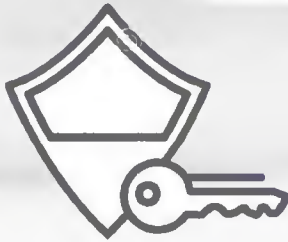




# eMagazine

signature  
technology



## AUTHENTICATION

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**AUTHORITY**

*For Private Circulation Only*

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### Vision

"To be a global leader in promoting good corporate governance"

### Motto

सत्यं वद। धर्मं चर। इत्येते तेन ज्ञानेन श्रेयसेन स्युः तेन ज्ञानेन।

### Mission

"To develop high calibre professionals facilitating good corporate governance"





**CS Veerash M.J.**  
Chairman  
Mysore Chapter

Dear Professional Colleagues,

I am happy to meet and greet you all through the E-magazine. I hope you all had a wonderful Preparation for the Basava Jayanthi with family and friends. The month of May and June 2019, as most of the professionals are busy with filing so many new forms that was introduced by MCA and hope the webinar helped all fellow professionals in understanding and filing of new forms with ROC.

I would like to wish students all the best for their Results who took CS Examination June 2019 Session.

Thank You,

**-: Editorial Team:**

CS Vijaya Rao

CS Sherene

CS Phani Datta

CS Parvati K.R

CS Ajay Madhaiah

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## CS Signature on Financial Statements - Is it Authentication or Authority?

The provision of signing of Balance Sheet by a Company Secretary under the Company Law has always been a debatable issue as the preparation and finalisation of financial statement is generally handed by Accounts and Finance Departments of the Organisation.

As per the provisions of Section 134 of Companies Act, 2013, the financial statements shall be approved by the Board of Directors before they are signed by the Company Secretary along with the Chairman/two directors and Chief Executive Officer and Chief Financial Officer, wherever they are appointed. Thus, as per this provision, the Company Secretary only authenticates the Financial Statements on behalf of the Board and after the same have been approved by the Board of Directors. Further, as per Lexicon Law Dictionary, by P. Ramanatha Aiyar, meaning of "Authentication" is "to give legal validity to a document, to establish the genuineness of the document, an attestation made by a proper officer by which he certifies that the record is in due form of law, and that the person who certifies it is the officer appointed to do so". Meaning of "authorize" is "to give formal approval to, to sanction, approve, countenance, to empower, to give a right or an authority to act, to endow with authority or effective legal power, warrant, or right. To permit a thing to do be done in the future. It has a mandatory effect or meaning, implying a direction to act". Meaning of "signing" is - "To "sign" a paper is to subscribe one's own name to it". A Company Secretary is not authorised to approve the Financial Statements under the Companies Act, 2013 and accordingly no authority is attached therein to the

Company Secretary., it is just an authorization by the Board.

Section 215 of the erstwhile Companies Act, 1956 also enumerated that the Balance Sheet and Profit and Loss Account shall be approved by the Board of Directors before they are signed on behalf of the Board by the Secretary. Further, as per MCA Circular No. 7/72, dated 12-5-1972, the authentication by the Secretary is "on behalf of the board of directors" and not in his personal capacity, the secretary can be held responsible regarding errors, etc., only as an "officer" of the company within the meaning of section 628 and not because of authentication by him under section 215 as such. Authentication does not mean that the facts and figures or truth or accuracy of the transactions in the accounts are all certified as true but it only implies, that the documents authenticated are genuine and not faked.

Section 205 of the Companies Act, 2013 read along with Rule 10 of Companies (Appointment and Remuneration) Rules, 2014 defines the duties of Company Secretary and there is no duty or responsibility attached therein relating to the financial statements of the Company.

It was held by The Board of Discipline, The Institute of Company Secretaries of India in the complaint of professional or professional misconduct filed by Dr. K.V Sreenivasan against Mr. K.Viswanath (ACS-8742), that by signing the annual accounts, a Company Secretary does not incur liability for wrong entries in the books of account or falsification of accounts.

From the above points, it can safely be concluded that the Company Secretary is just an “authenticating authority” under the Companies Act, 2013. A Company Secretary can be held liable only in case if, he has been duly authorized by the Management or the Board of Directors, specifically to look into the accounts or maintenance of the accounts or records, and also he has been given the responsibility to prepare the accounts of the Company.

## References and Acknowledgements:

- 1) [https://www.icsi.edu/media/webmodules/linksofweeks/bod/DC\\_233\\_Dr.%20K%20V%20Sreenivasan%20Vs%20Mr.%20K%20V%20iswanath,%20ACS-8742.pdf](https://www.icsi.edu/media/webmodules/linksofweeks/bod/DC_233_Dr.%20K%20V%20Sreenivasan%20Vs%20Mr.%20K%20V%20iswanath,%20ACS-8742.pdf)
- 2) Lexicon Law Dictionary



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## Form DPT -3 and Form – MSME -1

### Filing of Form DPT – 3

This is the return of deposit to be filed by companies under the erstwhile act, that have accepted Public deposits .However under the present act, All companies are required to file this form.

In Column no 3 of the form, the company is required to choose one out of 4 options for the “purpose of the form”:

They are

1. One time Return for disclosure of details of outstanding money or loan received by the company but not considered as deposits in terms of rule 2(1)(c) of the Companies (Acceptance of Deposits) Rules, 2014
2. Return of deposit – applicable for companies that have accepted Public deposits
3. Particulars of transactions by a company not considered as deposit as per rule 2 (1) (c) of the Companies (Acceptance of Deposits) Rules ,2014 and

4. Return of Deposit and Particulars of Transactions by a company not considered as deposit.

The Issues requiring Clarifications:

1. What is the one time Return disclosure of details of outstanding money or loan received by the company but not considered as deposits? Is it applicable only to cases where the so called “outstanding money or Loan Received” continues to remain the same from 2014 till 2019?
2. If it is not so, is a company liable to file one Form – DPT3 for the period 2014 to 2018 (based on information available in the audited financial statement) under option - 1(one time Return) and again file one more DPT -3 under option 3 for the changes – transactions not considered as deposit? In which case what is the actual meaning of one time return? Moreover form DPT – 3 like the Return of Deposit has to be filed every year before 30<sup>th</sup> June? If it is so again what is the “one time Return” mean?



3. Another issue that requires clarification is while “the Purpose” under column 3 (3) states “particulars of Transactions” – meaning receipts of money / loan etc , Under Column 15 the word “Transaction” has been omitted but instead it states “receipt of money or loan at the end of the financial year”. Naturally only transactions of money or loan outstanding as at the yearend need to be reported. In other words all transactions of moneys or loans received and repaid during the year whether in full or in part need not be reported.
4. Item no 15(m) is “amount received in course of or for the purpose of the business of the company – As an advance for supply of goods or provisions of services accounted for in any manner whatsoever provided that such advance is appropriated against supply of goods or provision of services within a period of 365 days from the date of acceptance of such advance. – This mean that in case a company has received an advance from customer but has not made a supply or rendered service within 365 days of receipt , then the same need not be reported.
5. Even companies that have no information to report will have to file a NIL report.

### Conclusion

Instead of seeking information on moneys / loans not considered as deposits under the Companies (Acceptance of Deposits) Rules 2014, the information can be made reportable in Schedule – III – Balance Sheet by suitable amendments. This will have an additional advantage that the amounts reported will have the stamp of certification by the statutory auditor of the company.

The Normal Return of deposits for companies accepting deposits from Public can however continue as before. Will the department make things clear to stake holders. The more the forms and stipulations on compliance and imposition of penalties the concept of ease of doing business is compromised.

### Form – MSME -1

This is yet another form to be filed before 31.05.2019 for dues to MSMEs as on 22.001.2019 and subsequently twice a year – once before 31<sup>st</sup> October and again by 30<sup>th</sup> april.

DUES to MSME – suppliers or service providers due for more than 45 days is to be disclosed in this form. It is understood that information of suppliers/service providers who are registered under the MSME act need to be filed.

The issues involved are:

1. Most companies do not have a list of MSME registered suppliers / service providers.
2. Even those who are registered with MSME are not willing to furnish details of PAN / MSME registration etc.,
3. Most of the cases the terms of supply is for a credit period exceeding 45 days and both the company and the MSME supplier are not willing to disclose details and thereby stall the existing business relationship.
4. Since there is no provision to file a NIL return most companies prefer not to file the return.
5. It is not possible to comprehend how the penal provisions u/s 405 will be imposed unless there is a complaint from the MSME supplier / service provider.

It is also not clear as to why this form has been introduced especially when Schedule – III already in its present form has disclosure of details of Trade Payables in the following format.

### FA. Trade Payables

The following details relating to Micro, Small and Medium Enterprises shall be disclosed in the notes:—

- (a) the principal amount and the interest due thereon (to be shown separately) remaining unpaid to any supplier at the end of each accounting year;
- (b) the amount of interest paid by the buyer in terms of [section 16](#) of the Micro, Small and Medium Enterprises Development Act, 2006, along with the amount of the payment made to the supplier beyond the appointed day during each accounting year;
- (c) the amount of interest due and payable for the period of delay in making payment (which have been paid but beyond the appointed day during the year) but without adding the interest specified under the Micro, Small and Medium Enterprises Development Act, 2006;
- (d) the amount of interest accrued and remaining unpaid at the end of each accounting year; and

(e) the amount of further interest remaining due and payable even in the succeeding years, until such date when the interest dues above are actually paid to the small enterprise, for the purpose of disallowance of a deductible expenditure under section 23 of the Micro, Small and Medium Enterprises Development Act, 2006.

*Explanation.*—The terms 'appointed day', 'buyer', 'enterprise', 'micro enterprise', 'small enterprise' and 'supplier', shall have the same meaning assigned to those under clauses (b), (d), (e), (h), (m) and (n) respectively of section 2 of the Micro, Small and Medium Enterprises Development Act, 2006.]



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## CSR- Mandatory Provisions and Way Forward

### Introduction

Philanthropic activities as part of social commitment from individuals have been in existence from time immemorial. " O Man! Procure wealth with one hundred hands and distribute it with one thousand hands. Thus you attain perfection of the work done and to be done" (Artharva veda (3-24-5). One of the models of Corporate Social Responsibility (CSR) is the Strategic model where the Companies are scouting for competitive advantage and profit maximization through CSR. It is not aimed at making contributions through NGOs where Companies get tax rebate under section 80G or 12AA of the income Tax Act.

Section 135 of the Act has been framed on the principle of "Comply or Explain". India is the first country in the world where a mandatory provision on CSR has been brought into effect.

According to sub-section (1), the CSR provisions are made applicable when any company is having

- i) Net worth of Rupees Five Hundred Crores or more, or
- ii) Turnover of Rupees One Thousand Crore or more or
- iii) A net profit of Rupees Five Crore or more during any financial year.

By prescribing a threshold limit of net profit of Rs. 5 Crs or more, even medium sized companies have been brought under the CSR provisions. These Companies shall constitute a Corporate Social Responsibility Committee (CSR Committee) of the Board consisting of three or more Directors, out of which at least one Director shall be an Independent Director, if any.

Further sub-section 5 of section 135 casts a responsibility on the Board of these Companies to ensure that the Company spends as per its CSR

Policy in every financial year, at least 2% of the average net profit of the Company made during the three immediately preceding financial years. While implementing the CSR Projects, Board shall give preference to local area(s) where it operates.

#### **CSR Policy and Role of CSR Committee**

Sub-section (3) mandates that the CSR Committee shall, — (a) formulate and recommend to the Board, a CSR Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII; (b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and (c) monitor the CSR Policy of the company from time to time.

Company can execute the CSR Project(s) through own/group foundation/Society or foundation formed with other company or through implementing agencies.

If the entity is not set up by the company, then it must be an established entity having a track record of at least 3 years.

Companies may collaborate/pool resources together but companies should be able to report about the CSR Spend separately.

Companies may spend up to 5% of CSR expenditure on building capacity of own personnel, implementing agencies, administration and on salaries paid to CSR Staff.

#### **Role of the Committee**

- To formulate CSR Policy along with the internal CSR Team.
- To Form core team.
- To recommend the amount to be spent on CSR.
- To develop internal operating structure and transparent monitoring mechanism.
- Board to approve CSR policy, monitoring mechanism and amount to be spent.

#### **Schedule VII.**

The CSR Committee can formulate the policies in such a way that the activities which are going to be undertaken by the Company as CSR Project should be covered under schedule VII of the Act. MCA vide notification No. 582(E) dated 27<sup>th</sup> February 2014 implemented section 135 and Schedule VII of the Act with effect from 1<sup>st</sup> April, 2014. Since then, Schedule VII has been amended several times to add and or clarify the applicability of the activities covered under the Schedule VII by giving a liberal interpretation to the headings of the items. The activities under the schedule as amended are given below:

#### **Activities covered under Schedule VII.**

- 1) Eradicating hunger, poverty and malnutrition, promoting healthcare including preventive healthcare and sanitation including contribution to the Swachh Bharat Kosh set up by the Central Government for the promotion of sanitation and making available safe drinking water. Giving medical and legal aid, treatment to road accident victims, Provision for Aids and appliances.  
Trauma Care around highways in case of road accidents.  
Supplementing of Government Schemes like mid-day meal.
- 2) Promoting education including Special education and employment enhancing vocational skills especially among children, women, elderly and the physically challenged and livelihood enhancement projects; educating the masses and promotion of road safety awareness in all facets of road usage, traffic engineering and awareness through print, audio and visual media. Drivers' Training. Capacity building for farmers covering best sustainable farm management practices.  
Providing effective consumer grievance redressal mechanism, protecting consumer health and safety, sustainable consumption, consumer service, support and complaint solution, consumer protection activities.  
Donation to Indian institute of Management- Ahmedabad ( IIM-A ) for conservation of buildings and renovation of classrooms.  
Donation to Non Academic Techno-Park Technology Business Incubator (TBI) not located within an academic Institution but approved and supported by Department of Science and Technology.
- 3) Promoting gender equality, empowering women, setting up homes and hostels for women and orphans, setting up old age homes, day care centre, and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups.  
Slum re-development or Economically weaker Section (EWS) housing.
- 4) Ensuring environmental sustainability, Ecological balance, protection of flora and fauna, animal welfare, agro forestry,

conservation of natural resources and maintaining quality of soil, air, and water including contribution to the clean Ganga Fund set up by the Central Government for rejuvenation of River Ganga. Doing own research on the field for individual crops to find out the most cost optimum and Agri-ecological sustainable farm practices (applied research) with a focus on water management. To do Product Life Cycle analysis from the soil conservation point of view, Renewable Energy Projects.

- 5) Protection of National heritage, art and culture including restoration of buildings and sites of historical importance and works of art, setting up public libraries, promotion and development of traditional arts and handicrafts.
- 6) Measures for the benefits of armed forces veterans, war widows and their dependents;
- 7) Training to promote rural sports, nationally recognized sports and Olympics sports;
- 8) Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or any other fund set up by the Central Government for socio-economic development and relief and welfare of the scheduled Tribes, the scheduled Castes, other backward classes, minorities and women.
- 9) Contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government.
- 10) Rural Development Projects.
- 11) Slum Area development.
- 12) Disaster Management including relief, rehabilitation and reconstruction activities.

#### **Clarifications**

- 1) "Slum Area" shall mean any area developed as such by the Central Government or any state Government or any other competent authority under any law for the time being in force.
- 2) Contribution to Corpus of a Trust/Society/Section 8 Companies etc. will qualify as CSR expenditure as long as:
  - a) The Trust/Society/Section 8 Companies etc. is created exclusively for a purpose

directly relatable to a subject covered in Schedule VII of the Act.

- 3) Items covered under more than one head. "Disaster relief" can be covered under the following heads
  - a) Medical Aid - under "promoting healthcare".
  - b) Food Supply - under "eradicating hunger, poverty and malnutrition"
  - c) Supply of clean water - under sanitation and making available safe drinking water.
  - d) Enabling access to or improving the delivery of public health systems - under healthcare or measures for reducing inequalities faced by socially and economically backward groups.

#### **Activities not coming under Schedule VII**

- 1) Marketing of Agriculture Products.
- 2) Sustainable Urban Development and Public Transport System.
- 3) Activities exclusively for benefit of employees and their families.
- 4) Activities undertaken in pursuance of normal course of business of the company.
- 5) Activities undertaken outside India.
- 6) Contribution directly or indirectly to Political Parties.
- 7) Expenses incurred for fulfilment of any Act/ Statute or Regulations (such as Labour Laws, Land Acquisition Act, etc.)

#### **CSR policy format in board's report**

##### **The Board Report shall include the following**

1. A brief outline of the company's CSR policy, including overview of projects or programs proposed to be undertaken and a reference to the web-link to the CSR policy and projects or programs

2. The Composition of the CSR Committee.

3. Average net profit of the company for last three financial years

4. Prescribed CSR Expenditure (two per cent of the amount as in item 3 above)

5. Details of CSR spent during the financial year

(a) Total amount to be spent for the financial year;

(b) Amount unspent, if any;

(c) Manner in which the amount spent during the financial year is to be mentioned in the following format.



Sl.No.	CSR Project/activity	Sector in which covered	Project/Programs undertaken i)Local area ii)State and district wise	Amount or outlay-Project or program wise	Amount spent on project/programs a)Direct expenses b)Overhead	Cum. Expense upto reporting period	Amount spent director or thru agency
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TOTAL

1. In case the company has failed to spend the two per cent of the average net profit of the last three financial years or any part thereof, the company shall provide the reasons for not spending the amount in its Board report.

2. A responsibility statement of the CSR Committee that the implementation and monitoring of CSR Policy, is in compliance with CSR objectives and Policy of the company.

**Conclusion**

The MCA need to reframe the entire gamut of the CSR aimed at incorporating more strategic

provisions. Companies should be given freedom to choose the project which will strengthen their competitive advantage.

This will also lead to find solution for creating economic value with that of societal value, managing their stakeholder relationship, identifying and responding to threats and opportunities facing their stakeholders, developing sustainable business practices and strengthening organizational capacity for philanthropic activities.



## ***Words Worth Million***

*Passion will move men beyond themselves, beyond their shortcomings, beyond their failures.*

*- Joseph Campbell*



## GST: Advance Rulings – Part 8

**Applicant: M/s. E-Square Leisure Private Limited**

**Advance Ruling No.: GST-ARA- 71/2018-19/B-171 Dated 29.12.2018**

### Brief Facts & Issues before the Authority

M/s. E-Square Leisure Private Limited (the applicant) is engaged in the business of exhibition and business services, accommodation in hotels, inn, guest house, club or camp site, etc services, and restaurant services. The applicant intends to enter into a contractual agreement of renting of immovable property with the lessee for leasing of the immovable property for rent. Apart from rent, it also plans to collect expenses of electricity, water charges, property tax and cooking fuel from the lessee. The aforesaid electricity, water charges, property tax and cooking fuel are expected to be recovered from lessee at actuals. The Applicant has approached the Authority for Advance Ruling – Maharashtra with two questions:

1. Whether GST is levied on the reimbursement of expenses from the lessee by the lessor at actual?

**Answered in affirmative**

2. In case GST is levied, what is the rate of GST applicable on the said reimbursement of expenses?

**At a rate as applicable to the principal supply.**

### Authority's Observation

The Authority has observed that the definition of supply defined under sub-section (92) of Section 2 under the Central GST Act, 2017 requires the presence of consideration. The definition of consideration under sub-section (31) of Section 2 of the said Act requires some sort of direct link between the payment and supply. Security Deposits will only classify as consideration where the

supplier appropriates such deposit as consideration for the said supply.

The Authority by relying on four parameters for a payment to qualify as 'security deposit' for performance of an obligation, security against the return of hired goods, security against damage to properties rented, reasonable, held that security deposit taken by the applicant cannot be treated as consideration for the supply and they are not liable to pay any GST on the same.

**Closing Remarks:** Interest-free security deposit, given for leasing commercial property, will not attract GST, however, if at the time of completion of lease tenure, the entire deposit or a part of it is withheld and not paid, as a charge against damages etc., then such amount withheld will be liable to levy a GST.

### **GST: Advance Rulings – Part 3 Edition – 177 January 2019**

M/s Columbia Asia Hospitals Private Limited  
Advance Ruling No. : KAR ADRG 15 / 2018 Dated  
27th July 2018

Appellate Authority Ruling No. : KAR / AAAR/  
05/2018-19 Dated 12th December, 2018

Up on M/s. Columbia Asia Hospital Private Limited's Writ Petition, the Hon'ble Karnataka High Court had issued Notice to the State Government.  
Citation 2018-TIOL-31-AAAR-GST

*To be continued.....*



## CS MINERVA

# Commentary on Vacation of Office of Directors Series- 17

**Provisions:** Section 167 of the Companies Act, 2013 ('the Act'):

(1) The office of a director shall become vacant in case-

a. he incurs any of the disqualifications specified in section 164;

Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

b. he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board;

c. he 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. he 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. he becomes disqualified by an order of a court or the Tribunal;

f. he 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 not be vacated by the director in case of orders referred to in clauses (e) and (f)-

(i) for thirty days from the date of conviction or order of disqualification;

(ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or

(iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of.

g. he is removed in pursuance of the provisions of this Act;

h. he, having been appointed a director by virtue of his holding any office or others employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

(2) If a person, functions as a director even when he knows that the office of director held by him

(3) 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 one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

(4) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

(5) A private company may, by its articles, provide any other ground for the vacation of

the office of a director in addition to those specified in sub-section (1).

### Commentary

**1. Meaning of term 'vacation':** As per the Oxford Dictionary, the term vacation means, "the action of leaving something one previously occupied."

The provisions of section 167 of the Act provides such scenarios when director will cease to be director of the company automatically.

**2. Applicability:** It is applicable to all types of directors like, additional, alternate or casual Vacancy Director etc. Further it is applicable to all types of company private or public company.

**3. What is the difference between 'vacation of director u/s section 167 the Act' and 'disqualification of director u/s 164 of the Act'**

Section 167(1) begins with 'office of a director shall become vacant'. Hence, section 167 provides for grounds for vacation of office of a person who is *already a director* of a company whereas section 164(1) begins with 'a person shall not be eligible for appointment', as a result of this, section 164 is applicable to a person who is *proposed to be appointed as a director* of any company.

**4. Automatic and mandatory**

If any of the grounds gets attracted to a director, such director ceases to be the director automatically by law without passing any resolution as wording is 'shall become vacant'. Neither Board nor company nor shareholders do have a power to waive or condone it. Subject to provisions of proviso to Section 167(1)(f), where director disputes the vacation of office, he shall first vacate the office and may resort to court for seeking necessary direction.

**5. Grounds for vacation of office of director:**

**a. he incurs any of the disqualifications specified in section 164:**

If a director is disqualified under any of the clauses specified u/s 164 of the Act, his office shall stand automatically vacated in all other companies wherever he is director. Exceptions –

(i) In case a Government Company has not complied with section 164(2) of the Act, such Company's director shall not vacate his office as per section 167 of the Act – Exemption Notification issued to Government Companies vide Notification dated 05/06/2015.

(ii) In case a Company has not complied with section 164(2) of the Act, director shall vacate in all other companies except in defaulting company.

**b. he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board:**

a. The onus is on the Company to prove such directors' vacated the office considering the following and provision cannot be used as device to remove unwanted directors:

i. The company has duly served the notice/agenda in accordance with provisions of the Act;

ii. Meeting was duly held in accordance with provisions of the Act;

iii. Concerned director in question absented from such meetings and it was duly recorded in the minute's in accordance with provisions of the Act.

b. A director shall attend at least one Board meeting during a period of 12 months from the date of his appointment. By combined reading of Section 167(1)(b) and Guidance Note on Secretarial Standard on Meeting of Board of Directors (SS-1), for the purpose of counting of Board Meetings held in the preceding twelve months, the counting should commence from the date of the first Board Meeting held immediately after the Meeting which the Director concerned last attended. It is immaterial whether the director had sought leave of absence or not.



**Illustration** - Suppose, the Board Meetings of a company were held on 28th March, 2014, 25th June, 2014, 20th September, 2014, 30th December, 2014 and 27th March, 2015. Director X attended the Meeting on 28th March, 2014 and did not attend any Meetings thereafter. In such a case, the count for Meetings of the Board held during a period of twelve months for the purpose of reckoning his vacation of office should commence from 25th June, 2014. Thus, if he does not attend any of the Meetings held upto end June 2015, he shall vacate the office.

- c. Committee meetings are not covered under this provision. Hence, if a Committee member is absent from all the committee meetings held during 12 months, he shall not vacate as a member of that committee.
- d. Where the number of directors reduces below minimum statutory limit, no meeting can be held without proper quorum. In such cases, question of vacation does not arise.
- e. The words 'absents himself' imply voluntary or deliberate absence and do not cover cases of involuntary absence such as that caused by illness etc.. due to causes beyond the control.
- c. ***he 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. ***he 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:***
  - i. Except difference in language, there is no difference between these two clauses.
  - ii. The office shall be vacated if a director acts in contravention or fails to disclose his interest, as the case may be, to the contracts or arrangements as required under section 184(2) of the Act. However, if a director fails to disclose

his interest as per section 184(1) of the Act, then his office shall not be vacated.

- iii. The exceptions provided in section 184 as well as exemptions/modifications as provided in exemption notification issued to Private Companies, Section 8 Companies as well as Specified IFSC Public Companies shall also be considered.
- e. ***he becomes disqualified by an order of a court or the Tribunal.***
- f. he 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:  
As per Companies (Specifications of definition details) Rules 2014, "or otherwise" means any offence in respect of which he has been convicted by a Court under this Act or the Companies Act, 1956 only, not under any other laws.
- g. he is removed in pursuance of the provisions of this Act;
- h. If a person is appointed as 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.
- 6. **Vacation of all directors:**  
In case office of all the directors of a company is vacated under section 167 of the Act, then the promoters (as defined under section 2(69) of the Act) or Central Government is having power to appoint the required number of directors on the Board of such company. Such director(s) shall hold office till the directors are appointed by the company in the general meeting.
- 7. **Additional Grounds for Private Companies**
  - a. The private companies are empowered to include any additional grounds for vacation of a director in their Articles in addition to the grounds specified under Section 167(1) of the Act. In other words, public company and private companies' which are subsidiaries of public companies cannot have any additional grounds other than those specified in the provisions.

- b. MCA Circular – Where any such additional grounds are included in the articles, virtually results in removal of a director, hence power shall be exercised only in the GM.
- 8. Punishment - When:** 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), punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both
- 9. Re-appointment:** The director who has vacated the office may be reappointed as director by the Board or by a General meeting in the usual way as any other director as there are no restrictions. It will be considered as fresh appointment for the purpose of retire by rotation and all other applicable provisions of the Act.
- 10. No compensation u/s 202:** No compensation shall be paid to director who vacates office under this provision.
- 11. Alternate director u/s 161(2):** The interim period during which original director did not attend board meetings will not be considered for calculation of 12 months.

**12. Non holding of Board Meeting –** Without actually convening meetings for a period of 12 months will not lead to vacation of office of director.

**13. Other procedure**

g. **Forms:** Within 30 days of vacation, the company needs to file Form DIR 12 along with the supporting documents justifying such vacation, before RoC.

h. **Submission of Additional documents**

At the time of approval of Form-DIR-12 filed in the event of vacation, Registrar shall verify the documents as to correctness of contents and whether adequate supporting documents namely, copy of board resolution, copy of notices sent for calling board meeting or copy of minutes of board of directors reflecting voted for or against etc.. in line with Rule 11 of Companies (the Registration offices and Fees) Rules, 2014.

**Happy PCS Day**





## Passion and Profession

### A passionate perspective

As professionals, it is easy to dive into the details that enrich our professional lives and spend tremendous amount of time at the office.

Whether it is a pending deadline for a new set of forms released by the Ministry of Corporate Affairs or the Income Tax Department or keeping up with the latest happenings with the SEBI (Alternate Investment Funds) Regulations, 2012. The nature of the beast is such that, no matter how much time is spent at the office, there is always more to do.

Now that some context is set, it would help to take a moment to step back on reflect on our pie chart of time.

During the 24 hours, is there a moment during the day where time is spent on an “active” activity (Travel, writing, reading, exercise, theatre, learning music, art, meditation, singing etc) that we pay attention to?

If you are left wondering, I think we are off to a good start. While, professional (and by extension financial) success is important, equally so is to ensure that an eye is kept on our passion.

A passion is something one does without being told so and fulfilling one emotionally in the process. Across conversations with people in age groups ranging from 16 to 60 years of age, people’s passions range from wanting to impact the society for the larger good to spending time perfecting a song on a guitar or a piano.

“Passion is energy. Feel the power that comes from focusing on what excites you.” - Oprah Winfrey

Professionals often say that they are very passionate about their work. This is something to disagree about. The reason that activities outside of work exist, is to keep the mind rejuvenated and get the neurons there make new connections. Whether these new insights or connections impact the workplace can be debated but whether these activities fulfill and enrich our lives, cannot.

As one grows up, the emphasis slowly shifts from play to “studies” and from there on the career. Little or no space is left for activities that could be labeled as a passion. People are busy playing catch-up with a rich neighbor or friend and trying to adhere to the societal norms of success.

If there is a call to action for the individuals reading this article, it would be this. Step back and reflect on the activities that were most enjoyable as you grew up that you no longer pursue. They maybe sacrificed for various reason, now there is a reason to re-visit them. Spend at-least 15 minutes a day for the next couple of days to see the impact that it has on your energy levels and your professional work.

*During his free time Naga runs the Passion People Podcast where he conducts interviews with people who follow their passion. The objective of the podcast is to catalogue stories of how passion is made to manifest.*



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M/s XYZ Ltd., a registered person has Input Tax of Rs.2,00,000 for the month of January 2018 and Output Tax payable for Rs.5,00,000/-. Due to working capital issue, the entity filed their return during March 2018. Examine the Interest payable in this regard

Please send your opinion to, [newsletter.icsimysore@gmail.com](mailto:newsletter.icsimysore@gmail.com)



## Opinion To Last Month's Brainy Bits

### Facts of the case

- M/s XYZ Ltd., (hereinafter called as “service provider”) a company registered in the state of Karnataka for GST
- Employees of service provider travel abroad for rendering the services to the customers of service provider
- Expense incurred by the employee shall be construed to be expense incurred by the Service provider considering the Principal-Agent relation
- Service provider books for the expenses incurred by their employees in the Books of Accounts as Foreign expense

### Relevant citation:

Section 2(11): Import of service

Section 5(3) of IGST Act, 2017

Notification 10/2017 IGST (Rate) dtd:28.06.2017

Sl. No.	Category of Supply Services	of	Supplier of service	Recipient of Service
(1)	(2)		(3)	(4)

1	Any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient.	Any person located in a non-taxable territory	Any person located in the taxable territory other than non-taxable online recipient.
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### Conclusion

A combined reading of the above provision indicates that the service provider has received services in relation to their outward supply. The services provided by the supplier are in the non-taxable territory and the same are duly received and recorded in the books of accounts. Accordingly, as per the powers vested under Section 5(3) read with above Notification, the service provider registered in India has to pay tax for the supplies received







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*Solved cases of Supreme Court and NCLAT*

## ***Delhi Diaries 15***

# **Hari Sankaran v. Union of India – Reopening and Recasting of Accounts**

In the previous edition of this column, we examined the judgment of the Supreme Court of India in *63 Moons Technologies Pvt. Ltd. v. Union of India* where the Supreme Court *vide* its judgment dated April 30, 2019 laid down the law on the scope of the term Public Interest with respect to drastic actions under the Companies Act. However, within a short period of a month, we may the Supreme Court using the term Public Interest in a broader sense, in its judgment dated 4<sup>th</sup> June, 2019 in *Hari Sankaran v. Union of India and Ors.* while confirming an order passed under Section 130 of the Companies Act, for reopening and recasting the past accounts of Infrastructure Leasing and Financial Services Limited (IL&FS)

It is important to take a close look at the wording of Section 130, to understand the crux of the decision of the Supreme Court in *Hari Sankaran*:

### **130. Re-opening of accounts on court's or Tribunal's orders**

(1) A company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by the Central Government, the Income-tax authorities, the Securities and Exchange Board, any other statutory regulatory

body or authority or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that—

- (i) the relevant earlier accounts were prepared in a fraudulent manner; or
- (ii) the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements:

Provided that the court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income-tax authorities, the Securities and Exchange Board

or any other statutory regulatory body or authority concerned and shall take into consideration the representations, if any, made by that Government or the authorities, Securities and Exchange Board or the body or authority concerned before passing any order under this section.

(2) Without prejudice to the provisions contained in this Act the accounts so revised or re-cast under sub-section (1) shall be final.

The facts, in short, are that IL&FS sits at the apex of a large conglomerate with interests in infrastructure, finance and energy sectors which has 348 group companies of which around 170 are registered in India and the rest are abroad.

The Union Government, in October 2018, filed an application under Section 241 and 242 of the Companies Act, 2013 seeking suspension of the board of directors of IL&FS and appointment of ten other persons as the new board of directors. This prayer was allowed by the NCLT and accordingly the board was reconstituted. In November 2018, the Serious Fraud Investigation Office submitted an interim report pursuant to a reference by the Union Government under Section 212(1)(c) of the Companies Act, with the finding that the IL&FS Group Companies were mismanaged and the manner in which the affairs of the company were being conducted was against public interest. Further, the Registrar of Companies also conducted an enquiry under Section 206 of the Companies Act and *prima facie* concluded that mis-management and compromise in corporate governance norms and risk management has been perpetuated on IL&FS by raising long term and short term loans/borrowings through Public Sector Banks and Financial Institutions and that IL&FS had been camouflaging its financial statements and concealing and suppressing severe mismatch between its cash flows and payment obligations.

Thereafter the Union Government filed an application before the NCLT seeking reopening and recasting of the accounts of IL&FS under Section 130 of the Companies Act. The said application came to be allowed on the basis of the order of the NCLT under Section 242 reconstituting the board of directors and the findings in the interim report of the SFIO. The order of the NCLT allowing the reopening and recasting of the accounts for the last five years was challenged by one of the suspended directors before the NCLAT by way of an appeal which came to be dismissed. The said suspended director further challenged the decisions of the Tribunals below in the Supreme Court.

It was contended on behalf of the Appellant that such an order of reopening and recasting of accounts could not be passed unless the Tribunal returned a specific finding that either (i) the relevant earlier accounts were prepared in a fraudulent manner; or (ii) the affairs of the company were mismanaged during the relevant period, in terms of Section 130 of the Act and that in this case, the order of the NCLT did not reflect any such independent finding. The Appellant focused on the specific wording of the Act, and pointed out that such wording was not to be found in the order of the NCLT.

To negate or distinguish the findings of the other bodies such as the SFIO, the Appellant contended that Section 130 operated in an entirely different field from Section 242 or Section 212 of the Companies Act and that findings for the purpose of one of the provisions could not be used as a basis for action on the other set.

The Union Government on its part placed on record the series of findings against IL&FS through several agencies and also brought to the notice of the Court that in subsequent proceedings before the NCLAT, a committee headed by a retired judge of the Supreme Court had been appointed for resolution of the liabilities of the group.

The Supreme Court, after recording both sides of the argument at length, though without adverting to the interpretation of the phrase Public Interest in *63 Moons*, held that there did exist a larger public interest which necessitated the reopening and recasting of the accounts of IL&FS and that the reports of the other agencies *prima facie* indicated mismanagement in the company.

It may be of relevance, particularly to the readers who are also chartered accountants, that soon after this judgment, the Government of India moved to ban Deloitte Haskins and Sells and an arm of KPMG for audit violations in respect of audit of the accounts of a key subsidiary of IL&FS, namely IL&FS Financial Services Ltd. (IFIN).



## EXPRESS NEWS

- Pre-budget meet with FM: Economists seek IBC-type law for NBFC sector, tax reforms
- India may get caught in Sino-US 5G war: NSAB chief
- Not fast and furious, it's a slow turn for consumer companies
- SBI says it continues to lend to NBFCs

### **India's flat May fuel demand points to sluggish economy**

India's fuel demand in May was unchanged from a year earlier, preliminary government data showed on Saturday, indicating a continued slowdown in various sectors including industrial output. India to impose higher tariffs on 29 US goods next week

### **India has decided to impose retaliatory tariffs on 29 American goods next week**

India has decided to impose retaliatory tariffs on 29 American goods June 16 onwards, after having deferred the higher duties multiple times after announcing them last year in June, sources said. The proposed retaliatory tariffs worth at least \$200 million came against the Donald Trump administration's extra 25% levy on imported steel and aluminium

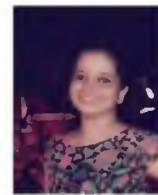
### **IL&FS probe: NFRA seeks documents from auditors**

The National Financial Reporting Authority (NFRA), the newly created regulator for auditors, has begun full-fledged investigations into the audit failure at Infrastructure Leasing and Financial Services (IL&FS) after taking over the job from the Institute of Chartered Accountants of India (ICAI) in April this year.

### **M&M acquires 11.25% in Gamaya for \$4.3 million**

Homegrown automaker Mahindra & Mahindra's farm equipment sector (FES) has picked up 11.25 per cent equity stake in Swiss agri technology firm Gamaya SA for a consideration of \$4.3 million (Rs 30 crore)





## Companies Act, 2013

### Updates on Amended Rules

MCA has amended Companies (Prospectus and Allotment of Securities) Rules, 2014, which is to be known as Companies (Prospectus and Allotment of Securities) Third Amendment Rules, 2019.

The following Sub-rules shall replace, sub-rule (8) of the principal rule.

“(8) Every unlisted public company governed by this rule shall submit **Form PAS-6** to the Registrar within **sixty days** from the conclusion of each half year duly certified by a company secretary in practice or chartered accountant in practice.

(8A) The Company shall immediately bring to the notice of the depositories any difference observed in its issued capital and the capital held in dematerialized form.”

MCA has introduced Form PAS-6.

### *Companies (Prospectus and Allotment of Securities) Third Amendment Rules, 2019, dated 22<sup>nd</sup> May 2019.*

MCA has amended Companies (Appointment and Qualification of Directors) Rules, 2014, which is to be known as Companies (Appointment and Qualification of Directors) Second Amendment Rules, 2019.

In the principal rule, following rule shall be inserted, after rule 12A.

### **12B. Directors of company required to file e-form ACTIVE:**

(1) The Director Identification Number (DIN) allotted to the directors of such company shall be marked as “**Director of ACTIVE non-compliant company**”, which is governed by

Rule 25A of the Companies (Incorporation) Rules, 2014 and has failed to file the e-form ACTIVE within the period specified.

(2) Such director shall take all necessary steps to ensure that all companies governed by rule 25A of the Companies (Incorporation) Rules, 2014, has filed the e-form ACTIVE.

(3) After all the companies referred to in sub-rule (2) file the e-form ACTIVE, the DIN of such director shall be marked as “Director of ACTIVE compliant company”

### *Companies (Appointment and Qualification of Directors) Second Amendment Rules, 2019, dated 16<sup>th</sup> May 2019.*

### Circulars

In continuation of General Circular No. 09/2014 dated 25.04.2019, the Ministry of Corporate Affairs has received representation from stakeholders seeking relaxation of fee for filing e-form no. ADT-1

Accordingly, the matter has been examined and it is here by clarified that companies which had filed Form no. ADT-1 through GNL-2 as an attachment (by selecting 'others') during the period from 01.04.2014 to 20.10.2014 may file e-form no. ADT-1 for appointment of Auditor for the period up to 31.03.2019 without fee, till 15.06.2019.

### *General Circular No.06/2019, dated 13.05.2019.*