences of termination or modification of certain agreements

Section 242 of the Act, empowers the tribunal to terminate, setting aside or modify, any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case. Further, Section 243(1) (b) of the Act provides that no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the approval of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company.

Therefore, the provision of Section 243 (2) of the Act, provides that any person who knowingly acts as a managing director or other director or manager of a company in

contravention of clause (b) of Section 243(1), and every other director of the company who is knowingly a party to such contravention, shall be punishable with imprisonment for a term which may extend to 6 (six) months or with fine which may extend to Rs. 5,00,000/- or with both.

16. Section 245 Class Action suits

Section 245 of the Act provides that an application may be filed for restraining the Board from committing such action or pass any resolution which is prejudicial to the affairs of the Company. Application can be made by following persons:

| | |
|---|---|
| Company having share capital | <ul style="list-style-type: none"> ✓ Not less than 100 members or 1/10th of total members, whichever is less or ✓ Any member/members holding not less than 1/10th of issued capital subject to no dues in respect of those share held |
| Company not having share capital | <ul style="list-style-type: none"> ✓ Not less than 1/10th of total members |

Further, this Section empowers the Tribunal to pass order as it deems fit and so passed order shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

Section 245 (7) provides that if the company fails to comply with an order passed by the Tribunal under this section then it shall be punishable with fine which shall not be less than Rs. 5,00,000/- but which may extend to Rs. 25,00,000/- and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 3 (three) years and with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 1,00,000/-.

17. Section 337 Penalty for fraud by Officers

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The provisions of this section are somewhat similar to the provisions of Section 447 of the Act. However, Section 337 is notified to the extent of its applicability for Section 246.

According to its provisions, at the time when the office was committed, a person is an officer of the company which is subsequently ordered for winding up and has with a false pretence or with an intention to defraud has induced any person to give credit to the Company or removed any property of the Company will be punishable with imprisonment for a term not less than 1 (one) year which may be extended to 3 (three) years or fine of Rs. 1,00,000/- which may extended to Rs. 3,00,000.

18. Section 447 Punishment for Fraud

Section 447 of the Act is very crucial section as the Act makes reference to this section for many times. According to this, without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least Rs. 10 Lakhs or 1% (one per cent) of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than 6 (six) months but which may extend to 10 (ten) years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 (three) times the amount involved in the fraud.

19. Section 448 Punishment for making false statement

As per the provisions of Section 448, where any false statement is made or omission of material fact, knowing it to be material in annual returns, reports, certificates, financial statements or any other documents required under this Act will attract the penalty same as that of Section 447 of the Act.

20. Section 449 Punishment for false evidence

Where a person gives any false evidence on oath in any examination or in any affidavit or depositions under any of the provisions of the Act, shall be punishable with imprisonment for a term which shall not be less than 3 (three) years but may extend to 7 (seven) years and a fine which may extend to Rs. 10 Lakhs.

21. Section 451 Punishment for repeated defaults

According to this section, if a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of 3 (three) years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.

22. Section 452 Punishment for wrongful withholding of property

Where a person wrongfully obtains the possession of the property of the Company including cash or withholds it or applies it to

the purpose other than those expressed in the articles or as per the Act, then he shall be punishable with a imprisonment which may extend to 2 (two) years.

The board of directors are in charge of the management of the company's business; they make the strategic and operational decisions of the company and are responsible for ensuring that the company meets its statutory obligations. They need to be very much attentive and vigilant enough to understand the impact of their acts. A slight negligence can be prejudicial to attract criminal liabilities.



Words Worth Million

When a doctor makes a mistake, a person goes six feet below the ground. When a judge makes a mistake, a person is hung six feet above the ground. But when a teacher makes a mistake, the entire batch of students is destroyed. Don't ever look down on teachers.

Sudha Murty, The Day I Stopped Drinking Milk: Life Lessons from Here and There



Overview of the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 and the Building and Other Construction Workers' Welfare Cess Act

The Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter referred as 'BOCWA') regulates the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures.

Applicability of BOCWA BOCWA is applicable to establishments which employ ten (10) or more building workers¹ in any building or other construction work².

Compliances under BOCWA

Registration of establishment: BOCWA mandates the employer to register the establishment. The registration must be complied within 60 days from employing ten (10) or more workers in any building or other construction work. The application for registration should be submitted in Form -I to the concerned registering officer along with the applicable registration fee.

If the employer has complied with all the requirements for registration, the registration certification shall be granted within fifteen (15) days of receipt of the application.

Notice of commencement of building or other construction work

¹ The 'building worker' is defined to mean any person who is employed to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, but does not include persons who are employed mainly in a managerial or administrative capacity or supervisory capacity (drawing wages exceeding Rs. 1600 per month).

² 'Building and construction work' is defined to mean construction, alteration, repairs, maintenance or demolition, of or, in relation to, buildings, streets, railways, etc.

The employer must at least thirty days before the commencement of any building and construction work must notify the jurisdictional inspector of the commencement vide Form IV.

Applicability of the BOCW Cess Act: The Cess Act is complementary to the BOCW Act and provides for the levy and collection of cess on the cost of construction incurred by the employer.

The cost of construction includes all expenditure incurred by the employer in connection with the building or other construction work but does not include:

- a. the cost of land; and
- b. any compensation paid or payable to a building or construction worker under the Workmen's Compensation Act, 1923.

Calculation of cess: The Notification No. SO 2899 dated September 26, 1996 specifies cess for the purposes of the BOCW Act at the rate of 1% of the cost of construction work incurred by the employer.

Ministry of Labour and Employment has released a draft outline of Model Welfare Scheme for building and other construction workers

Pursuant to the directions of the Supreme Court of India in the case of *National Campaign Committee for Central Legislation on Construction Labour v/s. UOI & others*, a draft outline of the Model Scheme for Welfare of Building and Other Construction Workers ("hereinafter referred as Scheme") was released by the Ministry of Labour and Employment in May 2018, for perusal and comments by the general public and other stakeholders.

1. **Life and Disability cover** - The Scheme proposes that 50% of the total contribution of premium for the Pradhan Mantri Jeevan Jyoti Bima Yojana and the Pradhan Mantri Suraksha Bima Yojana schemes which provide coverage of Rs. 2,00,000 in case of natural death and Rs. 4,00,000 lakh in case of accidental death, shall be borne by the State Welfare Board and the other 50% will be borne by the Central Government.
2. **Health and Maternity cover** - It is proposed that the Board will bear hospital expenses up to Rs. 5,00,000 per family and in case of serious diseases, reimbursement up to Rs. 2,00,000. For female workers, 26 weeks' minimum wages are to be provided for up to two (2) deliveries.
3. **Education** - The Scheme provides for scholarships at the rate of Rs. 3000 per year for two (2) children of the workers studying in class 9 to 12 and up to Rs. 12,000 for those studying in ITI's, vocational and professional courses, etc.
4. **Housing** - The Scheme states that loans/ advances may be provided by the Board subject to a ceiling of 10% of the cess collected in a particular year. The draft also recommends the building of transit accommodation for migrant construction workers.
5. **Skill Development** - Skill development training programmes are to be conducted for workers as well as their dependents and they must be paid minimum wages and stipends respectively while attending these programmes.
6. **Pension** The Scheme states that a pension of Rs. 1000 per month must be provided to the construction workers after the age of 60 years provided they have been registered with the Board for at least five (5) years. However, this provision relating to pension is subject to the financial capacity of each State.

**The Institute of Company Secretaries of India
Notification**

New Delhi, the 10th September 2018

Election to the Council and the Regional Councils, 2018

https://icsi.edu/media/webmodules/Notification_for_ICSI_Elections_2018.pdf



Commentary on Minimum & Maximum Number of Directors -Series- 10

Provisions: Section 149(1) of the Companies Act, 2013 ('Act'):

Every company shall have a Board of Directors consisting of individuals as directors and shall have—

(a) a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company; and

(b) a maximum of fifteen directors:

Provided that a company may appoint more than fifteen directors after passing a special resolution

Commentary

1. Applicability:

- a. Minimum Number of Directors
 - i. Private Companies – 2
 - ii. Public Companies – 3
 - iii. OPC – 1
 - iv. Producer Company - 5
- b. Maximum Number of Directors without any approval of central government
 - i. Private Companies – 15
 - ii. Public Companies – 15
 - iii. OPC – 15
 - iv. Producer Company - 15

2. Mandatory:

- a. It is mandatory to appoint a minimum number of directors for all types of company as word is 'shall'.
- b. Consequently any business transacted after the number fell below the minimum was held to be null and void even if the decisions taken at such Board Meeting are in the interests of the company.

3. Individuals': Only individuals can become directors of the company which is in consistent with sec. 153. In other words, Partnership firms/ LLP/ Company/ AOP/ BOI or any other entities cannot become director of the company. Further, DIN can be obtained only for individuals.
4. AOA Provision – Provisions only stipulates minimum number of directors. The AOA can stipulate for higher number.
5. More than maximum number of directors – The private company, public company and even OPC Company can have more than 15 directors by passing special resolution.
6. Exemptions - Government Companies (GC) and Section 8 Companies– There is no restriction for maximum number of directors for GC and Sec.8 Companies and without passing special resolution, GC and Sec.8 companies can appoint more than 15 directors.
7. Reduction in number of directors below minimum :
 - a. Below minimum number of directors but quorum exists – Clause No. 3.4.2 of SS-1, where the number of Directors is reduced below the minimum fixed by the Articles, no business shall be transacted unless the number is first made up by the remaining Directors or through a general meeting
 - b. Below minimum number of directors and below minimum quorum - As per Section 174(2) of the Act r/w Clause No. 3.4.2 of SS-1 r/w Reg.69 of Table F to Schedule I, **continuing directors or director** may hold the Board meeting for increasing the number of directors required quorum and not for any other purpose.

- c. No Directors exists –Promoters in the absence of Central Government shall appoint the required number of directors in line with provisions of Sec.168(3) of the Act.

Company may take the advantage of General Circular No 03/2015 dated 03/03/2015 in case of resignation of all directors and filing of Form DIR 12 for new director appointment.



CS. Priscilla Shereen



Living Room



Quiet Time

Most of us have heard about Quality time, but what is this quiet time? Just as Shakespeare said in his famous pastoral comedy "As you like it", we all have different roles to play. As obedient children, a faithful spouse, a dedicated parent, a trust worthy friend, a hardworking employee and a friendly neighbor. These are the different masks we wear in a day to keep our lives rolling. But who else better than our own selves will know, who we are behind these masks we wear every day. We all keep running in the relay race which has no finish line and forget the incredible "ME". Few minutes of quiet time every day will help to identify the "ME" devouring the masks, to ponder on who am "I" and to detect the "TRUE ME". The better we know our "ME", the better person we become. This self-introspection will help us to work not only on what we lag as a person but also in the different roles we play. This quiet time should be a part of our everyday lives to search in us the bigger question "I" and how to make me a better ME. After all it is worth finding "ME"





GST Transition, Transformation & Way forward

Part 2

Introduction

As a budding *International Tax Law Professional*, come to a conclusion that the GST is a game changer as far as Indian economy concerned. As an evident, India has jumped to 100th rank in the index of 'Ease of Doing Business' due to the implementation of the GST [Revised Ranking is due in coming November and briefing its overall impact with all the concerned is underway]. However, it is appropriate to admit that the country's economy has seen chaos all over, particularly, reduction in domestic industrial output, fall in employment and exports during the transitional period. Initially, GST compliance levels were very low due to confusion, lack of understanding about 'GST Laws coupled with GSTN's technical glitches. The GSTN, an online compliance platform crashed many times which resulted in the waiving of late fee caused revenue forgone indirectly. Non-availability of 'Edit' function made issues even worse. Later a facility to view and reset values has been provided. The E-way Bill mechanism fared badly initially, the system unable to take the bill generation load on pan-Indian base. The Central Government quickly deferred its implementation for a few months and return well prepared. Now, it is successfully rolled out nationwide without any technical glitches. According to CBIC, more than 20 crore e-Way Bills have been generated till August, 31st 2018. Official data, further, reveals that the first 10 crore e-Way Bills have been generated in 83 days while the next 10 crore Bills have been generated in just next 66 days. Like any other major disruption, the economy is slowly stabilized itself by end of the last quarter. *The Part 1 of the GST Transition, Transformation & Way forward covered the brief introduction to the GST Laws, the necessity & Initial steps to introduce, Constitutional Authority, key organs and their roles. Part 2 deals with 'GST Impact' on 'key sectors' such as Logistics, Pharma & healthcare, FMCG, Automobile and Textile & Apparels.*

Sector-wise impact

1. Logistics

GST is transforming the transportation or logistics industry in the country where moving goods around was extremely difficult earlier. The new regime is compelling them to redesign their supply chains, centralizing its operations, efficient operational practices. Ease of moving across States is reducing the transportation delays. With effect from July 1, 2017, inter-state check posts have been disbanded across the country which in turn reduced travel time of long-haul trucks, cargo vehicles by at least one-fifth. Data from the Ministry of Road Transport and Highways reveals that a typical truck in India spends 20 per cent of its time in inter-state checkpoints. This varies from 20-30 minutes per Check post in some States such as Rajasthan and Maharashtra and it goes up to two hours per day per Check post in Bihar or Jharkhand. E-way Bill mechanism will do away of separate transit passes for moving goods from one State to another State. In Pre-GST India, usually, Trucks used to cover 225 km a day. Now, Trucks are covering 300-325 km a day. It is reported that a truck from Chennai to Jamshedpur carrying tyres made by Apollo Tyres reached in three and a half days after state border barriers were dismantled. The Central Government had launched countrywide e-Way Bill mechanism w.e.f 03.06.2018 mandatorily. According to a CRISIL Report, GST will reduce the logistics costs of companies producing non-bulk goods up to 20%. According to another Rating Agency, ICRA, the turnaround time in the road transport sector is down by 18-20 per cent due to GST.

2. Pharma and Healthcare

It is reported that India's Pharma and healthcare is one of the largest producers of generics in the world. The industry accounts for almost 5% of the country's GDP. In general, GST's net impact will be price neutral. GST is set

to benefit the industry by streamlining the tax structure. Prior to the GST regime, there were about eight indirect taxes levied on this industry. By Sub summation, GST is facilitating the streamlining of its store network. Dispensed with erstwhile Central Sales Tax, the new regime will reduce the assembling costs, enhancing the operational efficiency, etc. It is reported that Secretary of Health Ministry has written a letter to Finance Ministry requesting the government to impose either 0 or 5% GST on all health-related services.

3. FMCG

It is said that Fast Moving Consumer Goods or FMCG sector is the fourth-largest in the country. Post GST implementation, most products and services in it are being taxed under 18% tax bracket. FMCG is one of the fastest growing sectors. The sector consists of more than 50% of the food and beverage industry and around 30% of personal and household care. Due to GST, the FMCG companies can set up their warehouses anywhere in India. As said above, reduction in logistics cost is one of the most beneficial factors for the FMCG sector. Prior to GST, the distribution cost was around 2 to 7 per cent but now it has been reduced to 1.5 per cent. However, effective tax rates have increased on some products, to name, aerated drinks, beverages, etc., which are attracting 18 to 28 % GST and Cess of 12% on certain goods.

4. Automobile

The automobile industry is one of the emerging sector post liberalization. Automobile industry consists of three segments such as passenger cars including utility vehicles, commercial vehicles and two-wheelers. GST Rate on Automobiles has been kept under the 28% tax bracket. It is evident that a marginal change in the tax on commercial vehicles post GST implementation. Since uniform GST rates across the country, hardly any or no differentiation of tax cost for the end user or consumer. Standard rate across variants will reduce tax evasion. Prior to GST, inter-state purchase and sale of auto and its components attracted a 2% CST which was a cost to the manufacturer which was ultimately passed on to the consumer. Seamless but wider input tax credit availability under GST regime will go a long way. However, some negative impact is the absence of State-sponsored incentives and subsidies like erstwhile Central Excise regime which ultimately denies certain benefits like Excise

Duty Exemption on inter-state supplies. The Auto sector has seen both positive as well as the negative impact up on implementation of GST.

5. Textiles & Apparels

The other key sector got benefited from the implementation of GST is the textile & apparel industry. The sector has allowed availing due ITC on the hospital goods and readymade garments up to Rs 1,000 which is exempted from GST and branded garments above Rs 1,000 will be taxed at 12%. In the earlier regime, the import cost of procuring the latest technology for manufacturing textile goods was expensive since non-availment of excise duty as ITC. In the GST regime, taxes paid on capital goods will be allowed to claim. As far as export regime concerned, GST is compelling them to be more competitive in the International market. There are certain drawbacks in a form of higher tax rate, removal of benefits under cotton value chain, etc. However, it is believed that GST will help this sector in the long run by including more formal businesses under its bracket.

Conclusion

The all-powerful GST Council in its last meeting held on 4th August, 2018, has constituted a Group of Ministers (GOM) comprising State Finance Ministers to address MSME issues. In its 30th or next meeting which is scheduled to be held on 29 – 30 September, 2018 at Goa, may consider its submissions. Prior to the constitution of the said GoM, the Council has received more than 200 proposals including waiving off late fee, nil filing fee for appeals at various forums, exclusive MSME monetary sops, refund of a certain per cent of taxes paid by them which is in line with exemption from erstwhile Excise Duty among others. In Part – 3 and final piece, will cover GST impact on other key sectors such as real estate, education, e-commerce, etc and GST Council's 30th meeting's outcome and way forward.

Till then, happy festival season..!!



Learning from Unlearning Service Distribution vs Supply

GST law is a new learning for the persons who have to deal with its implementation and administration. Recent outcome of advance ruling from the GST authorities have been an experimental ruling which smoothened the complicated trade practices. At the same time, some of the advance rulings have triggered the intuition of the tax professional for revisiting the concepts. One of the recent ruling given by the Karnataka jurisdictional authority in case of M/s Columbia Asia Hospitals Private Limited vide: No.KARADRG15/2018

The Advance Ruling authorities have provided reasoning for holding the Head Office to be a supplier of services to its branches in relation to the employees working at Head Office. The above citation is more relevant from the larger corporates operating from different locations. Learned authority concerned have drawn a conclusion that employees working at head office deem to be employees of a particular establishment and not deemed to be employees of another establishment geographically situated elsewhere having same PAN.

GST law has no reference to the above concept of inferring the employee as per the above advance ruling constraining the interpretation to a geographical location for the employment agreement or performance of an employee. Goods can be touched and felt and identified with respect to their location. Possession of goods at a particular location and their movement can be traced unlike the service part

Service has been defined as per Section 2(102) of CGST Act, 2017 which has a broader perspective compared to goods. Reference to Supply as per Section 7 read with Schedule I of CGST Act, 2017 has got a larger role to play in the inference made by the learned authority concerned. Also, there exists a definition carved out for a specific requirement under Section 2(61) dealing with Input Service Distributor (hereinafter referred as ISD).

ISD is a concept which has been adopted from the existing law, Service Tax provision which dealt with existence of an Office of a larger enterprise having a practice for pooling all the bills pertaining to the common services and distribution thereof to the respective branches working independently.

We shall examine few services to understand the above concept:

- Corporate office decides for appointing the Merchant Banker for raising the funds through public issue or some other mode. All such expense on behalf of entire branches, liaisoning work is done at Corporate office
- Appointment of Professionals for undertaking statutory attest functions for the company overall is decided at Corporate level. Expenses for such attest function is absorbed at corporate office and distributed to the branches
- Replacement of worn out computers or electronic gadgets or updation of Software for business purpose are assigned to a sole agency, where decision for such appointment and work execution is taken at Corporate office. All the expenses pertaining to branches are billed to the nodal office i.e. Corporate office
- Insurance for business as a whole are decided and policy is executed at Corporate office on behalf of the branches
- Recruitment and processing of salary for all the employees of the company as a whole on behalf of the branches shall be undertaken at the Head Office. This activity can be either performed In-House or can be outsourced

The above list is an illustrative one out of the whole lot, where the decision for receiving the services from company perspective is undertaken at Corporate office. Such services being received from

a third party can be stated to be have received at an office i.e. Corporate where distribution of such services is made to the respective branches by allocation of the expense through an internally generated document. This practice has been upheld by Service Tax provision by way of the Concept ISD. This practice continues to exist even under GST law and the definition laid out in this regard is as per below:

“Input Service Distributor means an office of the supplier of goods or services or both which receive tax invoices issued under Section 31 towards the receipt of input services and issues a prescribed document for the purpose of distributing the credit of central tax, state tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same permanent account number as that of the said office”

The above definition has been carved out for facilitating distribution of the associated taxes paid along with the proportionate expense being transferred. The above definition is relevant to examine the service being received from a third party or for a service internally generated for consumption at another unit.

From the above definition one can make an understanding that the services bought out can be distributed to the other units located at different geographical areas other than the office where such service has been received. Recent amendment to Section 16 of CGST Act, 2017 a clarity has been provided in the Explanation towards receipt of the Services by any person on the instructions of the Registered person is an eligible service for Input Tax credit in the hands of the registered person.

This mechanism enables the Registered Office for distribution of the Expense along with relevant taxes paid to the receiving unit as per Section 20 of the CGST Act, 2017. Accordingly, concept of ISD should not be mis-interpreted for the Supply as per Section 7 for distribution of the services. For instance, a service rendered by the third party to the Head Office/ Corporate Office of a legal entity, is deemed to be received and consumed by such legal entity. However, for ease the payments & coordination is made by the specific office of the legal entity. In that scenario, such office is learned to receive the services which have to be transferred back to the other establishments located geographically at such other locations and having a

GST registration obtained with same PAN. There cannot be an interpretation drawn for making the supply of the Taxable services from such office to other establishments for the reason, legal entity is not into the business of making outward supply in relation to business.

Can the above analogy be adopted to goods, the answer for the same is in negative, Goods are tangible in nature and the same can be transferred from one location to another in the mode of a Dealer or a Manufacturer. Though the above analogy is debatable, there is lack of clarity in the GST law provisions with respect to adoption of ISD route and Supply route. Further, if a Registered person has adopted the Supply route, proviso to Rule 28 is a boon in disguise for avoiding the possible litigation in the valuation mechanism when the Supply route is adopted.

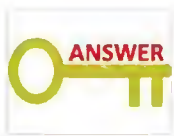
With regards to the irrational conclusion for concluding that employees working at Corporate office are not deemed to be the employees of a branch is a situation which is going to cause a night mare in adopting the cross-billing mechanism. All the services performed by the employee to the employer are held to be neither supply of goods nor supply of services as per Schedule III of CGST Act, 2017. Though the learned authority while concluding their decision in the Advance Ruling, there has been a gross negligence placed for confirming the analogy of employees located at one geographical location deemed to be not an employee of another geographical location. Further, the conclusion of this analogy towards making a cross charge for the activity performed by such employee at one location on behalf of another location for the Payroll processing work undertaken. The term employee and employment has not been defined under the GST law and in absence of the same a cross reference to allied laws has to be made.

To conclude, there is a dearth of clarity in the GST provisions to the Services portion for identifying the location eligible for Input Tax credit, situation where a Cross charge can arise and scenario where an ISD route has to be adopted. Accordingly, there is a big need for obtaining a proper clarification from the Department for dealing with the Services in relation to the above aspects highlighted to ease out the business process



Mr.A who has taken registration during January 2018 under GST has bought goods during December 2017 which got delivery during January 2018. Examine the eligibility of Input Tax credit in this regard in the hands of Mr.A.

Please send your opinion to, newsletter.icsimysore@gmail.com



Opinion To Last Month's Brainy Bits

Facts to consider

- M/s PVC Ltd., (hereinafter referred as supplier) has supplied goods to M/s ABC Ltd., (hereinafter referred as recipient) on the strength of a Tax Invoice. However, recipient has a choice to either accept or reject the goods supplied to him for the quality reason
- Recipient has received the goods during March 2018. Out of total goods received 30% were found to be defective [10% at Inspection stage and 20% AT PRODUCTION stage]
- Goods received by the recipient were received to the extent of 70% during March 2018 and balance were rejected for quality reasons
- Recipient either has a choice to accept the goods and send back the defective goods to the supplier or reject the whole lot of the goods received
- In the presence scenario let us assume that recipient has accepted the goods to the extent of good quality and send back the defective goods to the supplier

Relevant Provision

Section 2(67): Inward Supply

Section 2(83): Outward supply

Section 7: Scope of Supply

Section 31: Tax Invoice, Credit and Debit Notes

Section 34: Credit and Debit Note

Rule 55: Transportation of Goods without issue of Tax Invoice

Conclusion

Supplier has supplied the goods and the same were accepted to the extent of good quantity by the recipient and the balances were rejected by the recipient. Recipient doesn't own the goods unless they are used in their further supply. Accordingly, there shall be an inward supply of goods made at the recipient end when goods are received and supplier shall take back the unproductive supply owing to quality issue.

Recipient shall not raise a Tax Invoice, rather issue a Delivery Challan under Rule 55 for sending back the goods to the supplier. In turn on receipt of the same at the supplier end, he shall issue a Credit Note for the goods defective



Delhi Diaries 6

Solved cases of Supreme Court and NCLAT

Role of Central Government in Rectification of Financial Statement of a Company (Non) Notification of Rules

Background

Section 128 of the Companies Act, 2013 provides that every company shall prepare and keep at its registered office books of account and other relevant books and papers and financial statement for every financial year. The specifications for the financial statements in particular are provided at Section 129 and 134 of the said Act and it is the responsibility of the board of directors to lay such financial statement before the annual general meeting of the company.

Once the financial statement of a Company is submitted and filed as required under Section 129 of the Act, the Company cannot re-open the books of account or recast the financial statement in any manner unless either a statutory or regulatory body so seeks.

However, Section 131 of the Companies Act, 2013 provides a remedy in certain circumstances which may be seen from the following relevant extract of the said Section:

131. Voluntary revision of financial statements or Board's report

(1) If it appears to the directors of a company that—

(a) the financial statement of the company; or

(b) the report of the Board,

do not comply with the provisions of section 129 or section 134 they may prepare revised financial statement or a revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in such form and manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar:

Provided that the Tribunal shall give notice to the Central Government and the Incometax authorities and shall take into consideration the representations, if any, made by that Government or the authorities before passing any order under this section:

...

...

(3) The Central Government may make rules as to the application of the provisions of this Act in relation to revised financial statement or a revised director's report and such rules may, in particular—

(a) make different provisions according to which the previous financial

statement or report are replaced or are supplemented by a document indicating the corrections to be made;

(b) make provisions with respect to the functions of the company's auditor in

relation to the revised financial statement or report;

(c) require the directors to take such steps as may be prescribed.

The National Company Law Appellate Tribunal considered a peculiar question arising out of this Section in *Regional Director, Southern Region, Ministry of Corporate Affairs, RoC, Tamil Nadu v. Om Shakthi Agencies (Madras) Pvt. Ltd.*

In the said case, the Respondent Company had filed an application before the National Company Law Tribunal seeking to rectify its financial statements. Though the Central Government was not made a party to the said application as required by the proviso to the section, the Regional Director Southern Region of the Ministry of Corporate Affairs, Chennai and Registrar of Companies, Tamil Nadu was arrayed as a Respondent. The income tax department was also arrayed as a respondent. Neither of these respondents filed any objections despite a conditional order being passed that if objections were not filed within a specific period of time, the right to file such objections would stand forfeited. Hence the right of the authorities to file objection was treated as forfeited and accordingly the Company was permitted to original financial statements for the year ended 31.03.2016.

The Regional Director, who challenged this order in appeal contended that the office of the Regional Director was not empowered to deal with the subject matter and hence it was mandatory that the Central Government be impleaded as a respondent. This contention is to be seen in light of the fact that the Regional Director is the highest authority in the Southern Region for the purposes all approvals under the MCA.

The NCLAT however, took note of the fact that rules had not been framed under sub section (3) of Section 131 extracted above, empowering the regional director to take a decision and held that the Central Government ought to have been made a party.

On this basis the NCLAT held that the Central Government, through its Secretary, Ministry of Corporate Affairs, 5th Floor, 'A' Wing, Shastri Bhawan, Dr. R.P. Road, New Delhi, as party-respondent be impleaded as a Respondent and the matter be considered on merits.

It is common feature of law making in India that the legislature sets apart some areas for which rules are to be framed by government. However, it is also an unfortunate feature of delegated legislation in India that very often rules required to be laid down by a particular statute are not notified by the government, for years together. As a result the statute and the provisions which may confer certain rights to members of the public remain unworkable. It is precisely such policy paralysis which results in the scenario seen in the case under discussion. While no one can doubt the correctness of the decision in NCLAT in *Regional Director v. Om Shakti* one cannot but think that the whole situation would not have arisen had the Government taken steps to notify the rules as required by the Companies Act.



News Room

Express News



- IT sector on the move: Infosys signs deal to buy Fluido for \$76 million
- Imports of automobiles, textiles may be curbed in bid to reduce current account deficit
- Rupee tracking closer to its fair value, further depreciation unlikely, say experts

Companies can now pay managers excess Salaries without government nod

The government has termed the move a step towards 'Minimum Government-Maximum Governance and providing Ease of Doing Business to the law-abiding corporates of this country'. A public company can now pay to its managerial personnel the total remuneration in excess of 11 per cent of its profit without seeking an approval from the government. They can now do this by getting approval of shareholders through a special resolution

Consumer durables firms, GST body continue to spar over profiteering

Home appliance makers, like their counterparts in fast-moving consumer goods (FMCG), will be monitored closely by the National Anti-profiteering Authority (NAA) for not passing on the benefits

under the goods and services tax (GST) to consumers.

Government doubles NPA recovery for PSBs to Rs 1.5L crore this fiscal

The government expects state-run banks to recover Rs 1.5 lakh crore of bad debt during the current financial year, twice the amount that lenders had managed to get out of defaulting companies.

New norms for unlisted public companies shares: Insisting for demat form is a big jolt for benami crooks, but implementation is the key

A new rule has been notified by the Ministry of Corporate Affairs for all unlisted public companies. They can now issue new shares/ securities or allow their transfer after 2 October 2018 only in demat form. In other words, issue or transfer of shares in the traditional paper form will not be allowed.