Regional PCS Conference  
(Host: Jaipur Chapter)  
PCS – Road Ahead

Venue: Hotel Bella Casa, Jaipur Cityplex, 1, Ashram Marg, Near Durgapura, Tonk Road Jaipur 302018, Rajasthan  
Saturday, 10th January, 2015

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<th>Time</th>
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<tr>
<td>9.30 AM to 10.00 AM</td>
<td>Registration</td>
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<td>10.00 AM to 11.00 AM</td>
<td>Inaugural Session</td>
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<td>Welcome Address by:</td>
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<td>CS Shyam Agrawal</td>
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<td>Chairman, NIRC-ICSI</td>
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<td>Chief Guest:</td>
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<td>Shri Janga Srinivas Rao, IPS</td>
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<td>Commissioner of Police, Jaipur</td>
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<td>Guest of Honour &amp; Key-Note Speaker</td>
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<td>CS R Sridharan</td>
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<td>President, The Institute of Company Secretaries of India</td>
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<td>Vote of Thanks by:</td>
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<td>CS Girish Goyal</td>
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<td>Chairman, Jaipur Chapter of NIRC-ICSI</td>
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<td>11.00 AM to 11.30 AM</td>
<td>Tea</td>
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<td>11.30 AM to 12.30 PM</td>
<td>FIRST TECHNICAL SESSION</td>
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<td>Guest Speaker:</td>
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<td>CS T R Ramamurthy</td>
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<td>Ramamurthy Associates</td>
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<td>Topic: Compliance Management under FEMA</td>
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<td>Guest Speaker:</td>
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<td>CS P K Mittal</td>
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<td>Council Member, The ICSI</td>
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<td>Topic: Drafting of reply to Show Cause Notices issued by various Authorities</td>
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<td>1.30 PM to 2.30 PM</td>
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<td>THIRD TECHNICAL SESSION</td>
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<td>Guest Speaker</td>
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<td>CS S K Jain</td>
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<td>Sunil K Jain &amp; Associates</td>
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<td>Topic: Secretarial Audit</td>
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<td>3.45 PM to 5.00 PM</td>
<td>FORTH TECHNICAL SESSION</td>
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<td>CS Jitesh Gupta</td>
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<td>J.K. Gupta &amp; Associates</td>
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<td>Topic: Issues related to pre certification of E-Forms</td>
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<td>5.00 PM to 5.30 PM</td>
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<td>7.00 PM onwards</td>
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Background Material
for
REGIONAL PCS CONFERENCE
on the theme:
PCS – ROAD AHEAD
on
Saturday, the 10th January, 2015
at
Hotel Bella Casa, Jaipur Cityplex,1,
Ashram Marg,
Near Durgapura, Tonk Road Jaipur 302018,
Rajasthan
CONCEPT OF PRE-CERTIFICATION

Pre-certification was introduced to avoid registration delays and eventually evolved to check correctness of documents filed by professionals.

Pre-certification means certification of correctness of any document by a professional including Company Secretary in Practice before the same is filed with the Registrar in terms of the requirements of the Companies Act. The professional checks the correctness of the particulars stated in the form after due consideration of the provisions of the Companies Act, 2013 and the rules made there under. He also ensures that the particulars stated in the form are in agreement with the books and records of the company. If he notices any defect or finds that the information provided in the form is incomplete, he takes steps for rectification of the defect and gets the document completed before filing the same with the Registrar.

Pre-certification acts as a pre-emptive check to ensure that the particulars stated in the form or return are as per the books and records of the company and are true and correct. This would mean that the Registrar can rely on the certification of the Company Secretary in practice and take the document on record without further examination.

Thus, Pre-certification by a Company Secretary in practice ensures that no form or return is filed in the Office of Registrar of Companies which is defective or incomplete.

Disclosure of information to shareholders is a very important requirement under the company law. This is with a view to protect the interests of the shareholders and other stakeholders and to ensure better governance. Accordingly the Companies Act, 2013 has stipulated stringent measures and requirements for disclosures including in financial statements, in Board’s report and annual return. The Act has also prescribed onerous duties and responsibilities for company directors as well as company secretaries. The punishment for violation of provisions of the Act has also been enhanced under the Companies Act, 2013. Therefore, to ensure the correctness of information filed becomes very critical.

The introduction of pre-certification by an independent professional in the e-form is aimed at reducing the work load of the Registrar of Companies. Once an e-form has been pre-certified by a professional towards its authenticity based on the particulars contained in the books of accounts and records of the company, ROC is entitled to take on record the e-form. If a professional gives a false certificate or omits any material information knowingly, he is liable to punishment under the provisions of Companies Act, 2013 as well as liable for professional or other misconduct.

HISTORICAL BACKGROUND

Pre-certification was introduced after detailed deliberations and this has been refined over time. Though it initially aimed at avoiding delays in registration of documents and charges, its scope was expanded to authenticate correctness and integrity of documents being filed with the MCA in view of the benefits from such precertification.
The process has been now sanctified in the Companies (Registration Offices and Fees) Amendment Rules, 2014 [Sub-rule (12) of Rule 8].

MCA vide Circular 10/2014 dated 07.05.2014 has issued the following on certification of e-forms under the Companies Act, 2013 by the Practising professionals (extracts) –

“The Ministry has allowed registered Members of the professional bodies (the ICAI, ICSI and the ICOAI) to authenticate correctness and integrity of documents being filed by them with the MCA in electronic mode”.

The requirement of authentication of documents prescribed under Rule 8 of the Companies (Registration Offices and Fees) Rules, 2014 elaborates on the responsibility of professionals certifying the forms. The professional certifying the form must verify whether all the requirements as per the provisions of the Companies Act, 2013 and the rules made thereunder have been complied with and all the attachment to the forms have been duly scanned and attached completely and legibly.

PERSONS WHO ARE ELIGIBLE TO PRE-CERTIFY

The e-form should be certified by a company secretary (in whole-time practice) or cost accountant (in whole-time practice) or chartered accountant (in whole-time practice) by digitally signing the e-form.

Rule 8(12) the Companies (Registration Offices and Fees) Rules, 2014 as inserted by the Companies (Registration Offices and Fees) Amendment Rules, 2014 vide GRS 297(E) dt. 28 April, 2014 reads as under:

"(12) (a) The following e-forms filed by companies, other than one person companies and small companies, under sub-rule (1) of rule 9, shall be pre-certified by the Chartered Accountant or the Company Secretary or as the case may be the Cost Accountant, in whole-time practice, namely:—

INC-21, INC-22, INC-28, PAS-3, SH-7, CHG-1, CHG-4, CHG-9, MGT-14, DIR-6, DIR-12, MR-1, MR-2, MSC-1, MSC-3, MSC-4, GNL-3, ADT-1, NDH-I, NDH-2, NDH-3;

(b) The following e-forms filed by companies, other than one person companies and small companies, under sub-rule (1) of rule 9, shall be pre-certified in the following manner, namely:—

(i) GNL-1 – (Form for filing an application seeking approval from Registrar of Companies in e-form GNL-1 for different purposes under Companies Act, 2013) Optional pre-certification by the Chartered Accountant or the Company Secretary or as the case may the Cost Accountant in whole-time practice;

(ii) DPT-3 – (Return of Deposits) Certification by Auditors of the company;

(iii) MGT-10 – (Changes in shareholding position of promoters and top ten shareholders) Certification by a Company Secretary in whole-time practice;

(iv) AOC-4 – (For filing financial statement and other documents with the Registrar) Certification by a Chartered Accountant in whole-time practice;

(c) E-form DIR-3 shall be filed along with attestation of photograph, identity proof and proof of residence of the applicant by the Chartered Accountant or the Company Secretary or as the case may be the Cost Accountant, in practice."
Mapping of e-forms prescribed under the Companies Act, 2013 with e-forms prescribed under Companies Act, 1956 (Source: MCA Website: www.mca.gov.in) is annexed and marked as Annexure-I.

PRE-CERTIFICATION UNDER THE NEW ACT

As mentioned earlier, the process has now been sanctified in the Companies (Registration Offices and Fees) Rules, 2014 (hereinafter referred to as ‘the Rules’).

Every company registered under the Companies Act, 2013 (hereinafter referred to as ‘the Act’) is required to file with the Registrar of Companies a number of forms, returns and documents. While certain forms and documents are to be filed initially at the time of registration of the company, some of the returns are required to be filed periodically such as annual return and some others are required to be filed when some event occurs such as appointment of a director, increase in share capital, creation of charge etc.

As per Rule 7 of the of the rules, every application, financial statement, prospectus, return, declaration, memorandum, articles, particulars of charge, or any other particulars or documents or any notice or any communication or intimation required to be filed or delivered or served under the Act and rules made thereunder, is required to be filed or delivered or served in computer readable electronic form, in portable document format (PDF) or in such other format as has been specified in any rule or form to the Registrar through the portal maintained by the Ministry of Corporate Affairs (the MCA) on its website.

The MCA has set up and maintains the website through portal MCA-21 for providing access to the electronic registry for filing of forms, documents and applications etc.

The electronic registry so setup enables public access and inspection of such documents as are required to be in the public domain under the Act on payment of the fees as prescribed under the Act or the rules made there under.

As per the first proviso to rule 7, where the documents are required to be filed on non judicial stamp paper, such documents shall be filed in physical form in addition to their submission in electronic form unless the central government by an order does not require submission in physical form and proof of delivery of documents submitted in physical form are required to be scanned and forms part of the attachments to the e-form.

As per the second proviso to rule 7, if the stamp duty is paid electronically, the company is not required to make physical submission of such documents, in addition to their submission in electronic form.

As per the third proviso to rule 7, in respect of certain documents filed under the Act which are not covered for payment of stamp duty in electronic form and the stamp duty payable on such documents in the respective state is equal to or less than one hundred rupees, the company is required to scan such stamped documents complete in all respect and file electronically and is not required to submit such documents in physical form. However, documents required to be filed for compounding of offences or adjudication of penalties or applications to Central Government or Regional Director are required to be filed in the physical form separately.

As per the fourth proviso to rule 7, unless otherwise stated in any law for the time being in force, the company is required to retain such documents duly stamped in original

(i) permanently for the documents relating to incorporation and incidental matters thereto, changes in any clauses of the memorandum and articles of association; and

(ii) for a minimum period of eight years in other cases.
Such documents shall be required to be produced if the same are required for inspection and verification by the competent authority.

As per the fifth proviso to the rule 7, any correspondence (physically or electronically) and documents to be filed by any person with Registrar must contain name, designation, address, membership number or DIN, of the person signing such document and make sure correctness thereof and correspondence merely with signature and writing authorised signatory shall not be acceptable.

As per the rule 8(1), (2) & (5), all electronic forms are required to be authenticated by authorised signatories using digital signatures. The e-forms are required to be authenticated on behalf of the company by the Managing Director or Director or Company Secretary or other key managerial personnel. In case of any change in directors or company secretary, the form relating to appointment of such directors or company secretary is required to be filed by continuing director or secretary of the company.

As per rule 8(6), scanned image of documents must be of the original signed documents relevant to the e-forms and the scanned document image shall not be left blank without bearing actual signature of authorised person.

As per rule 8(7), the person signing the form and the professional certifying the form are responsible to ensure that all the required attachments relevant to the form have been attached completely and legibly to the forms or applications or returns filed as per the Act and the rules.

As per rule 9(2), every document or application or certificate or notice and other documents required to be registered or authenticated by the Registrar or an officer of the Central Government is required to be authenticated through a valid digital signature of such person or a system generated digital signature.

As per rule 9(3), the Registrar shall issue document, certificate, notice, receipt, approval or communicate endorsement or acknowledgement in electronic mode. If the Registrar is not able to issue any certificate etc. in electronic mode for the reasons to be recorded in writing, he may issue such certificate etc. in the physical form under manual signature affixing seal of his office.

As per rule 9(4), the company is required to create and maintain at all times a valid electronic address including e-mail, user identifications capable of receiving and acknowledging the receipt of document, certificate, notice or other communication, automated or otherwise.

As per rule 10, the Registrar of Companies is required to examine or cause to be examined, every application or e-form or document filed with or delivered to, in the electronic form.

As per the proviso to rule 10(1), save as otherwise provided in the Act, the Registrar is required to take a decision on the application, e-form or documents within thirty days from the date of its filing excluding the cases in which an approval of the Central Government or the Regional Director or any other competent authority is required.

As per the second proviso to rule 10(1), the e-forms identified as informatory in nature and filed under Straight through Process (STP) may be examined by the Registrar at any time or suo motu on receipt of any information or complaint from any source.

As per the rule 10(2), if any such document or e-Form is found to be defective or incomplete in any respect, the Registrar is required to give intimation of such defect or incompleteness noticed electronically, by placing it on the website and by e-mail on the last intimated e-mail address of the person or the company which has filed such document or e-form, directing him or it to furnish such information or to rectify such defects or incompleteness.
or to re-submit such application or e-form or document within fifteen days or such other period as provided in the Act or the rules.

As per the proviso to rule 10(2), in case the e-mail address of the person or company in question is not available, the intimation shall be given by the Registrar by post at the last intimated registered office address of the company or the last intimated address of the person and the registrar shall preserve the facts of the intimation in the electronic record.

As per the rule 10(3), except otherwise provided in the Act, the Registrar shall allow fifteen days’ time to the person or company which has filed the application or form or document, for furnishing further information or for rectification of the defects or incompleteness or for re-submission of such application or e-form or document.

As per the rule 10(4), if such further information has not been provided or has been furnished partially, or defects or incompleteness has not been rectified or has been rectified partially or has not been rectified within fifteen days, the Registrar shall either reject or treat the application or e-form or document as invalid in the electronic record, and shall inform the person or company in the manner stated above.

As per the rule 10(5), without prejudice to any other liability under the Act or rules, where any document has been recorded invalid by the Registrar, the document may be rectified only by fresh filing along with payment of fee and additional fee as applicable.

As per the rule 10(6), in case the Registrar finds any e-Form or document filed under Straight Through Process (STP) as defective or incomplete in any respect at any time, he shall treat and label such e-form or document as ‘defective’ in the electronic registry and issue notice pointing out such defects or incompleteness at the last intimated e-mail address of the person or the company which has filed the e-form or document, calling upon such person or company to file such e-form or document afresh with fee and additional fee as applicable. In case the e-mail address of the person or the company is not available, the intimation shall be given by the registrar by post at the last intimated registered office address of the Company or the last intimated address of the person, as the case may be and such facts shall be preserved by the Registrar in the electronic record.

**PENAL PROVISIONS FOR RECKLESS OR WRONG PRE-CERTIFICATION**

**Under the Company Secretaries Act, 1980**

The Second Schedule to the Company Secretaries Act, 1980 in clause 2 provides that where a Company Secretary in Practice certifies or submits in his name, or in the name of his firm, a report of an examination of the matters relating to company secretarial practice and related statements unless the examination of such statements has been made by him or by a partner or an employee in his firm or by another Company Secretary in Practice, he shall be deemed to be guilty of professional misconduct.

Further, clauses 6, 7 and 8 provide that where a Company Secretary in Practice while pre-certifying any e-Form or document fails to disclose a material fact known to him in his report or statement but the disclosure of which is necessary in making such report or statement, or fails to report a material mis-statement known to him or does not exercise due diligence, or is grossly negligent in the conduct of his professional duties or fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion, he would be deemed to be guilty of professional or other misconduct under the provisions of the Company Secretaries Act, 1980. In case there is any false statement in any material particular or omission of any material fact in the form certified as correct by a Practicing Company Secretary, he would be liable for disciplinary action for professional or other misconduct under the provisions of the Company Secretaries Act, 1980.
In view of section 21B(3) of the Company Secretaries Act, 1980, in case he is found guilty of professional or other misconduct mentioned in the second schedule to the Company Secretaries Act, 1980, he will be liable for the following actions—

(a) Reprimand,

(b) Removal of name from the registrar of members permanently or for such period as may be thought fit by the disciplinary committee,

(c) Fine which may extend to five lakh rupees.

Relevant extracts of the Second Schedule to the Company Secretaries Act, 1980 are as under:

Part I of the Second Schedule of the Company Secretaries Act, 1980 (Professional misconduct in relation to Company Secretaries in Practice)

A Company Secretary in practice shall be deemed to be guilty of professional misconduct, if he—

*****

(5) fails to disclose a material fact known to him in his report or statement but the disclosure of which is necessary in making such report or statement, where he is concerned with such report or statement in a professional capacity;

(6) fails to report a material mis-statement known to him and with which he is concerned in a professional capacity;

(7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;

(8) fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion; *****.

Under the Companies Act, 2013

With a view to ensure that the secretary in practice carries out his work with due diligence, the Registrar may carry out scrutiny of Forms on random basis.

As per rule 8(9) of the Companies (Registration Officers and Fees) Rules, 2014, where any instance of filing document, application or return etc. containing a false or misleading information or omission of material fact, requiring action under section 448 or section 449 is observed, the person shall be liable under section 448 and 449 of the Act.

Further as per rule 8(10), without prejudice to any other liability, in the case of certification of any form, document, application or return under the act containing wrong or false or misleading information or omission of material fact or attachments by the person, the Digital Signature Certificate shall be de-activated by the central government till a final decision is taken in this regard.

Penal provisions under sections 447, 448 and 449 of Companies Act, 2013 & MCA circular (Circular No. 10/2014 dated 07.05.2014).

Section 447 (Punishment for fraud) of the Companies Act, 2013 provides for severe punishment. As per this section, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which
may extend to 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 three times the amount involved in the fraud.

**As per section 448 (Punishment for false statement)**, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement,—

(a) which is false in any material particulars, knowing it to be false; or

(b) which omits any material fact, knowing it to be material, he shall be liable under section 447.

**As per section 449 (Punishment for false evidence)**, if any person intentionally gives false evidence—

(a) upon any examination on oath or solemn affirmation, authorised under this Act; or

(b) in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act,

he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and with fine which may extend to ten lakh rupees.

**As per MCA circular no. 10/2014 dated 07.05.2014**, where any instance of filing of documents, application or return or form etc, containing false or misleading information or omission of material fact or incomplete information is observed, *the Regional Director or the Registrar as the case may be, shall conduct a quick inquiry against the professionals who certified the form and signatory thereof including an officer in default* who appears prima facie responsible for submitting false or misleading or incorrect information pursuant to requirement of above said Rules, 15 days notice may be given for the purpose.

The Regional Director or the Registrar will submit his/her report in respect of the inquiry initiated, irrespective of the outcome, to the E-Governance cell of the Ministry within 15 days of the expiry of period given for submission of an explanation with recommendation in initiating action under section 447 and 448 of the Companies Act, 2013 wherever applicable and also regarding referral of the matter to the concerned professional Institute for initiating disciplinary proceedings.

The *E-Governance cell of the Ministry shall process each case so referred and issue necessary instructions to the Regional Director/ Registrar of Companies for initiating action under section 448 and 449 of the Act wherever prima facie cases have been made out*. The E-Governance cell will thereafter *refer such cases to the concerned Institute for conducting disciplinary proceedings against the errant member as well as debar the concerned professional from filing any document on the MCA portal in future*.

The Registrar shall forward a fortnightly report to the concerned Regional Director as well as to the E-Governance Division. Thereafter, the Regional Director shall forward a consolidated report to the Joint Secretary E-Governance Division on or before 7th of every month.

**POINTS TO BE KEPT IN MIND WITH REGARD TO PRE-CERTIFICATION**

It is duty of the Company Secretary in practice to check thoroughly the correctness of the contents of the form before certifying it as correct. The members in practice are, accordingly, expected to exercise due care, diligence and skill while performing the duty of pre-certification.
Pre-certification of forms is, therefore, not a routine or mechanical exercise but is a serious and involved work calling for sound application of mind in verifying the averments made in the respective forms after due consideration of the provisions of the Act read with the relevant rules.

Before undertaking the work relating to pre-certification of forms, a Company Secretary in practice should thoroughly read the requirements of the provisions of the Companies Act, 2013, the Rules made there under and familiarise himself with the actual practices that are followed in this regard. He should also:

- Ensure that letter of engagement/Board Resolution authorizing the professional for the particular assignment by the company is obtained.

- Maintain a physical/scanned of all documents verified (subject to confidentiality requirement)

- Obtain the signature(s) of the authorised signatories of the e-forms in presence of the professional.

- Ensure that all relevant documents and attachments are legible & visible.

In this Referencer, it has not been the intention to deal exhaustively with the legal aspects relating to various forms but to highlight the various important aspects which should engage the attention of a member in practice while certifying forms. -

Source: Publication of ICSI
Practical Aspects of Secretarial Audit

First of all let us understand the provisions of Secretarial Audit as enshrined in the Companies Act, 2013:

Section 204 of the Companies Act, 2013: Secretarial Audit for Bigger Companies:

1. Every listed company and a company belonging to other class of companies as may be prescribed shall annex with its Board’s report made in terms of sub-section (3) of section 134, a secretarial audit report, given by a company secretary in practice, in such form as may be prescribed.

2. It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company.

3. The Board of Directors, in their report made in terms of sub-section (3) of section 134, shall explain in full any qualification or observation or other remarks made by the company secretary in practice in his report under sub-section (I).

4. If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, the company, every officer of the company or the company secretary in practice, who is in default, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Rule 9 of Companies (appointment And Remuneration of Managerial Personnel) Rules, 2014 provides that:

1. For the purpose of sub-section (1) of section 204, the other class of companies shall be as under-
   (a) every public company having a paid-up share capital of fifty crore rupees or more; or
   (b) every public company having turnover of two hundred fifty crore rupees or more.

2. The format of the Secretarial Audit Report shall be in Form No. MR-3.

Section 205. Functions of Company Secretary:

1. The functions of the company secretary shall include,—
(a) to report to the Board about compliance with the provisions of this Act, the rules made thereunder and **other laws applicable to the company**;

(b) to ensure that the company complies with the applicable secretarial standards; (c) to discharge such other duties as may be prescribed.

*Explanation.*—For the purpose of this section, the expression “secretarial standards” means secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central 56 of 1980. Government.

(2) The provisions contained in section 204 and section 205 shall not affect the duties and functions of the Board of Directors, chairperson of the company, managing director or whole-time director under this Act, **or any other law for the time being in force**.

Now let us go through the format of the Secretarial Audit Report

**Form No. MR-3.**

**Form No. MR-3**

**SECRETARIAL AUDIT REPORT**

FOR THE FINANCIAL YEAR ENDED ... ... ...

[Pursuant to section 204(1) of the Companies Act, 2013 and rule No.9 of the Companies (Appointment and Remuneration Personnel) Rules, 2014]

**SECRETARIAL AUDIT REPORT**

FOR THE FINANCIAL YEAR ENDED ... ... ...

To,
The Members,
............. Limited

I/We have conducted the secretarial audit of the compliance of applicable statutory provisions and the adherence to good corporate practices by....... (name of the company).(hereinafter called the company). Secretarial Audit was conducted in a
manner that provided me/us a reasonable basis for evaluating the corporate conducts/statutory compliances and expressing my opinion thereon.

Based on my/our verification of the …………………………….. (name of the company’s) books, papers, minute books, forms and returns filed and other records maintained by the company and also the information provided by the Company, its officers, agents and authorized representatives during the conduct of secretarial audit, I/We hereby report that in my/our opinion, the company has, during the audit period covering the financial year ended on ____ ____ complied with the statutory provisions listed hereunder and also that the Company has proper Board-processes and compliance-mechanism in place to the extent, in the manner and subject to the reporting made hereinafter:

I/we have examined the books, papers, minute books, forms and returns filed and other records maintained by ............. (“the Company”) for the financial year ended on __, ____ according to the provisions of:

(i) The Companies Act, 2013 (the Act) and the rules made thereunder;
(ii) The Securities Contracts (Regulation) Act, 1956 ('SCRA') and the rules made thereunder;
(iii) The Depositories Act, 1996 and the Regulations and Bye-laws framed thereunder;
(iv) Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;
(v) The following Regulations and Guidelines prescribed under the Securities and Exchange Board of India Act, 1992 ('SEBI Act'):-
(a) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;
(b) The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992;
(c) The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;
(d) The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
(e) The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008;
(f) The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client;
(g) The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009; and
(h) The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998;
(vi)……………………………………………….. (Mention the other laws as may be applicable specifically to the company)
I/we have also examined compliance with the applicable clauses of the following:

(i) **Secretarial Standards issued by The Institute of Company Secretaries of India.**

(ii) **The Listing Agreements entered into by the Company with ..... Stock Exchange(s), if applicable;**

During the period under review the Company has complied with the provisions of the Act, Rules, Regulations, Guidelines, Standards, etc. mentioned above subject to the following observations:

Note: Please report specific non compliances / observations / audit qualification, reservation or adverse remarks in respect of the above para wise.

**I/we further report that**

The Board of Directors of the Company is duly constituted with proper balance of Executive Directors, Non-Executive Directors and Independent Directors. The changes in the composition of the Board of Directors that took place during the period under review were carried out in compliance with the provisions of the Act.

Adequate notice is given to all directors to schedule the Board Meetings, agenda and detailed notes on agenda were sent at least seven days in advance, and a system exists for seeking and obtaining further information and clarifications on the agenda items before the meeting and for meaningful participation at the meeting.

Majority decision is carried through while the dissenting members' views are captured and recorded as part of the minutes.

**I/we further report that** there are adequate systems and processes in the company commensurate with the size and operations of the company to monitor and ensure compliance with applicable laws, rules, regulations and guidelines.

Note: Please report specific observations / qualification, reservation or adverse remarks in respect of the Board Structures/system and processes relating to the Audit period.

**I/we further report that** during the audit period the company has...........................

(Give details of specific events / actions having a major bearing on the company's affairs in pursuance of the above referred laws, rules, regulations, guidelines, standards, etc. referred to above).

For example:

(i) Public/Right/Preferential issue of shares / debentures/sweat equity, etc.
We find that in the Secretarial Audit Report, the Secretarial Auditor is required to give his observations on “other laws as may be applicable specifically to the company”.

Recently the scope of “Secretarial Audit” has been communicated by the President of ICSI to the members vide his message dated 22.12.2014.

Extracts from his Communication:

“The Council at its 226th meeting held on November 21, 2014 decided as under:

Scope of Secretarial Audit would include:
Reporting on compliance of Five laws as mentioned in form MR-3
Companies Act, 2013,
Securities Contracts (Regulation) Act, 1956 (‘SCRA’),
Depositories Act, 1996,
Foreign Exchange Management Act,
Securities and Exchange Board of India Act, 1992;
Reporting on compliance of ‘Other laws as may be applicable specifically to the company’ which shall include all the laws which are applicable to specific industry for example for Banks- all laws applicable to Banking Industry; for insurance company-all laws applicable to insurance industry; likewise for a company in petroleum sector- all laws applicable to petroleum industry; similarly for companies in pharmaceutical sector, cement industry etc.
Examining and reporting whether the adequate systems and processes are in place to monitor and ensure compliance with general laws like labour laws, competition law, environmental laws.

**In case of financial laws like tax laws and Customs Act etc., Secretarial Auditor may rely on the Reports given by statutory auditors or other designated professionals.**

**Certain important aspects of Secretarial Audit:**

**Process of appointment of ‘Secretarial Auditor’:**

a) Consent to act as Secretarial Auditor/ Proposal

b) Board Resolution

c) Issue of ‘Engagement Letter’ by the Company

d) Filing of Form MGT-14 with Registrar of Companies

**Tool Kit of Secretarial Auditor:**

In order to undertake a meaningful Secretarial Audit, the Secretarial Auditor should possess books and other relevant literature as under:

- Companies Act, 2013 and rules made there under,
- SEBI Rules & Regulations
- Listing Agreement
- Secretarial Standards issued by ICSI
- Important Case Laws
- Circulars and Clarifications
- ‘Guidance Note on Secretarial Audit’ Issued by ICSI
- Master Circular under FEMA
- Book on Contract Act
- Standard Book on Labour Laws
- A standard Dictionary
- ……………..
How to conduct ‘Secretarial Audit’:

For conducting Secretarial Audit, the Secretarial Auditor should carefully examine the following documents/records:

**Documents:**
- Memorandum and Articles of Association
- Audited Annual Accounts
- Directors’ Report
- Notice of Annual General Meeting along with Explanatory Statement
- Notice of Extra-Ordinary General Meetings along with Explanatory Statement
- Resolutions passed by circulation,
- Forms & Returns Filed ROC,
- Applications & Petitions filed with CLB/Ministry of Corporate Affairs/NCLT/High Court/RD
- Correspondence with Directors
- Copies of instruments creating charge
- Copy of Annual Return
- Copies of all contracts for appointment of manager/managing director/whole time director
- Copies of notice of board meetings
- Evidence of dispatch of board meeting notices/ general meeting notices
- Attendance registers of board meetings
- Copies of Form No. 22A for short notice of notice of annual general meeting/ extra ordinary general meeting
- Newspaper cutting of public notice of notice of annual general meeting/ extra ordinary general meeting
- Copies of Form MBP - 1 received from all Directors
- Copies of special resolutions and copies of contracts in respect of office or place of profit under section 188, if any
- Relevant documents if duplicate share certificates are issued
- Relevant documents if interim dividend is declared
- Relevant documents if dividend is transferred to unpaid dividend account
- Letter received from financial institution, joint venture partner nominating a person as a director on the board
- Copy of agreement if any entered into between the company and the managerial person
- Documents relating to buy-back of shares, if any
- Documents relating to deposits accepted, if any
- List of Inter-corporate investments/loan/guarantees/securities
- Copies of notices received from directors under section 184
- Copies of all letters sent to and received from the Stock Exchanges on which the company’s securities are listed.
- Copies of all disclosures received by the company under SEBI (substantial Acquisition of Shares and Takeovers) Regulations, 2011
- Copies of all returns and forms filed with SEBI and Stock Exchange.
- Copies of Shareholding Pattern filed with stock exchanges under clause 35 of the listing agreement
- Copies of all disclosures received by the Company under SEBI (Prohibition of Insider Trading) Regulation, 1992
- Copies of returns Filed with the Stock Exchange under SEBI (Prohibition of Insider Trading) Regulation, 1992
- Minute Books of:
  a) General Meetings
  b) Board Meetings
  c) Meetings of Committee of Directors
- Joint Venture Agreement, Share Purchase Agreement
- Other Records
- Review of Compliance management of the Company
- …………..

**Statutory Registers:**
- Register of contracts in which directors are interested under section 170
- Register of Investments under Section 187
- Register of Inter-corporate investments/loan/guarantees/securities to which section 186 applies.
- Register of Buy – back of securities (is any)
- Register of Directors, Managing Directors, manager and Secretary under section 189
- Register of Directors Shareholding under Section 170
- Register of Deposits
- Register of renewed and duplicate certificate
- Register of Charges under Section 85
- Register and Index number of members under section 88
- Register and Index number of debenture holders under section 88
- Foreign register of members and debenture holders under section 88
- Duplicate of every foreign register of members/ debenture holders under section 88
- Minutes book of general meeting, board meetings and committee meetings under section 118
- ------

**Remark: The above is not an exhaustive list of records.**

In addition to the examination of ‘Secretarial and other related records’; the Secretarial Auditor is required to examine the ‘Board Process’ and to offer his observations as to the adequacy of ‘system and process’. The Board Process can be broadly divided into two parts namely:-

**Part A- Board Structure** which consists of:

1. Composition of the Board
2. Suitability of members of the Board
3. Succession Planning

**Part B- Board Systems and Procedures which** consists of:

1. Convening the Meeting
While conducting ‘Secretarial Audit’, the Secretarial Auditor should obtain a suitable ‘Management Representation Letter’ from the Company. In addition, in case of financial laws like tax laws and Customs Act etc., **Secretarial Auditor may rely on the Reports given by statutory auditors or other designated professionals.**

Given below is the Specimen of ‘Management Representation Letter’ as given in the “Guidance Note on Secretarial Audit” published by ICSI.

**Management Representation Letter for Secretarial Audit**

Representation made by management may vary from one entity to another entity and from one year to another. It should be adopted in the light of individual requirements and circumstances.

Date:…………………

M/s ………………………& Co.
Company Secretaries
……………………………………
………………………………

Dear Sirs,

This representation letter is provided in connection with your audit of the Secretarial Records maintained under (i) The Companies Act, 2013 (the Act) and the rules made there under; (ii) The securities Contracts (Regulation) Act, 1956 (SCRA) and the rules made there under; (iii) The Depositories Act, 1956 and the regulation and bye-laws framed there under; (iv) Foreign Exchange Management Act, 1999 and the rules and regulations made there under to extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowing; (v) The Regulations and guidelines prescribed under the Securities and Exchange Board of India Act, 1992 (SEBI ACT) and other applicable laws including Labour Laws like Factories Act, Payment of Gratuity Act etc for the year ended on 31st March……..for the purpose required in it. We the undersigned acknowledge our responsibility for maintaining the Secretarial records referred above and confirm, to the best of our knowledge and belief, the following representations:
COMPANY LAW

I. The Company has maintained books of accounts as required under section 128 of the Companies Act, 2013

II. The Company has complied with all the provisions of Companies Act, 2013 relating to Statutory Audit/Cost Audit/Internal Audit.

III. No request for transfer or transmission of shares have been received by the Company during the year other than as recorded

IV. Statutory Registers were kept open for public inspection during working hours on all working days

V. Notice of Board Meetings were duly sent to all Directors

VI. No resolution were passed by way of circulation during the year under review other than________

VII. Company has not obtained any secured loan from any financial institution/banks other than those mentioned in the register of charges.

VIII. Notice of Annual General Meeting has been duly sent to all the members

IX. No show cause notice has been received by the company under the Acts referred above or any other laws applicable on the Company

X. Minutes of the Board and General Meetings, were entered in the minutes book within thirty days of the meeting

XI. The share certificates were properly stamped

XII. The entries in the statutory registers were made within the prescribed time

XIII. The Company has not done any alteration to the Articles of Association or Memorandum of Association other than those of which the necessary compliance as to alteration is carried out and the proofs of the filling with ROC are Available in the Records

XIV. We have provided to you all relevant information and have given access to all data and records

XV. There is no pending litigation and claims other than reported in the balance sheet by way of contingent liability

XVI. No event other than reported to you specially has occurred during the year which has a major bearing on the Company’s affairs in pursuance of the laws, rules, regulations, guidelines, standards, etc referred to above

XVII. The views of all the dissenting Directors (if any) on the important matters have been captured and recorded in the minutes

XVIII. The venue and time of Board Meeting was finalized with the consultation of the Board Members

SECURITIES LAW

I. All price sensitive information was informed to the Stock Exchanges From time to time by the company
II. All investors complains directly received by the Company are recorded on the same date of receipt.

LABOUR LAW
I. The premises and establishments of the Company have been registered with the appropriate authorities
II. There is no Child Labour/Bonded Labour in any establishment of the Company
III. The Company has done the compliance of PF/ESI and other social security measures to the contract employees

ENVIRONMENTAL LAWS
I. The Company is not discharging the contaminated water at the public drains/rivers
II. The Company has efficient water treatment plants at its factory premises.
III. The Company has not any hazardous waste as per applicable rules

We are attaching herewith the list of various applicable laws other than the laws listed above
For ABC Limited

**Director**
Date:
Place;

*From “Guidance Note on Secretarial Audit” published by ICSI.*

Checklists for Secretarial actions/ events

A secretarial auditor may prepare ‘Checklists’ for various secretarial actions/ events. It is suggested that instead of having detailed checklists, it is better to focus on important bullet points.

How to prepare Working Papers File:

Primarily, the work reflected in the working papers serves as the basis for the opinion rendered by the Secretarial Auditor on the secretarial records of the company
The completed working papers should be bound in folders. This helps to organize the papers and makes them easier to review. Folders should be marked clearly so that a
reader will know whether they are current working paper folders or prior-year or permanent file folders. The cover of each folder should have a list of the contents.

The following is an example of the ordering that might be used in a set of working papers:

1. Engagement letter
2. Memorandum & Articles of Association
3. Management Representation letter
4. Joint Venture Agreement/ Shareholders’ Agreement
5. Management Control questionnaire
6. Audit program
7. Audited financial results
8. Directors’ Report
9. Notice of AGM
10. Copies of Board Resolutions for constitution of various committees
11. Extracts from the minutes
12. ……

I may remind the members in practice that for ‘Peer Review’ ‘ Attestation Service’ would include the ‘Secretarial Audit’ hence they should maintain a proper working papers file and other records of the client company.

**How to qualify Secretarial Audit Report**

Qualifications/ reservations or adverse remarks, if any should be stated by the secretarial auditor at the relevant places in his report in **bold type** or *italics*.

In case of a qualified opinion, the secretarial auditor expresses certain reservations concerning the scope of the secretarial audit or non- compliance of particular provision of companies act /secretarial standard etc. In issuing a qualified opinion, the secretarial auditor should clearly explain the qualification.

If the secretarial auditor is unable to express an opinion on any matter, he should mention that he is unable to express an opinion on that matter and the reasons thereof. -

*Courtesy : CS S K Jain*
Compliance Management under FEMA
Introduction

- Preamble

- An Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India

- This preamble is in sharp contrast to the FERA 1973 preamble which had conservation of foreign exchange resources and for proper utilisation thereof
Commencement

- Act became applicable from 1st May 2000
- Section 49 of the act prescribed a sunset period of two years from the date of commencement for commencement of proceedings under FERA 1973
- Act applies to all branches, offices and agencies outside India owned or controlled by a person resident in India and to any contravention committed outside India by any person to whom the act applies

Application
• Means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India and includes transactions referred to in sub-section (3) of section 6
• Means a transaction other than a “capital account transaction” and includes – Payments due in connection with foreign trade, other current business, services short term banking and credit facilities Payments due as interest on loans and as net income from investments
• Remittances for living expenses of parents, spouse and children living abroad
• Expenses in connection with foreign travel, education and medical care of parents, spouse and children
• Section 5 allows drawing of foreign exchange to any person for a current account transaction. It is however, subject to, Foreign Exchange Management (Current Account Transaction) Rules, 2000 which has three schedules

• Section 6 allows availment of foreign exchange for a capital account transaction which are subject to the Regulations for the topic specified by the Reserve Bank of India
Inference of Section 5 and section 6

• If the transaction is a current account transaction and is not specifically prohibited or upper ceiling prescribed under the Rules, foreign exchange is permissible. It need not be specifically permitted.

• If the transaction is a capital account transaction, first one has to study the regulations for the purpose of the transaction and ensure compliance with the requirements to avail the foreign exchange. The compliance has to be meticulous and in conformity with the requirements of the regulations/AP DIR Circulars of the Reserve Bank.
Broad areas whose compliance aspects are to be discussed

- Foreign Domestic Investments under Automatic Route and approval route
- Overseas direct investments
- External commercial borrowings under automatic and approval routes
- Opening of Liaison Office/Project Offices and Branches
- Compliance for non-corporates in need of foreign exchange
Foreign Direct Investment

Likely to be the focus area for the next few years with the clarion call “Make in India” and presenting a business friendly environment
Present compliances for Foreign Domestic Investment

Certain pre-requisites where compliance is omitted

• KYC report of the foreign investor entity should be brought to the notice of the overseas investor at the stage of negotiation itself

• Better to have a look at the advance reporting form, FC GPR form and annual return of assets and liabilities to be sent to RBI
• The Permanent account number of the investee company should be there
• FIRC (Foreign inward remittance certificate) should be collected
• KYC report (Know your customer) as per format in RBI Master circular
• Requirements with regard to FC GPR – attested copies of overseas investor company like MoA/AoA should be collected. Preferably by the Indian Embassy/High Commission as the case may be.
Valuation guidelines

- Valuation (Pricing) guidelines to conform to AP(DIR Series) Circular No. 4 dated 15.7.2014 (FEMA notification No. 306 dated 23.5.2014)
- As per “Internationally Accepted Pricing Methodology”
Compliance requirements for foreign domestic investment

- Reporting of receipt of monies in Advance reporting form within 30 days with the KYC report and also the FIRC copy
- Allotment should be made within 180 days from the receipt of inward remittance
- Reporting of allotment of shares within 30 days from the date of allotment in form FC-GPR duly certified by Company Secretary of Company or a Practising Company Secretary
Annual Reporting of foreign Liabilities and Assets

- Annual Return on Foreign Liabilities and Assets in FLA in soft form to the Reserve Bank by 15th of July each year.

- Transfer of shares between residents and non-residents to be reported in form FC-TRS within sixty days from the date of receipt of consideration.
Overseas direct investment (ODI)

- As of now, the ceiling limit for overseas direct investments is 400% of the net worth – subject to a ceiling that investments beyond US$ 1 billion would require the approval of the Reserve Bank of India.

- Regulation 15 of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 deal with the obligations of the Indian party e.g. receipt of share certificates within six months or within extended period as permitted by RBI, repatriate to India within 60 days of all dues receivable from foreign entity and submission of annual performance report in ODI Part III
External Commercial Borrowings

• External Commercial Borrowings falls under broadly three heads – automatic route, approval route and trade credits.

• Under automatic route, submission of form 83 to the Reserve Bank of India and Obtaining Loan Registration Number (LRN) before availing / drawing down the loan

• Under approval route an application to be made in form ECB and after approval avail the loan

• Monthly report in form ECB-2 till full repayment of External Commercial borrowings
External Commercial Borrowings (contd.)

• Conversion of External Commercial Borrowings to Equity – for full conversion and for partial conversion to equity

• For full conversion of borrowing into equity – report in FCGPR to Regional Office and ECB-2 to DSIM RBI

• For partial conversion FC-GPR to the extent of converted portion to Regional Office and ECB-2 clearly differentiating the converted portion from the unconverted portion
LO/BO/PO
Liaison Offices/ Branch Offices

- Opening of Liaison Office and Branch Office
- All new entities setting up LO/BO should submit a report within five working days of LO / Bo becoming functional to the DGP of the State concerned and if there is more than one office then to the DGP of each such state
- Submission of annual activity certificates along with audited balance sheet on or before 30th September of each year to the AD Category I Bank and with copy to the DGIT (international Taxation) New Delhi
• Same report within 5 days to the DGP of the State
• CA certificate regarding project status
Compliance for individuals needing foreign exchange

- Liberalised remittance scheme

- Permission to invest up to US$ 125,000 per person per financial year permitted for any current account transaction or capital account transaction or a combination of both (including for gift and donation)

- Limit which started with US$ 25,000 enhanced from time to time to US$ 200,000 later reduced to US$ 75,000 and now enhanced from 24th June 2014 to US$ 125,000 per financial year

Courtesy: CS T.R. Ramamurthy
Practicing Company Secretary, Delhi
DRAFTING OF REPLY TO SHOW CAUSE NOTICE:

PRELIMINARY ISSUE:

1. TIME BARRED

- **P&B Pharmaceuticals (P)Ltd. v. Collector of Central Excise**
  MANU/SC/0151/2003 : 2003(86)ECC20. In this case, the question was whether the extended period of limitation could be invoked where the Department has earlier issued show-cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or misstatement and that, therefore, the extended period under Section 11A could not be invoked.
In this case, the Supreme Court again held that where previously, a show cause notice has already been issued, then in the subsequent, Show Cause Notice, it cannot alleged that there is suppression and the assessee did not disclose the facts to the Department, penalty cannot be imposed.

The Supreme Court has held that when there is no suppression of facts, the department would not be justified in invoking the extended period of limitation.
The Hon’ble Supreme Court in the case of Commissioner of Customs Vs. MMK Jewellers 2008(225) ELT SC has once again held that in view of the clear legal position crystallized by a series of judgments that in case where the assesees are not guilty of suppression of facts, collusion or wilful misstatement of facts, therefore, the extended period of limitation cannot be invoked under proviso to Section 28(1) of the Customs Act, 1962 in the instant appeal and the other connected appeals. Consequently, this appeal and other connected appeals filed by the appellant have to be dismissed being time barred.
2. SHOW CAUSE NOTICE IS VAGUE/UNSPECIFIC

Staff Selection Commission Vs. Sudesh MANU/DE/3596/2014
CCE, Vs. Brindavan Beverages (P) Ltd. MANU/SC/2645/2007

3. SHOW CAUSE IS ISSUED WITHOUT JURISDICTION

a) Monetary Jurisdiction;

b) Legal jurisdiction;
The Delhi High Court in the case of BSES Rajdhani Power Ltd Vs. Ishwar Chand 2009(160) DLT 505 has held as under:-

It is well settled that this Court can invoke its inherent jurisdiction whenever the act complained tantamount to miscarriage of justice and whenever the process of Court is abused.
4. **NON-SUPPLY OF RELIED UPON AND NON-RELIED UPON DOCUMENTS:**

- *Kothari Filaments Vs. CCE* 2009 RLR 112 SC:
- *PGO Processors P Ltd Vs. CCE* 2000(141) RLT 741 (Raj):
- *Tribhuvandas Jhimji Zaveri Vs. CCE* 1997(92) ELT 467 (SC)

5. **NON-SUPPLY OF INVESTIGATION REPORT:**

- *CCE Vs. Zeto Engg Pvt Ltd.* 2008(232) LT 403 P&H

6. **CROSS-EXAMINATION OF OUR OWN OFFICERS & THAT OR DEPARTMENTAL OFFICERS**

- *Nagraj Walchand Jain Vs. CCE* 2000(123)ELT 50 (Bom) ;
- *Kellogg India (P) Ltd Vs. UOI* 2006(193) ELT 385 (Bom):
CONFESSION BY ACCUSED:
The Section 24 of the Indian Evidence Act, 1872, which reads as under:

“24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”
The Hon’ble Supreme Court in the case of *Vinod Solani Vs. Union of India* 2009(233)ELT 157 SC, has observed as under:-

It is now a well settled principle that presumption of innocence as contained in Article 14 of the International Covenant on Civil and Political Rights is a human right although per se it may not be treated to be a fundamental right within the meaning of Article 21, Right to life and Personal Liberty, of the Constitution of India.
The Act, thus, does not provide for a 'reverse burden'. No presumption of commission of an offence is raised under the Act. Even in a case where the law provides for a burden on the accused having regard to the aforementioned presumption of innocence as a human right, this Court in *Noor Aga v. State of Punjab and Anr.* 2008 (9) SCALE 681 held as under:
“114. Only when these things are established, a statement made by an accused would become relevant in a prosecution under the Act. Only then, it can be used for the purpose of proving the truth of the facts contained therein. It deals with another category of case which provides for a further clarification. Clause (a) of Sub-section (1) of Section 138B deals with one type of persons and Clause (b) deals with another.
The Legislature might have in mind its experience that sometimes witnesses do not support the prosecution case as for example panch witnesses and only in such an event an additional opportunity is afforded to the prosecution to criticize the said witness and to invite a finding from the court not to rely on the assurance of the court on the basis of the statement recorded by the Customs Department and for that purpose it is envisaged that a person may be such whose statement was recorded but while he was examined before the court, it arrived at an opinion that
is statement should be admitted in evidence in the interest of justice which was evidently to make that situation and to confirm the witness who is the author of such statement but does not support the prosecution although he made a statement in terms of Section 108 of the Customs Act. We are not concerned with such category of witnesses. Confessional statement of an accused, therefore, cannot be made use of in any manner under Section 138B of the Customs Act. Even otherwise such an evidence is considered to be of weak nature. {See also *Alok Nath Dutta v. State of West Bengal* MANU/SC/8774/2006 and *Babubhai Udesinh Parmar v. State of Gujarat* (2006) 12 SCC 268}”
RETRACTED STATEMENT-DEPARTMENT TO PROVE THEIR CASE BY CORROBORATIVE EVIDENCE

The Supreme Court in the case of *Pon Adithan Vs. Dy.Director, Narcotics Ctrl. Bureau, Madras* MANU/SC/0403/1999 has observed as under:-

It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon.
The Supreme Court in the case of Collector of Customs Vs. D Bhoormall MANU/SC/0237/1974 has observed as under:-

The initial burden to prove that the confession was voluntary in nature would be on the Department. The special or peculiar knowledge of the person proceeded against would not relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue.
The Supreme Court in the *Collector of Customs Vs. D Bhoormall* MANU/SC/0237/1974 has observed as under:

The initial burden to prove that the confession was voluntary in nature would be on the Department. The special or peculiar knowledge of the person proceeded against would not relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. 12. As regards the aspect of financial hardship we are required to examine if the hardship to either appellant has been shown to be 'undue' or 'excessive.' The Supreme Court has in
Uncrossed statement cannot be relied upon:
• *Takshila Spinners Vs. CCE* 2001 (131) ELT 568:
• *Standard Industries Vs. CCE* 2000(118)ELT 59:
• *F.M.Potia Vs.Dilip Singh* 2000(126)ELT107(Bom)

Anything done under duress cannot be relied upon:
• *Sh Krishan Vs. Kurukshetra University* AIR1976SC376:
• *State of Maharashtra Vs. Sayed Mohamed* 1991(51)ELT41 (Bom)
REPLY ON MERITS:

a) Decide the points/issues involved;

b) Factual submissions on each points

c) Attach photocopy of the Circulars/Clarification,

d) Documentary evidence:
   
i) Primary Evidence
   iii) Secondary Evidence:
e) Attach report from Experts

f) Attach Technical Literature

g) Attach photocopy literature or dictionary meaning

h) Photocopies of judgments relied upon alongwith index;
INITIAL BURDEN ON THE DEPARTMENT

- The Constitution Bench of the Hon’ble Supreme Court Court in *Shanti Prasad Jain v. The Director of Enforcement* MANU/SC/0250/1962 has held that the initial burden would be on the Department to establish case.
BURDEN LIES ON THE DEPARTMENT TO PROVE THEIR CASE

The Supreme Court in the case of *Vinod Solanki Vs. Union of India* 2009(233)ELT 157 (SC) has held under:-

A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc if the same is to be relied upon.
solely for the purpose of securing a conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.
The Delhi High Court in the case of *Sunil Engineering Corporation Vs. Union of India* 2005 (117) ELT 525 in a case where petitioners submits that original Bills of Entry had also been tendered but they were not having the receipt for the same as the same had been misplaced and was not traceable. However, petitioners had duly furnished the copies of Bills of Lading, Invoices. The photocopy of Exchange Control copy of the Bill of Entry duly carried endorsement by the Customs Authorities of the clearance of the goods, has observed as under:-
In this view of the matter, there was hardly any doubt left regarding genuineness of the transactions which fact is not even disputed by the respondents. In these circumstances, the omission of the petitioners is merely a procedural irregularity. Therefore, no penalty is leviable.
The Hon’ble Supreme Court in the case of Union of India Vs. Dharmendra Textiles 2008(231)ELT 356 has observed as under:

“ This Court in a catena of decisions has held that mens rea is not an essential element for imposing penalty for breach of civil obligations:
Therefore, unlike in a criminal case, where it is essential for the `prosecution' to establish that the `accused' had the necessary guilty intention or in other words the requisite `mens rea' to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the `blameworthy conduct' of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947."
The Hon’ble Supreme Court in the case of *Chairman, SEBI v. Shriram Mutual Fund* AIR 2006 SC 2287 has held as under:

“35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant.”
A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not.”
LIABILITY OF DIRECTOR/PARTNERS

The Rajasthan High Court in the case of *Smt Naznee Vs. The Director of Enforcement* 2009(235)ELT 779 has held as under:

It is also true that there may be sleeping partners and some passive partners and some active partners. Because of this fact only, it appears that the provisions applicable generally for the company for determination of the liability for commission of offence, have been made applicable to the firm by making specific provisions, i.e., explanation (1) to Section 68 of the Act of 1973.
In view of the above reasons, the firm's partners who are responsible for the conduct of the business and were responsible and incharge at the relevant time, can be personally held liable. In this case, the firm was found guilty and this cannot be disputed in view of the fact that mere writing one after another letters to the buyer by the seller is not a sufficient and can not be treated bonafide effort for recovery of the sale price by the exporter and, therefore, the firm's liability is upheld.
However, so far as liability of the partners is concerned, it will be worthwhile to mention here that one of the partners is male and another is female. There is a reference of mail partner Abas Ali's ailment in the order passed by the Assistant Director of the Enforcement Department of Government of India and because of that, time was sought for filing reply. Then in that situation, it is difficult to presume that the another partner Smt. Nazneen was the person responsible for the business and was incharge of the firm's affairs at the relevant time.
The Delhi High Court in the case *Ajay Bageria Vs. Union of India* MANU/DE/0818/2008 has held as under:

Further, merely being a Director without an averment that he was in charge of the affairs of the Company and responsible to it for the conduct of its business at the time of the commission of the offence does not satisfy the requirement of the law as explained by the Supreme Court in Neeta Bhalla.
The Hon’ble Supreme Court in the case of *Girdhari Lal Gupta v. D.N. Mehta* MANU/SC/0487/1971 has observed as under:

What then does the expression “a person in-charge and responsible for the conduct of the affairs of a company mean”. It will be noticed that the word 'company' includes a firm or other association and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person 'in-charge' must mean that the person should be in over all control of the day-to-day business of the company or firm.
The Hon’ble Delhi High Court in the case of *Satish Kumar Bhalla Vs. Union of India* MANU/DE/0220/2009 has held as under:-

11. The Petitioner may have been a Director at the time when the first exports were made on 31st May 1997 and 3rd June 1997, he was no longer a director on the dates when the realization of the export proceeds were done, i.e., 30th November 1997 and 3rd December 1997 respectively.
The Respondents does not dispute the fact that the Form 32 was filed with the Registrar of Companies showing that the Petitioner ceased to be a director on 28th August 1997, even before the due date for realization of the export proceeds. Therefore, on the date of the alleged commission of offence the deeming provision of Section 68(1) FERA was not attracted as far as the Petitioner is concerned. Therefore, even on this ground the petition is liable to succeed.
The Delhi High Court in the case of **Union of India** Vs. **Amarjeet Singh** MANU/DE/0389/2009 has observed as under:

26. In Mohtesham Mohd. Ismail, the Supreme Court held that in an appeal under Section 54 FERA, the High Court should exercise its appellate power only "when there existed a question of law and not a question of fact."
Even under Section 35 FEMA, an appeal will lie only in regard to a "question of law arising out of such order appealed against." In the present case, the appellant has been unable to point out any such question of law that arises for determination from the impugned order of the Tribunal. What has been pointed out are essentially questions of fact, involving the appreciation of evidence.
FINANCIAL HARDSHIP

- The Hon’ble Supreme Court in the case of Monotosh Saha Vs. Enforcement Directorate 2008(11) SCALE 603, while considering waiver of pre-deposit, explained the legal requirement in paras 13 and 14 as under:

13. For a hardship to be 'undue' it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word 'undue' adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.
The show cause notice must be limited to the case made out therein and the department cannot support the show cause notice subsequently either by stating new facts or producing new documents or filing additional affidavits in support of the return as has been held in the cases of

- **Jackson v. Collector of Customs** JT 1997 (6) SC 1
In the case of M.A. Jackson (supra) a notice to show cause was issued for enhancement of duty.

In the case of GTC Industries Limited (supra) while dealing with Section 11A their Lordships observed as under:-

Each show cause notice must be limited to the case that it is made out therein by the Revenue. It is not within the jurisdiction of the Tribunal to direct otherwise; to do so is to go beyond its purely adjudicatory function."
APPEARANCE BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, APPELLATE TRIBUNAL, MEMBER, SEBI, SEBI APPELLATE TRIBUNAL.
REGIONAL DIRECTOR AND REGISTRAR OF COMPANIES, COMMISSIONER OF EXCISE, SERVICE TAX, INCOME-TAX OR OTHER REVENUE AUTHORITIES.

**POINTS FOR CONSIDERATION:**

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<th>a)</th>
<th>Dress Code:</th>
<th>The proper dress code must be followed:</th>
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<td></td>
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<td>Tell the court the capacity in which you are appearing i.e. Petitioner in person or Practicing Company Secretary or Practicing Chartered Accountant</td>
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<td>b)</td>
<td>Proper Address to the Court</td>
<td>May I respectfully submit – Please your Lordship or Ladyship.</td>
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| c) | How to Start: | i) Briefly narrate the facts of your case  
ii) Legal issues involved for decision by the Court |
d) Your own notes:

I) Identify the issues involved in the case or issues on which you wish to address the arguments before the Court or Authority.

For example: If it is a petition under Section 111/111A Companies Act Now Section 59 Companies Act, 2013. Please show to the court the following Documents with their respective Page Number of your Petition:
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<table>
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<td>a)</td>
<td>Contract Note;</td>
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<tr>
<td>b)</td>
<td>Photocopy of your cheque/DD</td>
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<tr>
<td>c)</td>
<td>Copy of Bank Statement showing Debit of amount in yr account.</td>
</tr>
<tr>
<td>d)</td>
<td>Photocopy of Share Transfer form And Share Certificates;</td>
</tr>
<tr>
<td>e)</td>
<td>Proof of Dispatch &amp; delivery;</td>
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<td>i)</td>
<td>If no reply has been filed by any of the Respondents, please contend that impliedly, the Respondent has no objection if the petition is allowed; or they deemed to have been accepted the averments of the petition - Section 115 of Evidence Act, - Estoppel – Section 114 of Indian Evidence act, A man refuses to answer a question.</td>
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**LEGAL POINTS:**

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<td><strong>a)</strong></td>
<td>Draw the attention of the Hon’ble Court to the provisions of Section 58 &amp; 59 of the Companies Act, 2013.</td>
</tr>
<tr>
<td><strong>b)</strong></td>
<td>Draw the attention of the court to The provisions of Company (Issue of Share Certificate) Rules;</td>
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</tbody>
</table>
| **c)** | Hand over photocopies of all judgments on which you wish to reply upon –  
  i) Judgment be subject-wise,  
  ii) All judgments be duly paged-numbered  
  iii) Relevant portion be duly highlighted with highlighter  
  iv) Your copy be highlighted with pencil  
  v) Never highlight the copies of judgments to be supplied to the opposite party. |
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<th>d)</th>
<th>Highlight any criminal cases pending against the opposite parties - any prosecution pending or decided against them; The CLB is a court of equity;</th>
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<td>e)</td>
<td><strong>Art of Arguments</strong></td>
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<td>Identify the all points on which you have to address your arguments</td>
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<td>(i) Start with the best arguments or master stroke so that the court immediately gets an impression that you have best case and then arguments on subsequent points; Never start with the weak points;</td>
</tr>
</tbody>
</table>
a) During the course of arguments, one should be very humble, polite and soft and present each of the points with softness and politeness;

b) Never be arrogant or shout at the Court;

c) Read the body language of the court, if the court is not able to appreciate your point, repeat the points on more than one occasion;
Disclaimer: Views expressed in the Backgrounder by the Speaker(s) of the Programs are solely his/her own view and the NIRC-ICSI does not accept any responsibility.