17th NATIONAL CONFERENCE OF PRACTISING COMPANY SECRETARIES

Theme
PCS @ Startup - Accelerate - Outpace

Days & Dates
Friday & Saturday, August 12-13, 2016

Venue
Welcome Heritage Glenview Resort
Kasauli, Himachal Pradesh

THE INSTITUTE OF Company Secretaries of India
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
The President of India, Shri Pranab Mukherjee, is happy to know that the Institute of Company Secretaries of the India (ICSI), New Delhi is organising its 17th National Conference of Practicing Company Secretaries on the theme PCS@Startup-Accelerate-Outpace on August 12-13, 2016 at Kasauli, Himachal Pradesh.

The President extends his warm greetings and felicitations to the organisers and participants and sends his best wishes for the success of the Conference.

Deputy Press Secretary to the President
Message

Hon'ble Vice President of India is happy to learn that the Institute of Company Secretaries of India (ICSI) is organizing its 17th National Conference of Practicing Company Secretaries on the theme 'PCS @ Startup – Accelerate – Outpace' on August 12 - 13, at Kasauli, Himachal Pradesh.

The Vice President extends his greetings and congratulations to the organizers and the participants and wishes the event all success.

(Anshuman Gaur)

New Delhi

4th August, 2016
Message

The Prime Minister is happy to learn that The Institute of Company Secretaries of India is organizing its 17th National Conference of Practicing Company Secretaries on the theme 'PCS@Startup-Accelerate-Outpace' from 12th-13th August, 2016 in Kasauli and publishing souvenir to mark the occasion.

On this occasion, best wishes for the organizers and participants.

(Chandresh Sona)
Deputy Secretary

25 July, 2016
New Delhi
Message

I am happy to note that the Institute of Company Secretaries of India (ICSI) is organizing 17th National Conference of Practicing Company Secretaries on the theme "PCS @ Start-up-Accelerate-Outpace" and also bringing a souvenir to commemorate the occasion.

Entrepreneurship is a key to creditable success of Economies worldwide, and today India is all set to promote the same through its Start-up India drive and allied initiatives. Company Secretaries as a versatile professional can support the growth of entrepreneurship by their value added services to budding start-ups and with this they themselves can also lead as successful entrepreneurs.

I convey my best wishes for the Conference a grand success.
The Institute of Company Secretaries of India is a premier national professional body constituted under an Act of Parliament, namely the Company Secretaries Act, 1980 (Act No. 56 of 1980) to regulate and develop the profession of Company Secretaries.

The Institute has on its rolls over 45,000 members including over 8,000 members holding certificate of practice. The number of current students is around 4,00,000.

**Vision**

“To be a global leader in promoting good corporate governance”

**Mission**

“To develop high calibre professionals facilitating good corporate governance”

**ICSI Nationwide Network**

Head Office - New Delhi

Chapters - 69

Counsellors - 170

Examination Centres - 204

Regional Councils - Chennai, Kolkata, Mumbai, New Delhi

Centre for Corporate Governance Research & Training (CCGRT) - Navi Mumbai
Objectives and Functions

The Institute

• develops a cadre of highly competent Company Secretaries for ensuring good corporate governance and effective management by registering students with 10+2 and graduate qualifications for Foundation and Executive Programmes of Company Secretaryship Course respectively with course contents in Law, Tax, Management, Accounting and Finance disciplines;

• provides postal/oral/web-based coaching and training enabling students to qualify as Company Secretaries;

• conducts Company Secretaryship Examination twice a year in June and December, at 204 centres spread all over India and an overseas centre at Dubai;

• arranges practical training for Executive/Professional Programme pass Students with Companies/Practising Company Secretaries empanelled with the Institute for the purpose;

• enrolls qualified persons as Associate/ Fellow Members of the Institute and issues Certificate of Practice to members taking up practice;

• conducts Post Membership Qualification Courses for Members of the Institute;

• publishes widely read and highly acclaimed monthly journal ‘Chartered Secretary’ disseminating information, expeditiously;

• brings out ‘Student Company Secretary’ and ‘CS Foundation Course Bulletin’ for the benefit of Students;

• circulates CS Updates containing current notifications and circulars relating to various corporate and related laws, daily;

• exercises professional supervision over the Members of the Institute both in practice and in employment on matters pertaining to Professional Ethics and Code of Conduct;

• undertakes research in Law, Management, Finance, Capital Market, Corporate Governance and CSR and brings out research publications;

• formulates Secretarial Standards and brings out Guidance Notes thereon;

• renders expert advisory services to Members on intricate issues relating to various corporate laws;

• organises Professional Development and Continuing Education Programme(s), International/National/ Regional Conventions and Conference(s) directly or through its Regional Councils and Chapters, Chambers of Commerce, Department of Public Enterprises, Sister Professional Institutes and other Professional Development/ Management Bodies;

• interacts with various National and Regional Chambers of Commerce with regard to various Government Policies and Legislations;

• interacts with various international/multilateral bodies/institutions with regard to issues relating to the Corporate Governance, Business Ethics, Sustainability and Corporate Social Responsibility;

• interacts with Government both at Centre and States on various issues concerning the profession;
• undertakes benevolence of members and employees;
• interacts with Members of Corporate Secretaries International Association (CSIA) and Company Secretaries Institutes in other jurisdictions;
• bestows ICSI National Award for Excellence in Corporate Governance to best governed companies;
• bestows ICSI Lifetime Achievement Award to eminent corporate personalities for Translating Excellence in Corporate Governance into Reality;
• conducts Investor Awareness Programmes throughout the country on behalf of the Investor Education & Protection Fund, Ministry of Corporate Affairs;
• undertakes Research Projects on behalf of Government and its agencies / Institutions.

Building Future Professionals to Guide Corporate India
The ICSI conducts the Company Secretaryship examination to bring in high level professionals specialized in corporate laws, management and governance.

Stages of Company Secretaryship Course
The Company Secretaryship Course is conducted in three stages as under:
• **Foundation Programme**: Candidates who have passed Senior Secondary Examination (10+2) are eligible for admission to Foundation Programme.
• **Executive Programme**: Graduates in any stream excluding Fine Arts or candidates who have passed the Foundation Examination are eligible to join Executive Programme.
• **Professional Programme**: A registered student is admitted to the Professional Programme on passing the Executive Examination.

Training
The candidates are also required to complete the following trainings:
• Three years on registration for Executive Programme; or
• Two years after passing the Executive Programme Examination; or
• One year after passing the Professional Programme Examination on whole time basis during working hours; or
• Fifteen days Academic Programme; or
• Fifteen days Management Skills Orientation Programme (MSOP).

The Company Secretaryship course is conducted through distance learning and supplemented by Class Room teaching as well as e-learning. The Institute also initiated a Full time Company Secretaryship course at CCGRT.

Associate Membership
After successful completion of examination and training, a candidate is conferred with Associate Membership of the ICSI.

Fellow Membership
A member of the Institute is entitled to get himself enrolled as a fellow, if he is an Associate Member for atleast five years.

Company Secretary – A Lead Professional
A Company Secretary is defined under the Company Secretaries Act, 1980 to mean a person who is a member of ICSI.
Company Secretary in Employment

Section 203 of the Companies Act, 2013 provides that every listed company and every other public company having a paid-up share capital of ten crore rupees or more shall have the whole-time key managerial personnel. Further, other companies having a paid up share capital of five crore rupees or more shall have a whole-time Company Secretary.

A Company Secretary in Employment,

• acts as a vital link between the company and its Board of Directors, shareholders and other stakeholders and regulatory authorities
• plays a key role in ensuring that the Board procedures are followed and regularly reviewed
• provides the Board with guidance as to its duties, responsibilities and powers under various laws, rules and regulations
• acts as a compliance officer as well as an in-house legal counsel to advise the Board and the functional departments of the company on various corporate, business, economic and tax laws
• is an important member of the corporate management team and acts as conscience seeker of the company

Company Secretary in Practice

The Company Secretaries Act, 1980 entitles a member of the Institute to practice whether in India or elsewhere only after obtaining from the Council of the Institute a Certificate of Practice. The Certificate of Practice is subject to renewal on annual basis.

Code of Conduct for Members

The members of the ICSI are subject to Code of Conduct provided under the Company Secretaries Act, 1980.

Regulatory Supervision

The Institute maintains strict regulatory supervision over its practising members through issuing Guidelines in accordance with the provisions of Company Secretaries Act, 1980.

• Guidelines for Advertisement by Company Secretary in Practice
• Guidelines for issuing Compliance Certificates and Annual Returns
• Guidelines for Requirement of Maintenance of a Register of Attestation/Certification services rendered by Practicing Company Secretary/Firm of Practicing Company Secretaries.

Disciplinary Control

The Company Secretaries Act, 1980 and the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 made by the Central Government in exercise of powers conferred under of the Company Secretaries Act, 1980 provide elaborate provisions and fast track process for dealing with the complaints of professional or other misconduct filed under the Act.
The Council

President
Mamta Binani (Ms.)

Vice-President
Shyam Agrawal (Dr.)

Members (in Alphabetical Order)

Gopal Krishna Agarwal
Santosh Kumar Agrawala
   Ahalada Rao V.
   Rajiv Bajaj
Amardeep Singh Bhatia
C. Ramasubramaniam
Vineet K. Chaudhary
Ashish C. Doshi
Ashish Garg
Gopalakrishna Hegde
Vijay Kumar Jhalani
Makarand M. Lele
Mahavir Lunawat
Atul H. Mehta
Ranjeeet Kumar Pandey
Rajesh Sharma
Satwinder Singh
Yamal Ashwinkumar Vyas

Secretary
Dinesh Chandra Arora

Practising Company Secretaries Committee

Chairman
Ashish Garg

Members

Ahalada Rao V.  Ranjeet Kumar Pandey
Ashish C. Doshi  S. K. Agrawala
Atul H. Mehta  Vineet K. Chaudhary
Rajiv Bajaj
Northern India Regional Council
(ICSi-NIRC)

Manish Gupta  
Dhananjay Shukla  
Pradeep Kumar Debnath  
Rajeev Bhambrí  
Amit Gupta  
Avtaar Singh  
Deepak Arora  
Manish Aggarwal  
Monika Kohli (Ms.)  
Nitesh Kumar Sinha  
N.P.S. Chawla  
Saurabh Kalia  
Rajiv Bajaj  
Ranjeet Kumar Pandey  
Satwinder Singh  
Shyam Agrawal (Dr.)  
Vineet K. Chaudhary  

Chairman  
Vice-Chairman  
Secretary  
Treasurer  
Member  
Member  
Member  
Member  
Member  
Member  
Ex-officio  
Co-opted  
Ex-officio  
Ex-officio  

17th PCS Conference Organising Committee

Ashish Garg  
Rajiv Bajaj  
Vineet K. Chaudhary  
Ranjeet Kumar Pandey  
Satwinder Singh  
Mamta Binani  
Shyam Agrawal  

Chairman  
Member  
Member  
Member  
Member  
Special Invitee  
Special Invitee
17th PCS Conference Organising Sub-committee

Vineet K. Chaudhary  Chairman
Ranjeet Kumar Pandey  Member
Rajiv Bajaj  Member
Satwinder Singh  Member
Manish Gupta  Member
G S Sarin  Member
Smriti Sud (Ms.)  Member
Sonia Baijal (Ms.)  Member Secretary

Souvenir Committee
Satwinder Singh  Chairman
Meena Rohilla  Member
Sudarshan Kumar Sharma  Member

Fund Raising Committee
Ranjeet Kumar Pandey  Chairman
Madhur Bain Singh  Member
Kanwal Arora  Member

Delegate Committee
Manish Gupta  Chairman
Shivani Sekhri  Member
Soumendra Das  Member

Hospitality & Reception Committee
G S Sarin  Chairman
Smriti Sud  Co-Chairperson
Nitin Kumar  Member
Arvind Sharma  Member

Tour & Transport Committee
Rajiv Bajaj  Chairman
K V Singhal  Member
Mukesh Kumar Sharma  Member

Public Relations & Cultural Programme Committee
Manish Aggarwal  Chairman
Vishwajeet Gupta  Member
Rameshwar Sharma  Member
ICSI - CENTRE FOR CORPORATE GOVERNANCE, RESEARCH & TRAINING (CCGRT)

The primary objective of the Centre is to act as a catalyst organisation in the professional development of the Indian corporate sector through qualitative research and high level corporate training with ‘Corporate Governance’ as the thrust area. Since its inception, the Centre has undertaken a number of activities.

**Professional Development Programmes**

ICSI-CCGRT conducts Professional Development Programmes (PDPs) for members, students, corporates and regulatory / government bodies. Apart from programmes for upgradation / updation of the knowledge base of Company Secretary functions, ICSI-CCGRT has designed programmes for enabling Company Secretaries to venture more effectively into newer areas.

ICSI-CCGRT provides reading material for these programmes, generally based on in-house research. These materials are also available for sale. Some such materials include Compliance with Listing Agreement, New Takeover Code (With Checklists and Formats), Revised Schedule VI, Labour Laws, Balance Sheet Analysis, Shareholders’ Agreement, SMEs and Company Secretaries etc.

**Integrated Company Secretaryship Course**

In order to groom the students of Company Secretaryship Course better to meet the challenges of today and build a niche cadre of professionals who can shoulder the responsibilities assigned to them in an evolving business environment and ensure governance in true letter and spirit, Centre for Corporate Governance, Research & Training (CCGRT) of the Institute of Company Secretaries of India (ICSI) is offering three years Integrated Company Secretaryship Course (Full-Time).

This Course is being delivered by CCGRT at its premises in CBD Belapur, Navi Mumbai through Academia, Industry Experts and Practitioners. The Course inter-alia covers the syllabus of the CS Course as notified by ICSI from time, focusing on experiential learning and, combining class room lectures, discussions, class exercises, case studies, mock meetings, industrial visits etc. and training in Soft skills, Leadership Traits and other Life Skills. Students are exposed to real life organisational situations, professional dilemmas etc. to enable them to develop holistic perspective towards decision making and governance. In addition, CCGRT also facilitates the following for the students of this Course:

- Registrations and Enrollments with ICSI
- Educational Loans for the Course
- Internship/Training
- Hostel Assistance around CCGRT for outstation candidates on request
- Placement Assistance

This not only prepares the students to complete the Company Secretaryship course,
thereby making them eligible to be the members of ICSI but also build their soft skills enabling them to be the governance leaders of tomorrow.

**Annual Membership Scheme**

ICSI-CCGRT continues with its Annual Membership Scheme, which is an invitation to all professionals, individuals and corporates, to attend a variety of Professional Development programs free of cost by making one-time payment. ICSI-CCGRT has also introduced a new flexible Annual Membership Scheme, which comprises of four different kinds of schemes; including a special scheme for members outside Mumbai.

**Residential Management Skills Orientation Programme (R-MSOP)**

An activity added to ICSI-CCGRT’s training initiatives for students pursuing Company Secretarship course is through the Residential Management Skills Orientation Programme. ICSI-CCGRT organizes Residential MSOPs where students from all over India, including from non-metro cities and abroad take advantage and get the opportunity for interaction with expert professional faculty. In addition to the core subjects of MSOP, the participants are also exposed to topics on soft skills, general management, human relations, financial markets etc. Students also get an opportunity to enhance their communication skills, presentation skills and co-operative learning through presentation of group projects and case studies before a panel of experts. ICSI-CCGRT with its amenities, well designed programme schedule incorporating varied topics, adept faculties possessing rich exposure and expertise in their relative fields and placement assistance has helped create a niche for its R-MSOP.

**Research Related Activities**

In order to foster and nurture proactive research among Company Secretaries and other researchers, ICSI-CCGRT was entrusted with the responsibility of administering the ICSI Research Initiative. The basic idea has been to develop sound information base and insights into corporate /related laws, their delivery mechanism, need for harmonization /changes in the light of emerging realities, corporate governance etc., and to use the developed knowledge base for brand building and interacting with the Government, regulatory and international agencies.

CCGRT has, since inception, completed a number of commissioned research projects for outside agencies/institutions.

**Infrastructure facilities**

The facilities at ICSI-CCGRT have been upgraded. ICSI-CCGRT with its modern infrastructure facilities comprising 180 seats, well-appointed auditorium with ultra modern audio visual acoustics, state-of-the-art training and conference halls of varying capacity, equipped with world class audio – visual facilities, residential wing of 22 air-conditioned self-contained rooms is now equipped to organize further high end training programmes.
Articles

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2. Real Estate (Regulations and Development) Act, 2016: A Ready Reckoner
   
   CS Ketan S. Madia

3. Startup India – Professional Opportunities for PCS – Real Estate Act
   
   CS Sharad Jhunjhunwala

4. The Real Estate (Regulation and Development) Act, 2016: A Perspective Analysis
   
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   CS Divesh Goyal

6. NCLT – A Forum to Prove Professional Competence
   
   CS (Dr.) M. Govindarajan

7. Preparedness of Company Secretaries (with Specific Reference to Appearance before NCLT / NCLAT)
   
   Prof. R. Balakrishnan

8. Journey of Competition Law in India
   
   CS Anupama Kakarlapudi

9. Competition Act, 2002: Exemptions and Exceptions
   
   CS Surendra U Kanstiya

    
    CS K G Saraf

    
    CS Divesh Goyal

12. Goods and Services Tax – An Overview
    
    CS (Dr.) Sanjiv Agarwal
Professional Opportunities for PCS: Covering Insolvency Laws, GST, Arbitration Law & Real Estate Act

CS Meenu Gupta*

Introduction

In a bid to boost employment generation and wealth creation and with a move towards ease of doing business in India, the Government passed the Insolvency and Bankruptcy Act, 2016, the Real Estate (Regulation and Development) Act, 2016, the Model Goods and Services Tax Law, 2016 and amendments to Arbitration Law to provide opportunities to professionals including Company Secretary in Practice. The article highlights the professional opportunities for PCS under these laws.

I. Insolvency Law - Opportunity to PCS


As per the Act, where any company or LLP commits a default in paying its financial debt or operational debt, a financial creditor/operational creditor/Company or LLP itself may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority. The National Company Law Tribunal will be the adjudicating authority to deal with insolvency matters of Company & LLP and the Debt Recovery Tribunal will be adjudicating authority to deal with insolvency matters of individual and partnership firm.

Composition of the Tribunal and Qualification of President and Members of Tribunal

1. Judicial Member
   — High Court - Judge
   — District Judge for atleast 5 years
   — Advocate of the court for atleast 10 years.

2. Technical Member
   Member of Indian Corporate Law or legal services (15 years) out of which 3 yrs as Joint Secretary to the GOI or equivalent or above.
   — PCS (15 yrs), PCA (15 yrs), PCWA (15 yrs)
   — Person with special knowledge (15 yrs) and Presiding Officer of Labour Court (5 yrs) or Industrial Disputes Act, 1947

* ACS, MBA (F). The views expressed are personal views of the author and do not necessarily reflect those of the Institute.
The Companies (Second Amendment) Act, 2002 provides for setting up of an NCLT and Appellate Tribunal to replace the erstwhile Company Law Board (CLB) & Board for Industrial and Financial Reconstruction (BIFR). The setting up of NCLT and NCLAT are part of efforts to move at a regime of faster resolution of corporate disputes, thus, improving ease of doing business in India.

**Nature of Powers exercised by Tribunals**

The establishment of the National Company Law Tribunal (NCLT) consolidates the corporate jurisdiction of the following authorities:-

- Company Law Board
- Board for Industrial and Financial Reconstruction.
- The Appellate Authority for Industrial and Financial Reconstruction.
- Jurisdiction and powers relating to winding up restructuring and other such provisions, vested in the High Courts.
- With the establishment of the NCLT and NCLAT, the Company Law Board under the Companies Act, 1956 stands dissolved.

**Powers of NCLT**

- NCLT would entertain proceedings which have been transferred to the Tribunal from High Court or Company Law Board or any other court or Tribunal as provided in section 434 of the Companies Act, 2013 ("Act") and also scheme of revival.
- Power of High Court in the matters of mergers, demergers, amalgamations, winding up, etc.
- Power of Winding up of Company
- Power to entertain application to failure in redemption of debentures or repayment of deposits or any part thereof or any interest thereon under the Act or RBI Act, 1934.
- Compounding of certain offence

**Opportunities & Scope for Practicing Company Secretary Professionals**

(i) *Compromise & Arrangement*: With the establishment of NCLT, a whole new area of practice will open up for Company Secretary in Practice with respect to advising and assisting corporate sector on merger, amalgamation, demerger, reverse merger, compromise and other arrangements right from the conceptual to implementation level. PCS will be able to render services in preparing schemes, appearing before NCLT/NCLAT for approval of schemes and post-merger formalities.

(ii) *Sick Companies*

   (a) Identification of Sickness: The PCS can identify the sickness of company as defined under the Act and place the matter before the Board of Directors of the company to take necessary action for making reference to the Tribunal for revival and rehabilitation of the Company.

   (b) Assistance in Revival: PCS may assist and advise the Sick Company in making
reference to the Tribunal, preparing scheme of rehabilitation, seeking various approvals from the Tribunal as may be required. Reference is to be made to the NCLT within a period of 180 days from the date on which Board of Directors of the company or the Central Government, Reserve Bank of India or State Government or a Public Financial Institution or a State level institution or a Scheduled Bank as the case may be come to know of the relevant fact giving rise to causes of such reference or within 60 days of final adoption of accounts whichever is earlier.

(c) Winding Up: The NCLT has also been empowered to pass an order for winding up of a company. Therefore, PCS may represent the winding up case before the Tribunal. Unlike the earlier position allowing only government officers to act as Official Liquidators, now professionals like Practising Company Secretaries have been permitted to act as Liquidator in case of winding up by the Tribunal.

(d) Reduction of Capital: As per amended section 100 of the Companies Act, subject to confirmation by the Tribunal, a company limited by shares or a company limited by guarantee and having a share capital may if so authorized by its articles by special resolution reduce its share capital. The PCS will be able to represent cases of reduction of capital before the Tribunal.

(e) PCS as Member of NCLT: PCS can be appointed as a Technical Member of NCLT, provided he has 15 years of experience as secretary in whole-time practice. A PCS has been authorised to appear before National Company Law Appellate Tribunal.

In view of vast opportunities emerging with the establishment of NCLT, the PCS should standardize their competencies with the global benchmarks to provide value added services in assisting the Tribunal in dispensation of justice and speedier disposal of matters like merger, amalgamation, restructuring, revival and rehabilitation of sick companies and winding up of companies.

II. Professional Opportunities - Real Estate Act, 2016

Real Estate, one of the fastest growing markets in the world, has four components—housing, retail, hospitality and commercial, of which the housing comprises 5-6 percent of India’s GDP. Gone are the days when constructing a house or purchasing a house was treated as lifetime achievement. At present soon after joining in employment people are thinking to have their own house. Hence, more and more people are investing their life time earnings in real estate market. Real Estate projects in India are taking comparatively longer time to complete due to very complicated procedures, and because of which ultimately the consumer or the buyer suffers. To protect both the promoter and the consumers, Parliament has recently introduced Real Estate (Regulation and Development) Act, 2016 which has received the assent of the President on 25th March 2016 and notified in official Gazette of India on 1st May 2016. This Act has to establish Real Estate Regulatory Authority (RERA) for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals.
Opportunity for PCS under Registration of Real Estate Project

Promoter means a person who constructs a building or develops land into project for sale. If the land proposed is more than 500 square meters or the number of apartments proposed is more than 8 (Appropriate Govt. may reduce the limit), then the promoter has to get the project registered under this Act.

For registration of the project, the promoter has to submit the following documents along with the prescribed application;

(a) Name, registered address, type of enterprise, its registration with other Acts, and names and photographs of promoters.
(b) Details of projects launched in the past 5 years, their status, details of cases pending, details of type of land and payments pending.
(c) Certified copies of approvals and commencement certificates.
(d) Sanctioned plan and Layout plan.
(e) Plan of development works and facilities including firefighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy etc.,
(f) Location details of the project.
(g) Proforma of allotment letter, agreement of sale, conveyance deed.
(h) The number, type and the carpet area of apartment for sale.
(i) The number and areas of garage for sale in the project.
(j) Name and address of real estate agents proposed.
(k) Name and address of contractors, architects, structural engineers.
(l) A declaration supported by affidavit which shall be signed by the promoter or his authorised person that:
   (i) Legal title to the land proposed is legally valid documents with authentication of such title.
   (ii) Land is free from all encumbrances.
   (iii) Time period for completion of project.
   (iv) A separate bank account is to be opened in a scheduled bank. At least 70% of the amounts realised for the proposed project from the buyers/purchasers/allottees from time to time is to be deposited into that bank account and to be exclusively spent for the Land cost and cost of construction. Promoter shall withdraw amounts from this separate bank account for construction purpose only in proportion to the percentage of completion of the project by obtaining a certificate from an engineer, architect, and a chartered accountant that the withdrawal amount is in proportion to the percentage of completion.

Opportunity to Professionals

At the time of each withdrawal of amount from the separate bank account, promoter contacts a practicing Chartered Accountant. After verifying certificates issued by an engineer
and architect, Chartered accountant has to certify the withdrawal amount. The proportion to the percentage of completion of the project must be stated in the certificate.

Since Company Secretary in Practice is equally well versed with corporate laws, accounting and secretarial audit services, they can be provided with the opportunity to certify the withdrawal amount under the Act.

**Representation before Appellate Tribunal**

Appropriate Govt. within a period of one year establishes appellate tribunal known as Real Estate Appellate Tribunal (REAT). The applicant or appellant may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his case before the appellate tribunal or regulatory authority or adjudication officer.

**III. Opportunity for PCS under Goods & Services Tax**

Empowered Committee of State Finance Ministers on 14th June, 2016 uploaded Model GST Law on website. Now Practicing Company Secretary is part of GST Law. The Good and Services Tax is the biggest indirect tax reform since 1947. This will be levied on manufacture and sale and consumption of goods and services. In the words of Finance Minister Arun Jaitley, the GST will lead to the economic integration of India.

The main function of the GST is to transform India into a uniform market by breaking the current fiscal barrier between states. Thus, GST will facilitate a uniform tax levied on goods and services across the country.

**Role of PCS under GST Law**

A company secretary is well versed in legal discipline by virtue of his academic knowledge and practical training and particularly understand the law subjects. GST would be a law majorly based on the concept of one tax one commodity. It is easier for the Company Secretary to understand and be an expert in the subject of GST. Company secretary can play an important role being an advisor and facilitator for due compliance of laws relating to GST to the general business community and corporate world as well. The company secretary can perform the following types of services to clients:-

(i) *Advisory services or strategic advisor* – The businesses would require regular services in areas such as determining place of supply, determining what are ‘goods’ and what are ‘services’, availability of credits and maintenance of records. Advisory services will also be required in dealing with unique issues such as inter-state supply of services (such a concept will be in play for the first time for service providers), inter-state supply of intangibles and valuation of branch transfers. A company secretary can better interpret the proposed GST law and provide comprehensive guidance and advisory to the business since the CS study curriculum includes paper on “Tax Laws and Practice” which includes Income Tax, Service Tax and VAT and paper on ‘Advanced Tax Laws and Practice’ including Income Tax, International Tax, Central Excise and Customs, International taxation. The course covers various components of proposed GST and once GST is in place, syllabus will automatically include GST in course curriculum.
(ii) **Tax Planning**: With a new law, comes a new set of tax / procedural issues and hence the professionals also need to evolve and devise new tax planning strategies. Under the proposed GST, taxes would be levied on destination base as compared origin base under the existing laws. Also, a new credit mechanism has been proposed. The business would accordingly be required to relook the existing transactional methodology to minimise taxation and hence would require the services of professionals for the same. Company secretary is competent to understand the impact of laws and its various alternatives based on the proper tax planning.

(iii) **Procedural Compliances**: The industry will immediately require assistance in terms of registration under the new law, details and mechanics of records to be maintained. Needless to say regular services such as payment of taxes, filing of returns, assessment and audit-related services would continue. And the procedure of compliance is the easiest task for Company Secretary because Company Secretary is already playing a role of Compliance Officer under various other laws.

(iv) **Representation before Competent Authorities**: As the new regime kicks in, litigation support would increasingly be required by the industry. Be it appearance before the Departmental officers, drafting (Replies, Appeals, Petitions) or appearance before higher forums, there is tremendous scope for company secretary in the litigation space.

**IV. Arbitration Law - An Opportunity for Company Secretaries**

In order to transform India from a 'least favoured' to 'most favoured' place for international arbitration after Singapore and London, suitable amendments to the existing Arbitration Act were contemplated. Subsequently, in an attempt to make arbitration a preferred mode of settlement of commercial disputes and making India a hub of international commercial arbitration, the President of India on 23rd October 2015 promulgated an Ordinance (Arbitration and Conciliation (Amendment) Ordinance, 2015, amending the Arbitration and Conciliation Act, 1996. The Arbitration denotes a dispute, appointment of a referee to adjudicate upon the dispute and the emphasis is on amicable settlement. It is a consolidated act containing provisions about domestic arbitration and conciliation, international commercial arbitration and enforcement of certain foreign awards.

Company secretaries are not only corporate legal experts but due to the very nature of profession, their knowledge is far superior in respect of commercial understanding. They have an edge in the sense that they understand the underlying commercial transaction or the legal framework in a more effective manner.

(i) **As a Counsel for the Client**: Since the Company Secretaries are exposed to various facets of law and the management, they can formulate a better strategy in arbitral proceedings while advising to the client. Thus, company secretaries in practice can act as strategist and authorized representative in arbitral proceedings. A Company Secretary normally represents the cases of his clients before various authorities including the Tribunals, Company Law Benches, SEBI, RBI etc. He can specialize in arbitration matters particularly those connected with breach of contracts, insurance claims, loss of profit, securities fraud, commercial disputes, rights of properties, lease transactions etc. and represent his clients in Arbitration proceedings.
(ii) **As an Arbitrator**: Company Secretary can act as Arbitrator/Conciliator in domestic and international commercial disputes. A body of arbitrators should be made by including Company Secretaries. Thus, they can act as arbitrators and the society can get the benefit of their knowledge and expertise in commercial and legal matters.

(iii) **As an Expert**: Under Sec 26(1) of the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal may appoint expert/s to report on any specific issue to be determined by it. A Company Secretary can help the arbitral tribunal in the capacity of an expert in matters relating to accounts, commercial transactions, lease transactions etc where he has sufficient domain knowledge.

(iv) A PCS can become a part of Mediation & Conciliation Panel consisting of experts having prescribed qualifications for mediation between the parties during pendency of proceedings before Central Govt./NCLT/NCLAT.

(v) A Company Secretary known for his/her drafting skills can provide services in relation to drafting of Arbitration/Conciliation Agreement/Clause.

(vi) In Clause 14 of First Schedule to the Limited Liability Partnership Act 2008 -All disputes between the partners arising out of the limited liability partnership agreement which cannot be resolved in terms of such agreement shall be referred for arbitration as per the provisions of the Arbitration and Conciliation Act, 1996.

**Conclusion**

In view of vast opportunities emerging with the establishment of NCLT under insolvency laws, enactment of Real Estate Act, the GST Law, the Practicing Company Secretaries should standardize their competencies to be ahead of their professional competitors including Chartered Accountants, Advocates, etc. Company Secretaries should develop thorough knowledge about the Civil Procedure Code, 1908 and Indian Evidence Act, 1872 as many a times the arbitration proceedings are conducted in accordance with these laws. With a new law, comes a new set of challenges and in comes newer opportunities. So the key to seizing the various opportunities would largely depend on being well prepared with the provisions applicable to new laws.

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Real Estate (Regulations and Development) Act, 2016: A Ready Reckoner

CS Ketan S. Madia*

Background

Real estate industry is not only one of the largest industries of Indian economy, but also an extremely complicated industry. Most large and small developers face the ire of home buyers due to various reasons like:

• Delay in handing over possession
• Change in scope and plan
• Not delivering what was promised at the time of booking
• Inferior quality of material used.

The developers get away with all this primarily because land is an asset where the supply is fixed, but the demand keeps increasing due to migration into urban centers, increase in disposable incomes, younger buyers and also as a means of investment.

In this backdrop, the Real Estate (Regulations and Development) Act, 2016 has been enacted to serve the following objectives:- Consumer Protection, Regulatory monitoring of developers and intermediaries, Fixing timelines for registration of projects, and Stating the duties for both developers and buyers.

The Act mandates setting up of Real Estate Regulatory Authority (RERA) in every state by March, 2017, i.e. within one year of passage of this Act. However, real estate is a concurrent subject (governance through both Central and State Government laws), that is why even after the Parliament has passed this law, respective state governments need to build upon these regulations.

Real Estate (Regulation and Development) Act, 2016: A Brief

The Real Estate (Regulation and Development) Act, 2016 (the Act, from hereon) proposes to bring about transparency in the real estate industry, both residential and commercial, by creating a uniform regulatory environment, thereby protecting consumer interest and making developers accountable. It also proposes to set up a Real Estate Regulatory Authority (RERA) for regulation and promotion of real estate sector while promoting transparency in real estate transactions.

* FCS, MBA. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.
Jurisdiction of Real Estate Projects under Real Estate Regulatory Authority (RERA)

Only projects which are still under construction at the time of enactment of the Act and any new project thereon fall under the purview of the RERA, provided they are developed on a land area of more than 500 sq meter or which have more than 8 units with all phases combined.

However, the local governments can change the area requirements to conform to the Act, if required such minimum area threshold can be revised even lower.

Roles and Responsibilities of a Developer under the Act

The key roles and responsibilities laid down include the following:

1. The developer has to register the project with RERA and obtain a valid registration number before going ahead with the project. He is also required to submit all documents related to the project which are considered necessary.

2. The developer cannot commence any kind of marketing, advertising or selling of units before registration of the project.

3. The developer must deposit 70% of the amount received from the consumers in an escrow account and ensure that the amount is solely used for the project for which it was taken. He must refund the money taken from the consumers with applicable interest in case the project cannot be completed for some reason and would also need to compensate the consumer for the time delay if any.

4. The developer must adhere to the project plan. He would also need to repair structural defects, if any, in the construction till 5 years of handing over of the project.

Documentation required for registration of a project with RERA

The documents required would include the following:

1. Details of the project such as name, address, type, names and photographs of the Promoters, sanctioned plan and layout plan, development plan for the project and details of facilities being made available like drinking water, electricity etc.

2. Location of the project with clear demarcation of the land.

3. Proforma of allotment letter, agreement for sale and conveyance deed to be signed with the buyers.

4. Number, type and carpet areas of units to be sold. Number and details of garages which are for sale in project.

5. Details of engineers, contractors, architects and intermediaries associated with the project.

6. Details of existing / earlier projects already launched by the developer and their status (in the preceding 5 years).

7. A declaration / undertaking from the developer.
Is it mandatory to register property at purchase under the Act?

There is lack of uniformity across various states of India. In some places property registration takes place at the initial stage of purchase while in others only an agreement for sale is signed at time of initial purchase but the registration is done later. This Act states that an agreement for sale needs to be registered once 10% of the contracted amount is collected from a consumer by the developer.

What does the Act say about ‘carpet area’ and ‘super built up area’?

Carpet Area is the area within the walls of a unit where a consumer can reside or have his office. Earlier developers would sell flats on the basis of super built up area (carpet area + 25% to 35%), built up area (carpet area + 15% to 20%) and also on carpet area basis. Thus, while a person is buying and paying for a flat of 1000 sft super built up area, he is getting only around 700 sft carpet area. The rest goes towards common areas like staircase, lift, generator room, etc. Therefore, to ensure that the consumer knows what he is paying for, it has been made mandatory for the developer to specify carpet area. Even the balconies, verandahs or terraces which are exclusively available within a unit cannot be added to the Carpet Area.

Can a developer change plans once the project is launched or is under construction?

While minor changes can be made to a unit plan (which includes fixtures, fittings etc) after proper declaration & intimation to the customer and certification by an architect or an engineer that such changes are required for architectural and structural reasons, major changes, i.e. changes to sanctioned plans, layout plans, and specifications of buildings or common areas can not be brought about without consent of at least 2/3rd of buyers.

What are the penalties if a developer fails to comply with requirements under RERA?

If any developer violates the registration procedures prescribed by the Act, he will be required to pay up to 10% of the total estimated cost of the project in question. For a continuing offence, the punishment will increase to either imprisonment (up to 3 years) or a fine which may extend up to a further 10% of the above project cost. In a Joint Venture Project, the Act makes both the developers and the landlord liable to adhere to the Act.

What are the guidelines on advertisements?

Developers generally use various marketing tools including brochures, media advertisements etc to attract consumers. Eventually there is a mismatch between the final product and what had been shown in the brochures. Under this Act, anything shown in the marketing material needs to be in line with the final product or else developer will be liable to penalty.

What are the rules applicable for an intermediary?

An intermediary is now required to be registered with the RERA and possess a valid registration number before facilitating a sale or purchase of a project or acting on behalf of any developer for the same. He shall also facilitate the possession of all information to the consumer. The Act makes it tougher for the intermediaries to conduct business in an unprofessional manner and in a way prompts them to adopt ethical means of dealing with
consumers. Misrepresentation, fraud, breach of any terms and conditions of the Act and any sort of unfair practice can cause the registration to be revoked.

What are the measures taken to secure consumer interest and empower him?

(1) The consumer is entitled to receive information about the sanctioned plan, layout plan as approved by the competent authority, stage wise time schedule of the project completion and the services promised by the developer like drinking water facility, electricity, sanitation etc. After receiving the physical possession of the unit, the consumer has a right to obtain the necessary documents and plans including that of the common areas.

(2) The consumers can claim possession of the unit and the association of consumers can collectively claim possession of the common areas as declared by the developer.

(3) If the developer fails to meet the timeline or does not deliver what was promised, the consumer has a right to claim refund of amount paid along with prescribed interest and compensation for the same.

(4) The rate of interest charged by the builder (in case of default by the buyer) shall be same as the rate of interest paid by the developer (in case of default by the developer).

What are the responsibilities of a consumer?

There are some responsibilities cast on the buyer also. These include -

1. It is mandatory for a consumer to make timely payments to the developer as per the agreement for sale, alongwith share of registration charges, municipal taxes, maintenance charges, ground rent, electricity charges, water supply charges and any other services. If the consumer is not able to make timely payments for his purchase, he is required to pay interest at a prescribed rate.

2. Once the occupancy certificate is issued by the developer, the consumer is required to take possession within two months’ time. A consumer shall participate towards registration of the conveyance deed of the unit.

3. It is compulsory for a consumer to exhibit active participation in the formation of an association, a cooperative society or any federation of consumers.

What is an escrow account?

One of the biggest problems has been project delays. Builders use the collections from one project into business expansion or construction of other project. Secondly, siphoning of funds by developers has also been a primary cause for project delay. Thereby to protect consumer of a project the Act mandates that all collections 70% funds be deposited in an escrow account maintained with a scheduled commercial bank. These funds can be accessed by a developer only for purpose of construction of the project to which it belongs. The developer can withdraw funds from this account in proportion to stage of work. The request for withdrawal of funds is to be certified by an engineer, architect and a chartered accountant that the developer’s claims are justified. This de-risks consumer to an extent that his payments to developer are being channelized only towards that project.
What is the provision for an aggrieved person to lodge a complaint? Does he have to go through the existing judicial system?

The Act mandates setting up of an Appellate tribunal by the appropriate government within one year of the Act coming into force. So RERA is the first body to be approached in case of disputes and as per set of rules. This body can establish the nature of violation and prescribe the penalty/ punishment. Any person aggrieved by the decisions of the RERA or an adjudicating officer can appeal to the Appellate Tribunal. This set up will fast track the process of dispute settlement since it minimises the involvement of the existing judicial system. A person can appeal in High Court if he is aggrieved by decision of the Appellate Tribunal however this isn’t allowed in cases where the decision was reached after consent of the disputing parties. The person has to approach High Court within 60 days of receiving the decision.

Conclusion

Common people are not experts in real estate, as the industry is extremely complicated with knowledge of finance, legal and secretarial required. Accordingly, it is recommended that a person planning to purchase a property should go through this Act once. It is a short document, less than 40 pages, and should not take more than a couple of hours. If one is putting in a lifetime’s savings into a dream home, these few hours will be well spent, as it will help in understanding consumer’s rights and obligations while dealing with a developer. One should also remember that in case of any doubt, it is always advisable to seek legal advice instead of interpreting provisions in a manner which may be incorrect.
Startup India – Professional Opportunities for PCS – Real Estate Act

CS Sharad Jhunjhunwala*

Introduction

The Real Estate (Regulation and development) Act, 2016 establishes the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish an Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

Scope for Practicing Company Secretaries

The Act empowers the Company Secretary to provide representative services under the Act by appearing before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be on behalf of the Client. In absence of any specific authority, the only forum till date was either the Consumer Forum or the Civil Courts. The Hon’ble Competition Commission was flooded with information against Real Estate Companies after the famous DLF case, but in most of the cases the Commission found that the real estate firms in question did not enjoy dominant position, and hence the commission could not proceed, however the commission did emphatically state that a real estate regulator is desirable. Now, after a long wait, the specific authority has been established and the act has specifically empowered the Company Secretary to file applications and appeals on behalf of their clients. Given the large number of disputes in the real estate sector, the CS has got a very big area of practice. However, a CS will have to compete with advocates and accountants to establish themselves in this area.

The enabling Section 56 is reproduced below:

"The applicant or appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be. Explanation.—For the purposes of this section,— (a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 or any other law for

* Assistant Director, ICSI. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.
the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act; (b) "company secretary" means a company secretary as defined in clause (c) of subsection (1) of section 2 of the Company Secretaries Act, 1980 or any other law for the time being in force and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act; (c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 or any other law for the time being in force and who has obtained a certificate practice under sub-section (1) of section 6 of that Act; (d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice."

Apart from the direct recognition to provide representative services, the CS can also provide other services like consultancy services under the Act and provide secretarial support to the client in complying with the various requirement of the Act.

The members of the Institute can help the authority in discharging its role of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies.

Relevant provision is quoted below:

Section 33(3) : The Authority shall take suitable measures for the promotion of advocacy creating awareness and imparting training about laws relating to real estate sector and policies

Formation of association or society or co-operative of the allottees

RWA’s working for common good

“It is an indisputable fact that urbanisation is expanding at a great speed and, ultimately, there is no doubt that the urban amenities will reach most of India. Currently, there are more than 5,000 urban places in India where nearly 40 percent of Indians are living and they, as local residents are struggling hard to improve quality of their lives by their own efforts. The quality of service from urban local bodies and politicians are always unsatisfactory, delayed, inefficient, vexatious, corrupt, etc. The support of MLAs and MPs come with a price which is always too high for urban residents. In the face of this and in order to realise the promise of a city, what is the solution?

It is the emergence of the Resident Welfare Association (RWA) which is formed by necessity in the areas or colonies and by statute in the apartment-buildings. RWAs are the first school of democracy as residents participate to elect their own governing body. They raise their own financial resources to initiate and maintain social infrastructures like community function halls, day care centres, play grounds, tank-bunds and parks, etc. RWAs deal with all aspects of the resident’s life, from the cradle to the grave. The RWAs are a coordinator and vector of all services from many departments, boards, corporations of the municipal, state and central authorities and cooperate with the constitutional bodies for elections, census, auditing, national security, etc. They form urban micro-communities which are laying the foundations for socio-democratic living

1 http://www.thehindu.com/features/homes-and-gardens/rwas-working-for-the-common-good/article6728173.ece
with new bonds of affinity and friendship, not necessarily limited to blood-relationships. RWAs serve as a tool to promote a cosmopolitan culture of sharing and caring among residents. Children learn social skills, women have more opportunities to express themselves, elderly find security and conviviality which their children may not always be able to provide. It is within these micro urban communities that all those groups that have low incomes and minority identity assertions can be included without conflicts into a cohesive and harmonious society.”

The Act specifically provides that the Promoter shall enable the formation of association or society or co-operative of the allottees. There is huge scope for the practicing Company Secretary to provide professional secretarial services as hundreds and thousands of more such associations would come up by virtue of this Act. The Practicing Company Secretary can not only certify that proper secretarial records were maintained at these associations, but can also certify that the associations followed proper procedures in taking decisions at these associations, popularly known as RWA's.

The PCS can certify the proper conduct of elections and voting, proper conduct of general meeting and that the proper systems and procedures

The PCS can also advice on best practices to these RWA's and help ensure that information technology is used to the maximum possible extent in these RWA's to ensure that these associations are governed in proper efficient manner, following all the principles of democratic institutions. The PCS can help these RWA's to use web based social media tools to revolutionize the way these RWA's function.

The enabling Section 11(4)(e) in present form is reproduced below:-

“Enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable: Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;”

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The Real Estate (Regulation and Development) Act, 2016: A Perspective Analysis

Dr. Gargi Rajvanshi*

Introduction

Over the past decades, India has emerged as one of the few world economies with a combination of healthy economic perspective; successful growth at global platform, amidst the mood of cynicism and uncertainties of emerging economies. It is widely accepted that India is on its road to global growth barring few impediments in her way.

The pursuit to ascertain India’s presence at global platform started from the day we obtained “Purna-Swaraj” in year 1947. The first and second Five Year Plans were aimed to settle down Indian masses with basic necessities of food, shelter and cloth and the rehabilitation of refugees who were the victims of Indo-Pak partition. Further, third and fourth and fifth FYPs were focussed on establishing agriculture as primary sector and promoting growth and development of industries in India. Seventh FYP targeted the promotion and facilitation of industries and agriculture with the ease in government policies and schemes. Then it comes the post liberalization period from 1991.

The introduction of liberalization, privatization and globalization has paved the way for Indian economy to perform meticulously at global platform. This prospect was well utilized by Indian government while introducing various economic reforms, implementing structural changes, and focusing on fundamental growth of various sectors: small, micro, medium and large. This confirms our focussed approach for inclusive development of India at global platform.

Following this approach, Indian economy has exhibited healthy growth rates in last decade. The average growth rate registered is last decade was about 7.2%.

The contemporary scenario of India’s economic growth is assorted with challenges and opportunities. It is contemplated that India is coming as world leader of global economy projected in year 2025-2030 provided that major sectoral impediments in her growth should be effectively addressed.

India’s real estate sector is among the fastest growing markets in the world. Rapid urbanisation, a large population base, rising income and rapidly expanding middle class are some of the factors behind the growth of real estate sector. The sector comprising of housing, retail, hospitality, and commercial is also one of the largest employers in the country. Real

* Assistant Director, ICSI. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.
Estate sector ranked 3rd out of 10 industries who are the major contributors to Indian Economy. Other being transport, agriculture, chemical industry, tourism etc\(^1\).

Real Estate Sector being one of the major contributor to the economy is a sector of soaring concern too. In the constructive memo, where real sector has been the backbone of Indian economy as a major contributor in economic growth with the contribution of 8.53% of total GDP and growth rate to the tune of 30%; on the another off-putting note real estate market in India is facing a bad turn with uncompleted projects all over the country, projected insolvency of builders, lined up consumer cases against builders in courts so one and so forth.

High rate of growth of this sector in over last few years as well as contemporary challenges in the real estate sector and its potential negative reflection on Indian economy’s growth have attracted huge attention from the policy makers which get reflected in policy support of 2005 provided by the government to this sector lately. Recently, the government has come out with Real Estate (Regulation and Development) Act, 2016 which further highlights the strategic position, the sector occupies in the growth scenario of the economy and the measures to address the challenges enrooted this sector.

The study is organised to discuss various concerns and issues related to the real estate sector in India. It also elaborates change in regulatory regime concerning the sector and discusses the recent specialized law concerning the sector.

**Objectives**

1. To analyse the present status of Real Estate Sector in India and its economic importance.
2. To discuss the change in regulatory regime and specialised law related to Real Estate Sector.
3. To discuss the policy support provided to the Real Estate Sector in the recent budget.

**Concerns and Issues**

Indian real estate industry is facing a numerous challenges at present. Some major challenges pessimistically impacting the progress of real estate sector are as follows:

1. **Lack of suitable developable land**: India is facing dearth of suitable developable land with the basic infrastructure facilities. Scarcity of land and the high demand for housing all over the country has resulted in significant surge in land prices especially in the urban areas. Metropolitan cities like Mumbai, Delhi, Bangalore are under highly detrimental demand and supply issues. High demand of the house in these cities has made the prices of the real estate tremendously sky-scraping. People with a decent earning are not able to afford the house. The one who are buying the houses are under the extreme loans from the bank. On an average a person taking loan from the bank is repaying back around more than double of the loan he has secured from the bank. This is raising economic as well as social concern. To overcome this issue of

unavailability of urban land and promote growth of housing stock, several state
governments like Gujarat, Maharashtra and Delhi are introducing the Land Pooling
Policy.²

2.  **Lack of clear land titles:** It has been seen that in majority of the cases the land title is
not clear. The Real Estate Developer makes the customers to subscribe the housing
scheme even before they have gathered the clear titles from the land owner.

3.  **Absence of title insurance:** Title insurance is special kind of insurance which protects
owners’ or a lender’s financial interest in real property against loss due to title defects,
liens or other matters. This kind of insurance is very popular worldwide and specially
in the developed countries. In India, the position of this insurance is at the pits. It has
been put on records many a times that ‘Title Insurance is still a dream in India.’³

4.  **Absence of industry status:** Since long, Real Estate Sector has been an unorganized
sector. Recently in last decade with the initiation of companies taking height in real
estate, this sector has taken a move towards organized budge. According to an
estimate, though it accounts for 10% of GDP, yet the sector lacks industry status. It is
one of the major challenges that the industry is facing with. The resolution of this
challenge will surely mark the smooth development of this sector.

5.  **Lack of adequate sources of finance:** This sector involves the high land cost and high
construction cost; but the delay in approvals and the liquidity issue results into the
crunch of money in this sector. As it is known that lack of financial resources may
adversely affect the growth of any adventure, so is equally applicable with real estate
sector. The lack of proper finances is affecting the projected growth of real estate
sector.

6.  **Shortage of labour:** The sector is also running into the shortage of skilled labour.
This in turn is resulting into the delay in projects. In majority of cases the delay in real
estate projects is also leading to legal proceedings.

7.  **Rising man power and material cost:** One rule of economics says that scarcity of a
commodity clubbed with its demand raises the price of the commodity.

   Shortage of Commodity + High Demand in market = Hike in Commodities Price

   This is applicable to the labour also. Therefore, real estate market is facing the
challenges of rising cost of man power and materiel.

8.  **Approvals and procedural difficulties:** Our legal system is very complex. For real
estate, one has to follow central laws and state laws also. This is creating complication
in the compliance procedure for real estate sector. Lot many approvals and complex
procedures for them are resulting in delays in real estate market. This challenge is
also a big contributor in the downfall of real estate sector.

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² Land Pooling Policy.
   Available at http://articles.economictimes.indiatimes.com/2005-08-21/news/27511903_1_title-
   insurance-insurance-companies-policy (Last Accessed: 8th July, 2016).
Legal Regulation of Real Estate: Change in Regulatory Regime

India is the possessor of large landscape. Its possession of large landscape coupled with the circumstances like rise of nuclear families, rise of Tier – II and Tier III cities, rise in disposal income, opening up of real estate market to foreign Direct Investments alike has created a boom in the Real Estate Industry. The increase of Real Estate Industry, its market share and investments has made one of the top contributors to Indian Economy. Significant performance of Real Estate Industry with the significant rights and liabilities involved in the transactions has fetched the government attention for proper policy and regulation of real estate sector.

Pre-Real Estate (Regulation and Development) Act, 2016: A Brief

Initially the government has not planned for any specialized law for this sector. The sector was very well governed with plethora of laws. Major laws applicable to Real Estate Sector are as follows:

1. Indian Contract Act, 1872: Regulating Contractual Obligation of Parties;
2. Transfer of Property Act, 1882: Regulating Property Transfers;
3. Competition Act, 2002: Regulating anti-competitive practices in real estate sector
5. FDI Policy: Foreign Direct Investment in Real Sector
6. Company Act, 2013: Regulation of formation and function of companies into real estate business
8. And many more.

Post 2010 has seen fall of Real Estate Sector with embarrassing challenges and concerns even in the existence of these plethora of laws and regulations. Apart from this, other strong factors like the concern of consumers, investors and adverse effect on Indian economy have led the government to initiate the specialised law to regulate this sector.

In year, 2012 the government has put in the perspective for the specialized law regulating the real estate sector. In year 2013, Real Estate (Regulation and Development) Bill, 2013 was prepared and put in the House of People. The Bill was aiming at introducing transparency and Governance in the Real Estate Sector. This Bill has proposed the framework for a regulatory body, the Real Estate Regulatory Authority (Rera), which will act as the central agency to co-ordinate the development of the sector, as well as promote transparency, efficiency and competitiveness. The move was also expected to boost domestic and foreign investment in the sector and help achieve the Indian government’s objective to provide housing for all by 2022 through enhanced private participation.

Somehow the Bill could not be been passed by both the houses and therefore lapsed in the wake of various suggested amendments.
The Real Estate (Regulation and Development) Act, 2016

In wake of downfall of Real Estate Market and abundant litigation in this sector, the Rajya Sabha on March 10, 2016 and subsequently the Lok Sabha on March 15th, 2016 passed the Real Estate Regulation and Development Bill, 2016. The Bill has subsequently received President’s assent and declared as the Real Estate (Regulation and Development) Act, 2016. The Act came into force on May 1, 2016. The Act has a major objective:

1. To protect home-buyers as well as help boost investments in the real estate industry.
2. To curb black money.
3. To protect the interest of the buyers;
4. To bring in transparency to the system.

It focuses on regulating transactions between buyers and promoters of residential and commercial real estate projects.

Salient features

The Real Estate (Regulation and Development) Act, 2016

Prominent features of this Act are as follows:

1. Real Estate Regulatory Authorities

   It establishes state-level regulatory authorities called Real Estate Regulatory Authorities (RERAs).

2. Registration with Regulatory Authority

   To ensure less corruption, the promoters will have to register all projects above a certain size with the RERAs.

3. Real Estate Appellate Tribunals

   The Act establishes also establishes state level tribunals called Real Estate Appellate Tribunals. Decisions of RERAs can be appealed in these tribunals.

4. Carpet Area

   Under the Act, the developers can sell units only on carpet area which means the net usable floor area of the apartment. This excludes the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

5. Capping on Realization

   The Act mandates that a promoter shall deposit 70% of the amount realised from the allottees, from time to time, in a separate account to be maintained in a scheduled bank. This is intended to cover the cost of construction and the land cost and the

amount deposited shall be used only for the concerned project. It means that 70 percent of the amount collected from buyers of a project to be used only for construction of that project.

6. **Acceptance or Refusal of Registration**

To streamline the procedures of approval, the Act mandates that upon receipt of an application by the promoter, the Regulator Authority shall within a period of 30 days, grant or reject the registration.

7. **Revocation and Lapse of Registration**

The Regulatory Authority may revoke the registration granted on receipt of a complaint or suo moto or on the recommendation of the competent authority in case (i) the promoter makes a default in doing anything required under the Act or the rules or regulations made there under; (ii) the promoter violates any terms of the approvals granted for the project; and (iii) the promoter is involved in any kind of unfair practice of irregularities.

8. **Website of the Regulating Authority**

The Act mandates that the promoter has to create a log in id and has to register himself with the Regulating Authority. Apart from this the promoter has to update the status of the project at every quarter. This will not only condone the delays at the part of the promoter but will also ensure transparency.

9. **Limit on the receipt of advance payment**

A promoter shall not accept a sum more than 10% percent of the cost of the apartment, plot, or building, as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement of sale with such person and register the said agreement of sale, under any law for the time being in force.

10. **Refund of Amount for Delay in Possession**

In case the promoter is unable to hand over possession of the apartment, plot or building to the allottee (i) in accordance with the terms of the agreement of sale; or (ii) due to discontinuance of his business as a promoter on account of suspension; or (iii) revocation of his registration or for any other reason, then the promoter shall be liable, on demand being made by the allottee, to return the amount received by him from the allottee with interest and compensation at the rate and manner as provided under the Act. This relief will be available without prejudice to any other remedy available to the allottee.

However, where an allottee does not intend to withdraw from the project, he shall be paid interest by the promoter for every month of delay, till the handing over of the possession, at a prescribed rate.

11. **Adjudicating Authority**

For adjudging the compensation to be paid by the promoter in accordance with the provisions of the Act, the Regulatory Authority shall appoint (in consultation with the appropriate Government) one or more judicial officers as deemed necessary, who is or has been a District Judge, to be an adjudicating officer for holding an inquiry in
this regard. However, such an appointment will be made after giving any person concerned a reasonable opportunity of being heard.

12. **Offences and Penalties**

Stringent penal provisions have been prescribed under the Act against the promoter in case of any contravention or non-compliance of the provisions of the Act or the orders, decisions or directions of the Regulatory Authority or the Appellate Tribunal.

**The Real Estate (Regulation and Development) Act, 2016: An Analysis**

The Act is enacted with the objective to regulate the transactions between buyers and promoters of residential real estate projects. This will serve two major purposes: firstly, it will protect the interest of the buyers and secondly, it will save economy from the adverse effects of the sudden fall of the real estate sector. The Act is not free from lacunas. There are certain portions in the Act, which requires prudent concern and attention of the government. Major concerns of this Act are listed as follows:

1. **Real Estate Regulatory Authorities**: It establishes Real Estate Regulatory Authorities (RERAs) which is a state level regulatory authority. It says that all the residential real estate projects, with some exceptions, need to be registered with RERAs. Promoters cannot book or offer these projects for sale without registering them. Real estate agents dealing in these projects also need to register with RERAs. The question of concern here in it has some exceptions for registration. And a detailed guide like who will have exemption, how the exemption will be claimed and alike has not been provided in the Act. This might lead to some corruption in registration under RERA.

2. **Land in State List**: Land and related matters comes in the State List, therefore one may question Parliament’s jurisdiction to make laws related to real estate as “land” is in the State List of the Constitution.

3. **Inconsistency with the State Law**: Some states have already enacted laws to regulate real estate projects. The Act differs from these state laws on several grounds. It will override the provisions of these state laws in case of any inconsistencies. This might create chaos among the people who were previously governed by the state laws.

4. **Issues with Transparency**: Some of the provisions and lisenness provided under the Act might lead to corruption in the real estate sector. For example 70% of the amount collected from buyers for a project must be maintained in a separate bank account and must only be used for construction of that project. The state government can alter this amount to less than 70%. This shows that major decision on alteration is on state and it is sure to vary from state to state. This will hamper the unified regulation and development of Real Estate Sector.

5. **Lack of Authenticity**: It says that on registration, the promoter must upload details of the project on the website of the RERA. These include the site and layout plan, and schedule for completion of the real estate project. The concern here is what if he uploads some misleading documents. Apart from this, the schedule will be the projected one and does not authenticate the confirmation of same or similar schedule.

6. **Red Tapism**: This Act do not address the delay at official level, which is the main reason for cost escalation and delay.
7. **Three Tier Regulations**: Being as one of the backbones of the Indian economy, Real Estate Sector requires three tier independent regulators. The Act provides to create a Real Estate Authority at State and UT level to monitor residential and commercial projects. The Act does not provide a national regulatory body to regulate and coordinate the functions of these Real Estate Regulatory Bodies. Therefore there is a need to bring structural changes in the Act.

8. **Bottleneck on Deposit of Funds**: The Act mandates that 70% of the amount collected from buyers of a project be used only for construction of that project. In certain cases, the cost of construction could be less than 70% and the cost of land more than 30% of the total amount collected. This implies that part of the funds collected could remain unutilized, necessitating some financing from other sources. This could raise the project cost.

Apart from this, some other major issues such as a lengthy process for project approvals, lack of clear land titles, and prevalence of black money etc. need to be addressed.

**Conclusion**

It has been rightly mentioned that for the growth and development of any sector, accountability, transparency and timely delivery of benefits are paramount. In the recent past, it has been observed that Real Estate Sector has been in difficulties because of severe delays in the possession of properties, violation of consumer’s rights and insolvency of promoters of the real estate projects. These all have slurred down the progress of this sector and has adversely affected the India economy too. Therefore in the pressing call to regulate the real estate sector, enactment of Real Estate (Regulation and Development) Act, 2016 is a way ahead in crafting growth and inclusive development. In essence, the Act intends to increase transparency and accountability in the real estate sector, by providing mechanisms to facilitate and regulate the sale and purchase of commercial and residential units/projects and timely completion of projects by the promoters.

Though the Act is not free from the challenges; but the directed implementation and establishment of the Regulatory Authority (or any other authority, in the interim) within the timeline prescribed under the Act will surely lead the way in coming future.

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Major Impact of the Insolvency and Bankruptcy Code, 2016 – Ease of Doing Business

CS Divesh Goyal*

India has a New Law on Bankruptcy

A historical step towards economic reforms in India took place on May 11, 2016 when the Rajya Sabha passed the Insolvency and Bankruptcy Code, 2016. Insolvency & Bankruptcy Code, 2016 (IBC) received the assent of President on May 28, 2016. The code has become an Act and provisions will be effective from a date to be notified in the official gazette.

The Act has been introduced with the object of clearing up bad assets & also to regulate the procedure of the insolvency and bankruptcy among the Indian Corporate.

What is Insolvency?

Insolvency is a situation where Individuals or Companies are unable to repay their outstanding debt. It may be resolved by changing the repayment plan of the loans, or writing off part of the debt. If insolvency cannot be resolved, assets of the debtor may be sold to raise money and to repay the outstanding debt.

What is Bankruptcy?

Insolvency is the situation where the debtor is not in a position to pay back the creditor. Bankruptcy is the legal declaration of Insolvency. So the former is a financial condition and latter is a legal position. All insolvencies need not lead to bankruptcy. The new code has a sequential procedure of Insolvency resolution, failing which, it leads to Bankruptcy.

Being bankrupt is a state of inability to repay debts to creditors. Under the proposed law, a bankrupt entity is a debtor who has been adjudged as bankrupt by an adjudicating authority that has passed a bankruptcy order. The adjudicating authority would be the National Company Law Tribunal (NCLT) for companies and limited liability partnerships, and the Debt Recovery Tribunal (DRT) for individuals and partnership firms.

Legislative Background

The Code seeks to repeal the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. In addition, it seeks to amend 11 laws. The Code has passed through the following timeline:

- Announcement at Budget Speech 2014-15
- Viswanathan Committee August 2014

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I and B Code vis-à-vis Ease of Doing Business

According to the World Bank’s Ease of Doing Business report, on the parameter of resolving insolvency, India is ranked 136 among 189 countries. Company in India typically takes four years, or twice as long as in China and Russia, with an average recovery of 25.7 cents on the dollar. This is one of the worst rates in emerging markets.

The Insolvency and Bankruptcy Law seeks to expedite the process in minimum time. This will not only improve the ease of doing business in India, but also facilitate a better and faster debt recovery mechanism in the country.

The move is expected to help India move up from its current rank of 130 in the World Bank’s Ease of Doing Business Index. The Insolvency and Bankruptcy Code 2016 is a vital reform that will make it much easier to do business in India.

This Law promises to make it easier to wind up a failing business and recover debts in Asia’s third-largest economy.


Bankruptcy - Position under the "Constitution of India"

Under the Constitution of India 'Bankruptcy & Insolvency' appears at Entry 9 in List III. List III is the Concurrent List which means that both Centre and State Governments can make laws relating to bankruptcy.

Objectives of Insolvency and Bankruptcy Code

The Code offers a uniform, comprehensive insolvency legislation encompassing all companies, LLPs, partnership Firms, individuals and other Body Corporate.

One of the fundamental features of the Code is that it allows creditors to assess the viability of a debtor as a business decision, and agree upon a plan for its revival or a speedy liquidation. The Code creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms, that will facilitate a formal and time bound insolvency resolution process and liquidation.
The objective of the new law is to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders by consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner and for maximization of value of assets of such persons and matters connected therewith or incidental thereto.

To attract Foreign Investment:

— This Code in specific will, when implemented in letter and spirit, provide a major boost to the India economy, especially on account of timely resolution and certainty in recovery.

— It would be of specific interest to international creditors and Investors, who are generally looking at Indian opportunities.

— According to the government data top 50 defaulters of public sector banks had exposure in excess of Rs 1.21 lakh crore as on December 2015. Because this law ensures time bound recovery foreign lenders will be more open to lend to Indian Corporate.

— The strict timelines for resolution of insolvency and liquidation proceedings would definitely be an incentive and provide the requisite impetus for economic growth.

— It will facilitate stress-free and time-bound closure of businesses.

— It’s a key reform that will make it much easier to do business in India and help the recovery of bad loans for banks.

Implementation

The implementation will remain the key, analysts point out, as the new code is presaged on the creation of a complementary eco-system including insolvency professionals, information utilities and a bankruptcy regulator.

Along with the proposed changes in India’s two debt recovery and enforcement laws, it will be critical in resolving India’s bad debt problem, which has crippled bank lending.

I. Whether there is any challenge before new Law?

The new bankruptcy law isn’t a “magic wand”. It sees the benefits flowing in after 3-5 years from now.

The main challenge will be creating a large pool of insolvency professionals who will help with the fast implementation of the law. The new regulators will also need to draft procedural rules for insolvency professionals and information utilities among others.

II. There weren’t any laws dealing with this problem until now?

There are, in fact, several laws that deal with insolvency of companies, such as the Sick Industrial Companies Act, the Recovery of Debt Due to Banks and Financial Institutions Act, and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI). Then there are a couple of laws dating from the time of the British Raj for dealing with individual debtors.
However, this multiplicity of laws has been a problem in the way of banks failing to recover their loans.

III. How This New Bankruptcy Law Will Help Banks?

As per the new Bankruptcy Law, banks are now entitled to recover their loan from defaulters within a period of 180 days. In case majority of creditors agree, then this period can be extended to 90 days and, in case recovery of loans doesn’t happen within this period, then the concerned company shall be liquidated by default.

IV. Why is a bankruptcy law such a big deal for Bank?

India’s banking industry is in the throes of a crisis. Bad debts are piling up at banks. According to central bank data, stressed assets (which include gross bad loans, advances whose terms have been restructured and written-off accounts) rose to 14.5% of banking sector loans at the end of December 2015. That’s almost Rs 10 trillion of loans that are stuck. Freeing up this money is crucial for the banking sector to go about its business.

Bird’s Eye View of IBC 2016

Part - 1

Preliminary (S. 1 to S. 3)

Part - 2

Insolvency Resolution & Liquidation of Corporates (7 Chapters, S. 4 to S.77)

Part - 3

Insolvency Resolution & Bankruptcy of Individuals & Partnerships (7 Chapters, S. 78 to S. 187)

Part - 4

Various Authorities - Board / IP/IPA/Committees (7 Chapters, S. 188 to S. 223)

Part - 5

CG power / Over riding effect on other laws and amendments to other 11 Acts (S. 224 to S. 255)

Schedules

Sch- 1 - Partnership Act
Sch - 2 - Central Excise Act
Sch - 3 - Income Tax Act
Sch - 4 - Customs Act
Sch - 5 - Recovery of Debt due to Bank & Financial Institutions Act
Sch - 6 - Finance Act, Act
Sch - 7- SARFAESI
Sch - 8 - SICA
Applicability

The code is applicable as follows:-

— Companies under the Companies Act, 2013
— Special Companies under special Act
— Limited Liability Partnerships
— Other body Corporate as notified by CG
— Individuals
— Partnership Firms

For what Matters

(1) Insolvency
(2) Liquidation
(3) Voluntary Liquidation and
(4) Bankruptcy

Creditors’ Power enhanced under Insolvency and Bankruptcy Code 2016

— The Insolvency and Bankruptcy Code 2016 empowers the operational creditors (workmen, suppliers etc.) also to initiate the insolvency resolution process upon non-payment of dues.

— In order to develop the credit market in India, in case of liquidation, financial debts owed to unsecured creditors have been kept above the Government’s dues in the list of priorities (waterfall).

How Much Time Will the Law Save?

Currently, it takes an average of 4.3 years to resolve insolvency in India. The new law introduces a time limit on the bankruptcy process. In the case of a default, the time-limit is 180 days, within which the resolution has to be completed. This can be extended by another 90 days by the adjudicator, depending on the process. Analysts say the new time frame will help India improve its World Bank insolvency ranking.

Time – Limit for completion of Insolvency Resolution Process:

180 Days + 90 Days (One Time Extension)  270 Days
### Key Changes

This note sets out certain key changes introduced by the Code, which are summarized below:-

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Name of Change</th>
<th>Particular</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Insolvency and Bankruptcy Board of India (“Board”)</td>
<td>The Code provides for establishment of an Insolvency and Bankruptcy Board of India (“IBBI /Board”) who will act as the insolvency regulator. The Board will perform the role of a regulator for insolvency and bankruptcy matters similar to the role the Securities and Exchange Board of India performs for the securities market. The Board will exercise regulatory oversight over insolvency professionals, insolvency professional agencies and informational utilities.</td>
</tr>
<tr>
<td>2.</td>
<td>Insolvency Professionals</td>
<td>The Bill proposes to regulate insolvency professionals and insolvency professional agencies.</td>
</tr>
<tr>
<td>3.</td>
<td>Insolvency Information Utilities</td>
<td>The Code proposes for information utilities, which would collect, collate, authenticate and disseminate financial information from listed companies as well as financial and operational creditors of companies. An individual insolvency database is also proposed to be set up for the purpose of providing information on the insolvency status of individuals.</td>
</tr>
<tr>
<td>4.</td>
<td>Insolvency Adjudicating Authority</td>
<td>The adjudicating authority will exercise jurisdiction over cases by or against the debtor.</td>
</tr>
<tr>
<td>5.</td>
<td>Moratorium</td>
<td>One of the most significant features of the Code is the grant of moratorium during which creditor action will be stayed. This is not automatic and has to be granted by the Adjudicating Authority on the recommendation of the Resolution Professional.</td>
</tr>
</tbody>
</table>
| 6.     | Corporate Liquidation               | The commencement of liquidation process takes place on:  
(a) recommendation of the resolution plan;  
(b) on account of failure to submit the resolution plan within the prescribed period or contravention of the resolution plan; and  
(c) based on vote of majority of the creditors. |
| 7.     | Liquidation Estate                  | To the extent assets held by the debtor belong to it, then will form part of the liquidation estate. Assets will be distributed by the liquidator in the manner of priorities laid in the law. |
8. **Cross border insolvency**

The Code provides that the Central Government can enter into agreements with any country outside India for enforcing provisions of the Code and notify applicability of the same from time to time. Further, assets of the debtor located outside India (in countries with whom India has reciprocal arrangements) may also be included for the purpose of the insolvency resolution process and/or liquidation before the Adjudicating Authority.

9. **Timelines**

Shortening time required in the insolvency process from filing a bankruptcy application to the time available for filing claims and appeals.

The entire process of resolution to be completed within 180 days, extended by 90 days with the consent of 75% of the creditors if required. Failure to resolve insolvency within this time frame may result in selling of debtors assets to recover the dues.

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**Insolvency Professionals**

A pool of licensed ‘Insolvency Professionals’ (IPs) will be responsible to carry out the resolution process on behalf of affected entities. Under the oversight of the Board, these agencies will develop professional standards, codes of ethics and exercise a disciplinary role.

Three sets of Resolution;

(i) Professionals are sought to be appointed – Interim Resolution Professional,

(ii) Final Resolution Professional

(iii) Liquidator

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**Insolvency Adjudicating Authority**

**DRT**

The Debt Recovery Tribunal ("DRT") shall be the Adjudicating Authority with jurisdiction over individuals and unlimited liability partnership firms. Appeals from the order of DRT shall lie to the Debt Recovery Appellate Tribunal ("DRAT").

**NCLT**

The National Company Law Tribunal ("NCLT") shall be the Adjudicating Authority with jurisdiction over companies, limited liability entities and other entities with limited liabilities. The jurisdiction of the NCLT shall be based on the registered office of the debtor. Appeals from the order of NCLT shall lie to NCLAT.

**NCLAT**

The National Company Law Appellate Tribunal ("NCLAT") shall be the appellate authority to hear appeals arising out of the orders passed by the Board in respect of insolvency professionals or information utilities.
Supreme Court: The Supreme Court will have appellate jurisdiction over the orders of the DRAT or the NCLAT.

Benefits of the Code

(i) Code to help wind up sick businesses: On the parameter of resolving insolvency, India is ranked 136 among 189 countries. At present, it takes more than four years to resolve a case of bankruptcy in India, according to the World Bank. The code seeks to reduce this time to less than a year.

(ii) Crossborder: The bankruptcy code has provisions to address crossborder insolvency through bilateral agreements with other countries. It also proposes shorter, aggressive time frames for every step in the insolvency process—right from filing a bankruptcy application to the time available for filing claims and appeals in the debt recovery tribunals, National Company Law Tribunals and courts.

(iii) Protect workers of a bankrupt Company: To protect workers’ interests, the code has provisions to ensure that the money due to workers and employees from the provident fund, the Pension fund and gratuity fund shouldn’t be included in the estate of the bankrupt company or individual. Further, workers’ salaries for up to 24 months will get first priority in case of liquidation of assets of a company, ahead of secured creditors.

(iv) Fast Track Corporate Insolvency Resolution Process: The Code has provisions for fast track corporate insolvency resolution process shall be completed within a period of ninety days from the insolvency commencement date.

(v) Voluntary Liquidation of Corporate Persons, Firms and Individuals: The Code also provides ways for a corporate person, Firms & Individuals who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings.

Conclusion

The intention of the Code is to revamp the antiquated existing laws covering aspects of insolvency and bankruptcy. Though the Code sets out certain provisions to amend and override the existing laws to avoid future litigation, a clear provision needs to be introduced to explicitly state the existing laws being repealed by the introduction of this legislation.

Thus it is a comprehensive and systemic reform, which will give a quantum leap to the functioning of the credit market. It would take India from among relatively weak insolvency regimes to becoming one of the world’s best insolvency regimes. It lays the foundations for the development of the corporate bond market, which would finance the infrastructure projects of the future. The passing of this Code and implementation of the same will give a big boost to ease of doing business in India.
NCLT - A Forum to Prove Professional Competence

CS (Dr.) M. Govindarajan*

Introduction

With effect from 31.05.1991 vide Companies (Amendment) Act, 1988, the Company Law Board was established under the Companies Act, 1956 to exercise and discharge such powers and functions as may be conferred on it. The Company Law Board is given power to inquire into various matters as conferred in Companies Act, 1956. However the matters such as winding up, merger, amalgamation etc., are handled by the High Court, designated as Company Court.

Vide Companies (Amendment) Act, 2002, Part IB and Part IC were inserted in the Companies Act which deal with the constitution of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT). Part IB, containing Sections 10FB to 10FP provides for the constitution of NCLT and the matters related thereat. Part IC, containing Sections 10FQ to 10GF provides for the constitution of NCLAT and the matters related thereat. It was proposed that NCLT will perform all the functions vested in Company Law Board and Company Court.

Judicial journey

The provisions of the constitution of NCLT and NCLAT were challenged by the Madras Bar Association on the ground that the Administration tried to usurp the functions of judiciary in Tribunals. The Supreme Court quashed the provisions relating to the constitution of NCLT and NCLAT but it gave directions to do suitable modifications.

The Companies Act, 2013 was enacted replacing the Companies Act, 1956 which came into effect from September 2013. All the provisions have not yet been notified. The provisions relating to constitution of NCLT and NCLAT are also found in the new Act. The Madras Bar Association again challenged the provisions relating to NCLT and NCLAT before the Supreme Court. The Supreme Court upheld the validity of the provisions but gave directions to modify the terms of the appointment of Technical member.

NCLT & NCLAT

Vide Notification NO. S.O. 1932 (E), dated 01.06.2016, the Central Government constituted the National Company Law Tribunal to exercise and discharge the powers and functions as are, or may be, conferred on it by the Companies Act, 2013, with effect from
01.06.2016. Vide Notification No. S.O.1933 (E), dated 01.06.2016, the Central Government constituted the National Company Law Appellate Tribunal (NCLAT) for hearing appeals against the orders of the National Company Law Tribunal with effect from 01.06.2016. Vide Notification No. S.O.1934 (E), dated 01.06.2016 the Central Government appointed the 01.06.2016 as the date on which the provisions relating to Tribunal shall come into force.

**Dissolution of Company Law Board**

Section 466 which provides for dissolution of Company Law Board has also come into effect from 01.06.2016. Vide Notification No. 1936(E), dated 01.06.2016 the Central Government appointed the 1st day of June, 2016, on which all matters or proceedings or cases pending before the Board of Company Law Administration (Company Law Board) shall stand transferred to the National Company Law Tribunal and it shall dispose of such matters or proceedings or cases in accordance with the provisions of the Companies Act, 2013 or the Companies Act, 1956.

**Transfer of cases to NCLT**

The transfer of cases to the Tribunal is being done in three phases from the existing bodies to NCLT-

- First Phase – All cases of Company Law Board have been transferred to NCLT;
- Second Phase – BIFR cases will be transferred to NCLT;
- Third Phase – The cases pending before the High Court are to be transferred to NCLT.

**Appearance before NCLT**

Chapter XXVII of the Companies Act, 2013 provides for the constitution of National Company Law Tribunal vide Section 408 and National Company Law Appellate Tribunal vide Section 408.

Section 432 of the Act provides for the right to legal representation. The said section provides that a party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorize one or more-

- Chartered Accountants; or
- Company Secretaries; or
- Cost Accountants; or
- Legal practitioners; or
- Any other person

Thus the Company Secretary is eligible to appear before the NCLT as well as NCLAT. The difference between the erstwhile Companies Act, 1956 and the present Companies Act, 2013 is that before the Company Court for the purposes of merger and amalgamations and winding up proceedings only Advocates could appear or practice. Now the scenario has
changed and the Company Secretaries may appear before the NCLT for the matters dealt with by Company Court previously. Therefore, in the view of the author NCLT and NCLAT are the fora, for the Company Secretaries to prove their professional competence.

The following matters were dealt with by Company Court/High Court under Companies Act, 1956-

- Section 75 – Returns as to allotments;
- Section 101 – Reduction of Share Capital;
- Section 102 – Reduction of Share capital;
- Section 103 – Registration of order and minutes of reduction;
- Section 104 – Liability of Members in respect of reduced shares;
- Section 107 – Rights of dissenting shareholders;
- Chapter V – Arbitration, Compromise and arrangements;
- Chapter VII- Winding up proceedings.

The corresponding sections in the Companies Act, 2013 are-

- Section 39(4) – Returns as to allotments;
- Section 48 – Rights of dissenting shareholders;
- Section 66 – Reduction of Share Capital;
- Chapter XV – Compromises, arrangements and amalgamations;
- Chapter XX – Winding up.

The above said provisions have not yet been notified since the cases pending before the Company Court/High Court have not yet been decided to be transferred. It is expected that the above provisions will be notified at the earliest possible and the NCLT will handle the cases that have been dealt with by Company Court/High Court.

Professional Competence

Definitely NCLT will be a challenge to the professionals such as Company Secretaries to exhibit their professional competence in all matters to be dealt with by NCLT. As discussed there are some areas which are being dealt with by Company Court/High Court. Among them the author chose the area of ‘Merger and Amalgamations’ which would be the better area for the Company Secretaries in practice to show their professional competence.

Mergers and Amalgamations

Mergers and amalgamations have become a big part of the corporate world, and are among the most strategic and tactical decisions made by the company. In the last decade, the merger and amalgamation deals have been increasing significantly which could be worth hundreds of millions or even billions of dollars. M&A may dictate the fortunes of the companies involved for years to come.
With the current trends of globalization more and more M&A happened nationally and internationally. The international transactions are dealing with more complicated situations when compared to national M&A. The cultural differences, trading barriers, different national policies are some among them.

**Reasons for M&A**

The following are some of the reasons that can be considered for M&A:

- Size is a great advantage in relation to costs. It assists in enhancing profitability, through cost reduction resulting from economies of scale, operating efficiency and synergy;
- Through business combination risk is diversified, particularly when it acquires businesses whose income streams are not correlated;
- M&A helps to limit the severity of competition by increasing the company’s market power where a company takes over the business of the competitor;
- A company is allowed to carry forward its accumulated loss to set off against its future earnings for calculating its tax liability;
- The business combination can result into financial synergy and benefits;
- Growth is essential for sustaining the viability, dynamism and value enhancing capability of a company. The company can grow externally by combining its operations with other companies through M&A;
- A business with good potential may be poorly managed and the assets underutilized, thus resulting in a low return being achieved. Such a business is likely to attract a takeover bid from a more successful company, which hopes to earn higher returns.

**Types of M&A**

The following are the various types of M&A-

- Horizontal merger – two companies that are in direct competition and share the same product lines and markets;
- Vertical merger – a customer and company or a supplier and company;
- Market extension merger – two companies that sell the same products in different markets;
- Product extension merger – two companies selling different but related products in the same markets;
- Conglomeration – two companies that have no common business areas.

All M&A have one common goal, i.e., they are all meant to create synergy that makes the value of the combined companies greater than the sum of the two parts. The success of a merger or amalgamation depends on whether this synergy is achieved.

**Objectives of M&A**

The key principle behind buying a company is to create shareholder value over and above that of the sum of the two companies. Two companies together are more valuable than two
separate companies. Except the obvious synergy effect, the other important motives for M&A are-

- Operating synergy;
- Financial synergy;
- Diversification;
- Economic motives;
- Horizontal integration;
- Vertical integration;
- Tax motives.

Provisions relating to M&A

- Section 230 - The power to compromise or make arrangements with creditors and members;
- Section 231 - Power to Tribunal to enforce compromise or arrangement;
- Section 232 - Procedure of merger and amalgamation of the companies;
- Section 233 – Merger or amalgamation of certain companies;
- Section 234 – Merger or amalgamation of company with foreign company;
- Section 235 – Power to acquire shares of shareholders dissenting from scheme or contract approved by majority;
- Section 236 – Purchase of minority shareholding;
- Section 237 – Power of Central Government to provide for amalgamation of companies in public interest;
- Section 238 – Registration of offer schemes involving transfer of shares;
- Section 239 – Preservation of books and papers of amalgamated companies;
- Section 240 – Liability of offers in respect of offences committed prior to merger, amalgamation etc.

Procedure

The merger and amalgamation involves the following procedure-

**Stage I**

- To identify industry;
- To select sector;
- To choose companies;
- To find comparative costs and returns with the selected companies;
- To short list good companies;
- To assess the suitability;
Stage II

- To negotiate with the selected company;
- To approve the proposal by the Board of Directors of the companies;
- To prepare the draft scheme of merger or amalgamation;
- To adopt the scheme by the directors of the merging company;

Stage III

- To apply to Tribunal for directions to hold the meeting of shareholders/creditors;
- Order of court for meeting;
- To hold meeting as per the directions of Court order;
- Scheme to be approved by 75% of the secured creditors;
- Scheme to be applied for sanction of the court;
- Court approval;
- To file the court order approving the scheme with Registrar of Companies;

Each stage involves much work in its process.

Section 232(1) of the Act provides where an application is made to the Tribunal showing that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies and that under the scheme the whole or any part of the undertaking, property or liabilities of any company is required to be transferred to another company the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct.

Section 232(2) provides that the merging companies shall be required to circulate the following for the meeting so ordered by the Tribunal, namely-

- The draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;
- Confirmation that a copy of the draft scheme has been filed with the Registrar;
- A report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;
- The report of the expert with regard to valuation, if any;
- A supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

Expertise is to be shown in the preparation of the scheme. Valuation is the must for the preparation of the scheme. Expertise is also to be shown in the valuation methods.
The Tribunal, after satisfying itself that the procedure specified, has been complied with, may, by order, sanction the merger or amalgamation scheme. The order of the Tribunal shall be filed with the Registrar by the company within a period of 30 days of the receipt of the certified copy of the order. The scheme shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

**Registered Valuers**

Chapter XVII of the Act deals with Registered Valuers. Section 247(1) of the Act provides that where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets or net worth of a company or its liability under the provisions of the Companies Act, 2013, it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed and appointed by the audit committee or in its absence by the Board of Directors of that company.

**Duties of Valuer**

Section 247(2) of the Act provides that the valuer appointed shall—

- make an appeal, true and fair valuation of any assets which may be required to be valued;
- exercise due diligence while performing the functions as valuer;
- make the valuation in accordance with such rules as may be prescribed; and
- not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during or after the valuation of the assets.

**Company Secretary as a valuer**

Section 247 has not yet been notified. The Company Secretary may act as a valuer according to the provisions of the Companies Act. The role of valuer in merger and amalgamation is very important.

**Benches of NCLT**

Vide Order [F.NO.10/03/2016-NCLT], dated 05-07-2016, the National Company Law Tribunal hereby constitutes the following Benches for the purpose of exercising and discharging the Tribunal's powers and functions: —

- NCLT, Principal Bench At New Delhi
- NCLT, New Delhi Bench
- NCLT, Ahmedabad Bench
- NCLT, Allahabad Bench
- NCLT, Bengaluru Bench
- NCLT, Chandigarh Bench
- NCLT, Chennai Bench
NCLT - A Forum to Prove Professional Competence

- NCLT, Guwahati Bench
- NCLT, Hyderabad Bench
- NCLT, Kolkata Bench
- NCLT, Mumbai Bench

Conclusion

As discussed, the area of practice for the Company Secretary has widened after the constitution of NCLT and NCLAT. The ICSI is working towards equipping the members in meeting the current challenges. This is an opportunity for the members to update their knowledge & establish their professional competence in these emerging areas.

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Preparedness of Company Secretaries (with Specific Reference to Appearance before NCLT / NCLAT)

Prof. R. Balakrishnan*

Enormous opportunities for PCS in legal field

With the constitution of National Company Law Tribunal (NCLT) and its appellate body, National Company Law Appellate Tribunal (NCLAT), constituted by the government on the 1st June 2016 implementing most of the provisions of new Companies Act, 2013 and helping implementation of the Bankruptcy Code, Company Secretaries are getting enormous opportunities to enter into the legal area of practice with the judiciary (without having a law qualification and enrolling as a member of bar council) and the entry gates are opening up in enormous areas such as company law related matters which had been dealt by in Company Law Board (CLB) and High Courts, under bankruptcy code and restructuring schemes related to sick companies, schemes relating to merger or acquisition or takeover or amalgamations and many other such issues which would be dealt at the National Company Law Tribunal.

In addition to representing the matters at the National Company Law Tribunal, Company Secretaries would be in a better position to render various advisory services relating to restructuring and rescue planning for distressed companies after proper evaluation taking into consideration the risk involved, suggest method of restructuring schemes and its implementation for the turnaround of the company and also rendering advisory services to management on an ongoing basis etc.

Constitution of NCLT / NCLAT

According to the provisions of the Companies Act, 2013, NCLT would not only replace the erstwhile Company Law Board, but also handle various cases of companies currently with the High Courts, the Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction.

Government has notified that NCLT will have 11 benches to start with and the details are as under as published in the notification - two at New Delhi and One each at Ahmedabad, Allahabad, Bangalore, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai and probably more benches would get opened up as per the needs arising in future.

With the constitution of NCLT and NCLAT, the Company Law Board (CLB) constituted under the erstwhile Companies Act of 1956 stands dissolved and all matters relating to company law would be dealt under one roof i.e. NCLT / NCLAT.

* FCS. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.
Pre-requisite to tap the opportunities

Since the Company Secretaries could now appear and present themselves before the National Company Law Tribunal (without having a formal law degree), it is imperative that the Company Secretaries need to know the detailed procedure right from advising the concerned company, providing opinion, drafting the petition, representing and appearing and presenting the matter before the Tribunal, making available necessary evidence supported by law, rules and past precedent with desired cases etc.

In order to achieve the desired goals / deliver the accomplished task to the committed management of the company, the Company Secretaries need to learn the art of doing first time right since the drafting and pleading is altogether a new area (all along in High Courts, the matters were handled by the qualified advocates / lawyers while the company secretaries were spectators whereas, at NCLT company secretaries themselves are going to handle the matter like that of the advocates / lawyers).

Preparatory work for appearing before the Tribunal

Let us try to understand the various steps / process involved before one ventures into the appearance / representation before the Tribunal as below.

(a) the starting point is to understand the issue and provide an opinion
(b) when management is interested in proceeding further, then comes the drafting of application / petition / complaint to NCLT
(c) Petition / application filing procedure
(d) e-filing
(e) requirement of advertisement on specified matters
(f) procedure at the Tribunal subsequent to filing of application / petition
(g) calling for evidence / cross examination by Tribunal
(h) hearing of petition / application – passing of order.

Providing Opinion or Advice

Understanding the issue and providing an opinion

The starting point is to understand the issue and provide an opinion to the management of the company where the service is being rendered. Once the opinion is given, then it is up to the management to decide to take the matter forward or otherwise. Also it is up to the management to go with the same person who has provided the opinion or go with someone else. While providing an opinion, the following needs to be taken care of:

(i) opinion / advice writing – opening para

The opinion or advice should start with an opening paragraph containing a brief statement of what the case or issue is all about and the objectives. In other words the fundamental facts, the key issues and what one is asked to advise about.

One may decide to state the opinion or advice at the end – however, one could be
encouraged to put the opinion or advice at the beginning which would in turn be helpful to the management as an aid to clarity. The whole idea is, if the conclusion is already stated in the beginning, one can read subsequent reasoning knowing where it is leading. It may also be noted that it is a very good discipline to put up the opinion or advice at the outset, as it ensures that one cannot start writing opinion without having decided what the opinion is.

(ii) Avoid irrelevance

The subsequent paragraphs could provide the reasons for arriving at the opinion or advice since providing reasoning actually constitutes to form the opinion / advice provided. While providing the reasoning, everything relevant must be provided and the opinion or advice should not - rather must not contain anything which is irrelevant. To decide relevancy or irrelevancy one should apply the mind by asking question like

(a) whether it is forming part of opinion,

(b) whether it is necessary step along the line of reasoning and

(c) whether it is part of the advice one is providing to the management.

Overall one should avoid irrelevancy and keep the reasoning clear, sharp and to the point. The aspect of being brief – of course with sufficient reasoning – to the point and focus is required.

(iii) Liability and quantum

The opinion / advice should state the liability first with reference to the applicable provisions, rules and regulations at the first place and then the quantum. One should not mix the two together or jump between them unless one has a very good reason to do so.

(iv) Subsidiary points

While providing opinion, while the main part is completion with reference to the facts put before, there could be subsidiary points which could also be addressed arising out of the issue raised. For example, with reference to the facts, one could arrive at an opinion but in the court of law, evidence is a must to substantiate the same and this could be addressed here. There are possibilities that the management would have put specific questions – nevertheless there could be certain implied questions which should also be addressed while providing the opinion/advice.

(v) Further advice

One might have dealt with all the issues, having answered all the questions raised by management, there could be other helpful advice – in which case one should provide the same so that it is relevant and helpful to the management having regard to the overall objectives which would lead the management to understand the issue clearly, the position where they stand so that the management could decide, based on the opinion what to do about it. The management is fully satisfied when the queries raised are answered and much delighted if the professional provides other helpful advice, going beyond the expectations.
(vi) Concluding paragraph

One may conclude the opinion or advice by titling it as “summary of advice” – setting the main points of advice once again in shortened form and close the opinion / advice letter.

**Drafting of Application/Petition/Complaint**

*Preparing or Drafting of application*

It is very important to know the rule to be followed at the Tribunal and the Government has notified the National Company Law Tribunal Rules, 2015 spelling out the definition of various terms, applicable procedures along with the forms that are to be used. Prima facie, the application / petition is required to be prepared or drafted in the specified format as per the rules. As per the rules notified the application / petition needs to be in Form No. NCT-1 along with necessary attachments in form no. NCT-2. If one is interested in seeking interim/interlocutory order from the NCLT, then the Form No. NCT-3 is required to be prepared.

Needless to mention here that an authorization in writing from the management to present and represent their case before the Tribunal as the authorized representative is a must as provided under section 432 of the Companies Act 2013. In the judicial parlors such authorization is nothing but a power of attorney/vakalatnama – authorizing the professionals to appear in the case on their behalf.

Application / petition by and large have to be fairly and legibly typewritten in English on durable while folio paper of legal size on the one side only in double space with a left margin of 5 cm and right margin of 2.5 cm duly paginated, indexed and stitched together in the paper book form.

*Precaution to be taken while preparing or drafting application*

Preparing or drafting of a petition / application is an art which is required to be mastered by the practicing company secretaries. What is required is a clear, concise petition text without cluttering information or requests that have no essential connection to the main matter or message.

The petition is required to be clearly structured containing a section for background information which is by and large known as “the preamble” followed closely by the body of the petition which could contain the “core petition text” and spelling out is the exact call for the required action – i.e. the prayer to the NCLT or request. The prayer or request would call for supporting factors by the petitioners. The drafting professional need to describe the situation at the first instance – suggest what is needed with giving reasoning for the same and finally provide a concise logical call to action or refrain or request (the prayer).

*Preparation / drafting and contents of petition / application*

The format prescribed in the rule itself very clearly spells out the structured way of preparing and presenting the petition as discussed below.

(i) Contents of petition / application

The first para would spell out the details of original application or reply being filed or rejoinder and seeking interlocutory application as the case may be. In this para, one
has to provide the complete particulars of the petitioner / applicant along with respondent stating the full details. In case of individual, name, father’s or husband’s name, occupation, capacity (shareholder / depositor etc.) In case of company the complete details of company, registered office address, the background description etc.

(ii) Jurisdiction of the NCLT Bench

The petitioner needs to declare that the subject matter of the petition is within the jurisdiction of bench of NCLT where the application / petition is being filed i.e. the facts showing that the Court has jurisdiction.

(iii) Limitation period (if applicable)

The petitioner / applicant needs to declare under this para that the petition is within the limitation period as laid down in the relevant section of the Companies Act, 2013 (or Securities Act, 1956) (where applicable).

(iv) Statement of facts

Under this para, one has to provide the details in a concise statement of facts, in a chronological order in which the events have taken place, making separate paragraph for each event as nearly as possible a separate issue, fact or otherwise.

(v) Declaration stating not previously filed / pending with any other court

The Petitioner / applicant is required to make a declaration he had not previously filed any application, writ petition or suit regarding the matter in respect of which this petition has been made, before any court of law or any other authority or any other Bench or the Board and not any such application, writ petition or suit is pending before any of them.

(vi) The final paragraph stating the relief sought / prayer made

This is the concluding paragraph based on the facts mentioned in the petition / application, the applicant / respondent makes the prayer for the relief sought for spelling out the same one after another. It is important to note that prayer or relief sought needs to be specific explaining the ground for relief / prayer and also quoting the relevant legal provisions replied upon as applicable.

(vii) Details showing the remittance of applicable fees

Any petition or application being filed in the Tribunal would call for the applicable fees and the details of particulars of bank draft evidencing payment of fee for the petition / application stating the branch of the bank on whom the draft is drawn, name of the issuing branch, demand draft number, date of the draft and the amount of draft (the fees). Payment of fees could also be made through electronic mode in which case the details are to be provided.

(viii) Signature of authorised signatory

Needless to mention that the application / petition is required to be signed by the practicing professional as an authorised signatory.
Filing the Petition / Application

Presenting the application / petition

All applications / petitions are required to be presented by the applicant / petitioner / authorized representative and in case of opposition party the, defendant / respondent in person / by his duly authorized representative at the Filing Counter of the Tribunal during the specified time for presenting the application / petition on all working days of the Tribunal. Wherever necessary, they are required to be accompanied by documents prescribed under the rules of the Tribunal, to be filed along with the application / petition. On presentation of every application / petition, the same shall be scrutinized by the Register of the Tribunal.

Scrutiny

A detailed scrutiny of the application / petition would be carried out by the Registrar at the filing counter to identify the defects if any.

If the Registrar of the Tribunal finds that the application / petition complies with all the requirements, the same would be accepted and the receipt is issued for having filed the application / petition.

In case, the application / petition are found to be defective, the defects are communicated to the concerned application / authorized representative /petitioner in person. Therefore, the applicant / authorized representative or the petitioner needs to carry out the necessary defects rectification and thereafter the application / petition is accepted and the receipt is issued for having filed the application / petition.

Petition filed

At this juncture, the petition is filed and one has the petition number with date issued by the Registrar of the Tribunal.

The CS Professional could have their own checklist prepared and kept handy for the purpose of filing, having regards to the requirements of the notified rules with reference to the procedure to be followed at the National Company Law Tribunal so that our professionals could perform on the principle of doing first time right.

Electronic Mode of Filing the Petition / Application

e-filing of application / petition at the NCLT

In National Company Law Tribunal Rules, 2015 it is spelled out that the part III deals with electronic filing which shall come into force on a date specifically notified by the Central Government in the Official Gazette later. Till such notification comes for the implementation of e-filing system, filing of applications or petitions shall be continued to be filed manually.

As on date there is no provision for e-filing system at the National Company Law Tribunal.

Requirement of Advertisement (on specified Matter)

Once the petition is filed, the same would be listed for hearing as per the chronological order or in case of urgent hearing at an earlier date as the case may be.
Advertisement detailing petition

On certain specified matters of application / petition, there could be requirement of making advertisement not less than fourteen days before the date fixed for hearing and such advertisement would be made in the specified form no. NCT 3A unless the Tribunal otherwise orders. Such advertisements are required to be advertised at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and circulating in that district, and at least once in English language in an English newspaper circulating in that district.

It is the well known practice that the text of the advertisement is shown to the Registrar and got it vetted before the advertisement is issued. Every advertisement is required to state (i) date on which application / petition presented, (ii) name and address of applicant / petitioner /authorized representative, (iii) nature and substance of application /petition, (iv) date fixed for hearing.

Further, the advertisement should also state to the effect that any person whose interest is likely to be affected by the proposed application / petition or who intends either to oppose or support the petition/ reference at the hearing shall send a notice of his intention to the petitioner or his authorized representative so as to reach him not later than two days previous to the day fixed for hearing.

After the release of the advertisement, an affidavit (along with the proof of advertisement release) shall have to be filed with the Tribunal in, not less than 3 days before the date fixed for hearing, stating the fact that the advertisement has been published in accordance with the rule and whether the notices, if any, have been duly served upon the persons required to be served.

Other relevant matters relating to the release of advertisement

The advertisement released is also required to be placed on the website of the company, if any.

The National Company Law Tribunal is at liberty to dismiss the petition or give such other directions as it thinks fit, in case the release of advertisement is not complied with. The Tribunal could also dispense with any advertisement required to be published under this rule, if it thinks fit upon making an application for such dispensation.

Issue of Notice Hearing of the Application / Petition at the Tribunal

Issue of notice to opposite party / respondent

Once the petition is filed, the next procedure would be that of issuing notice to the opposite party and accordingly the Tribunal shall send out notice to the opposite party / respondent asking them to show cause against the application / petition filed on the date of hearing fixed and the prescribed form of notice is in the form of NCT-5 as per rules notified. The notice in form NCT-5 shall accompany with a copy of the application and also along with supporting documents.

Method of serving notice

The notice could be served electronically i.e. through a valid e-mail address or physically – through hand delivery – registered post / speed post – service by the party himself.
Upon serving of the notice, the acknowledgement showing that the notice has been serviced is required to be provided to the Tribunal and thereupon only the hearing of case would take place. If the notice of service is not effected / acknowledgement is pending – then the Tribunal would provide sufficient time to serve the notice before hearing the case.

**Filing reply to the notice**

Upon issue of the notice, each of the respondents may file the reply to the petition / application – by himself / agent / legal counsel and also serve a copy of the reply on the applicant before the hearing takes place. The respondent shall have to either specifically admit or deny or rebut the facts stated in the application / petition and the reply may also include any such additional facts which may be found necessary in his reply.

**Filing Rejoinder**

Where the respondent states such additional facts as may be necessary for the just decision of the case, the Bench may allow the petitioner to file a rejoinder to the reply (already) filed by the respondent, with an advance copy to be served upon the respondent.

**Respondent / opposite party does not attend (absent)**

It may so happen that the respondent / opposite party choose not to attend the hearing on the date of hearing fixed by the Tribunal. In this case, the Tribunal would give more opportunity / opportunities – sufficient and reasonable time to the opposite party / opponent. Even after giving reasonable time to the opponent / opposite party, still the respondent / opponent party remains absent, the Tribunal would proceed and pass ex-parte order on the application / petition.

**Response from opposite party / respondent – admission**

In response to the notice issued, the opposite party / respondent would attend the Tribunal / appear and may admit the facts since the Tribunal would give reasonable opportunity to the other party. If the respondent admits the facts, then the Tribunal would dispose the application / petition accordingly based on the merits of the application / petition.

**Respondent /opposite party appears and contest to the notice**

In response to the notice issued, the opposite party / respondent would like to contest the case. In such a case as per the provisions of the rules, the respondent / opposite party either himself or through an agent or legal counsel is required to file a reply along with an affidavit and also along with copies of necessary documents on which the respondent / opposite party rely upon, before the date of hearing with an advance service to the applicant / petitioner and also to the Registrar of the Tribunal. Obviously, these documents filed by the respondent / opposite party would also form part of the record with the Tribunal.

**Drafting and presenting the facts**

The Crucial points at this stage is to present the facts to the Tribunal since at the time of hearing, the Tribunal would reply upon the facts presented and consider the prayer(s) duly supported with provisions, relevant circulars, rules, notification and also any precedent case laws of decided cases. Since the judiciary relies upon evidence duly supported by law, one has to develop the skill of pleading with effective communication.
Calling for Evidence / Cross Examination by Tribunal

Evidence through affidavit

The National Company Law Tribunal may direct the concerned party / parties to give evidence, if any, by way of making an affidavit in the prescribed format of NCT-7. Here again the drafting skills of the professional would be of importance since the affidavit would be relied upon as evidence in deciding the case. Clear, concise, relevant facts and clear effective communication skills would be utmost importance.

In case of conflict if any, the Tribunal, if considered necessary – in the interest of natural justice – could order cross examination of any deponent which could either be through video conferencing or on physical appearance.

Additional evidence

In case of any investigation matter (investigation of the affairs of the company by the central government), if the concerned parties had not produced the evidence at the time of investigation itself before the duly appointed officials {i.e. inspector(s)}, then the parties would not be entitled to produce the evidence before the bench at the time of hearing even though the evidence were with them or they had knowledge. However, the bench may allow such evidence / documents / witness to be produced if the bench is of the opinion that the parties were not given sufficient opportunity at the time of investigation after recording the reasons for allowing production at the time of hearing.

Hearing of Petition / Application by Tribunal

Hearing of petition or application

After filing of application, verification and upon providing with the petition / application number, the concerned parties would be filing their response / replies, rejoinder etc. After these, the Tribunal shall notify to the parties the date and place of hearing of the petition or application by an order.

Prior to the hearing of the petition or application, at any stage, if the applicant desires to withdraw his petition or application, he shall make an application to that effect to the Tribunal, and the Tribunal on hearing the applicant and if necessary such other party(ies) arrayed as opposite parties in the petition or the application or otherwise, may permit such withdrawal upon imposing such costs as it may deem fit and proper for the Tribunal in the interests of the justice.

Upon the date of hearing fixed the concerned party(ies) may appear before a Tribunal in person or through an authorized representative. Authorized Representatives could make their appearance after the filing of Memorandum of Appearance or a power of attorney in the specified form of NCT-12. In the case of legal practioner/ advocate, they are required to file Vakalatnama. It is needless to mention here that the Company Secretary in practice is one of the professional amongst others who could be appointed as an authorised representative.

The Tribunal might call upon of the Registrar of Companies (ROC) to submit information on the affairs of the company based on information available in the MCA 21 portal, during the proceedings of the case, after recording the reasons for calling for such information.
The Tribunal calls, summons witness, take their witness on oath; permit cross examination like any other procedure followed in the civil court.

Finally the order would be passed by the Tribunal. 

**Role of Professionals – Practicing Company Secretaries**

The procedure discussed above is only an illustration and it is not the exhaustive one. The point here is, since the NCLT / NCLAT opportunities are coming for the first time as practicing areas for Company Secretary professionals, who need not be a member of the bar council, we need to gear up to face the challenges and take advantage of the opportunity. The Companies Act 2013 paved the way for the company secretary professional to represent and argue out the cases which was the domain of only Advocates and Lawyers, it is very important for practicing company secretaries to enhance, develop their skills in the area of interpretation of laws – accurately, correctly according to the applicable provisions of the act, read with relevant rules and judicial pronouncements and sharpen the skills to begin with.

As said earlier this is altogether a new area, one has to sharpen their skills to deal with the matters at NCLT / NCLAT – acquire good drafting skills for making petition, written statement, rejoinder which would call for a good drafting skills with facts of the case and the facts of law along with required prayers sought from the authorities. Needless to mention, the command over English needs to be excellent, drafting skills as per legal requirement would be called for and above all, presenting the facts to the Tribunal and pleading the matter would lead to the success in the profession.

NCLT / NCLAT would be dealing with all the company law matters under one roof which are being dealt all along by different authorities earlier such as Company Law Board, Official Liquidator, Board for Industrial & Financial Reconstruction, Appellate Authority for Industrial and Financial Reconstruction and by various High Courts.

**Opportunities at a glance – for PCS**

Since the Company Secretaries has been recognized by the Companies Act 2013 as being an expert, the company secretary could do many things in his capacity as an expert including opinion writing, not only on company law related issues but also all other applicable laws (labour laws, FEMA, direct and indirect taxation matters, Central Excise, Customs, Environmental laws, CSR related issues etc.) for a company to which a practicing Company Secretary is rendering service.

Some of the areas of practice could be as that of advising and also assisting to various corporates / companies on the issue of merger, amalgamation, demerger, reverse merger, compromise work relating to reduction of capital and other arrangements of restructuring, making reference to NCLT about sick industrial companies and revival arrangement associated with sick industrial companies, to act as administrators and receivers, act as liquidator (CS young starters could render professional assistance to Company Liquidator), registered valuers, arbitration assignment and many other related areas.

It is up to the practicing Company Secretary professionals to make use of the emerging opportunities and they could even render advisory services on an ongoing basis to an organization, identify and assess non performing / distressed assets, cash position, carry out due diligence and advise the turnaround feasibility, render advice / suggestion on utilization
of optimum resources, review various risks and suggest suitable risk mitigation/management measures including strategic risk management policy for the organization.

The opportunities to practicing professionals could also be of representation before the Debt Recovery Tribunals, Representation and registration of sick companies, negotiating settlements, spotting and evaluating distressed companies for restructuring and rescue planning and working out a detailed plan for restructuring the business from all angles, to work out a detailed bankable financial structure of the business and also identifying areas of opportunity for the company.

At the end of the day, one should remember that the companies are looking for value addition and the company secretaries possess expertise knowledge not only in company law matters but also in corporate laws.

**Conclusion**

Considering the vast and enormous opportunities emerging by setting up of the National Company Law Tribunal and National Company Law Appellate Tribunal the Practicing Company Secretaries should get their competencies set with very high standards right from understanding the applicability of provisions / acts / rules at a given situation, correctly interpreting the law to the advantages of their clients to whom they render service in compliance with applicable laws while providing value added services in assisting the Tribunal for speedy disposal / dispensation of justice in all relevant matters such as scheme of restructuring, merger, amalgamation, compromise and arrangement, revival and rehabilitation of sick companies and winding up of companies etc.

Opinion writing would be one area which would emerge largely for practicing company secretaries and one has to develop an art of opinion writing, right interpretation of the provisions / definitions and also provide a clear, unambiguous opinion spelling out the procedural issues which are to be followed.

Needless to mention that the practicing companies secretaries need to improve upon their skills relating to drafting the documents, petitions, submissions, joinder, rejoinder for the requirements of the Tribunals and also get familiarized with the pleading skills so that they could be very competent to be successful in the new area of practice. Understanding the court procedures would be essential for representing the clients in judiciary.

The days are not far when the practicing Company Secretary professionals would be highly respected by the corporate and every corporate would be proud to be associated with the Company Secretary profession. However to reach this stage, the Company Secretary professionals need to embrace the values like – reliability, integrity, creativity and cooperation and works towards diversity, to bring improvement to their client’s business performance by being the partner in providing the greatest value through amenable solutions for any problem / risk / dispute etc.

Finally we could sum up and say that the role of company secretaries in the corporate world is going to be manifold and phenomenal and let us sharpen our skills with continuous improvement keeping up with the amendments from time to time and try our best to “deliver first time right” and excel in the areas of governance and compliance.
Introduction

Competition is necessary to achieve economic efficiency and is one of the essential conditions of a market economy. In a globalizing and liberalizing world economy, the developing countries recognized that the benefits of market-oriented reforms were likely to be fully realized only if enterprises acted under the spur of competition, to create a level playing field by reducing barriers to entry which originate from anti-competitive practices.

Competition improves the efficiency and utilization of resources by business entities and provides a wider choice of goods at competitive prices to the consumer. However, the benefits of competition are lost if the competition is unfair or non-existent.

There is possibility that markets suffer from failures and distortions and various players can resort to anti-competitive activities such as cartels, abuse of dominance etc. that adversely impact economic efficiency and consumer welfare. Hence, it is necessary to have suitable legislation in place to provide a regulative force which establishes effective control over economic activities.

Evolution of Competition Law

It would be interesting to turn the pages of history and see how the Competition Law has evolved in India. In the initial years after independence, Government intervention and control was prevalent in almost all areas of economic activities in the country. In 1951, the Industries (Development and Regulation) Act was implemented, which required firms in many industries to have licenses for entry into a business or expansion of existing business.

Thus, the system of controls in the shape of industrial licensing restricted the freedom of entry into industry and also led to concentration of economic power in the hands of few individuals or groups of business houses. This entrenchment of a few individuals led to the emergence of monopolistic industries, License-raj and consequently to their indulging in restrictive trade practices which were detrimental to the consumer and the economy.

In 1964, the Government of India, appointed a commission named Monopolies Inquiry Commission to inquire into the extent and effect of concentration of economic power in private hands and prevalence of monopolistic and restrictive trade practices in important sectors. While submitting its report, the Commission put forward the Monopolies and...
Restrictive Trade Practices Bill, 1965. The bill was later passed by both the Houses of Parliament, received assent of the President and came into force on June 1, 1970 as the Monopolies and Restrictive Trade Practices Act, 1969 (‘MRTP Act’). The Statement of Objects and Reasons mentioned in the MRTP Act were:

(a) to provide that the operation of economic system did not result in the concentration of economic power to the common detriment;

(b) for control of monopolies; and

(c) for prohibition of monopolistic and restrictive trade practices and other matters connected and incidental thereto.

In 1991, the Indian economy witnessed sweeping reforms in many areas of Government policies. The New Industrial Policy announced by the Government in July 1991 was based on the pillars of liberalization and competition. In light of the new policy regime, a need was strongly felt for shifting approach from curbing monopolies to fostering competition. Another factor underlying the desire for a new competition law stemmed from the changes in the international economic environment, in particular from the establishment of the World Trade Organization (WTO). In October 1999, the Government of India appointed a High Level Committee (‘The Raghavan Committee’) to recommend a suitable legislative framework relating to competition law for the country. The Committee observed that:

(a) The anti-competitive practices in the MRTP Act were inadequate in promoting competition in the market trade.

(b) MRTP Act was inadequate to provide adequate remedies to the complainants. Except for ‘cease and desist’ orders, the MRTP Commission could not impose penalties for breach of law.

(c) Extra-territorial application of law was refused by the Supreme Court and it was held that the wording of MRTP Act did not provide for extra territorial jurisdiction.

(d) MRTP Act did not define certain key terms and the generic nature of the Act caused ambiguities in interpretation and application.

The Committee presented its Competition Policy report to the Government in May 2000 and recommended replacement of the MRTP Act with new legislation. The proposed legislation was intended to cover anti-competitive agreements, abuse of dominance, mergers, and further recommended the setting up of an investigation and enforcement authority known as the Competition Commission of India (“CCI”) in place of the MRTP Commission (MRTPC). In November 2000, based on the recommendations of Raghavan Committee, a draft competition law was prepared and presented to the Government. After considering the recommendations and effecting some refinements, the Parliament passed the bill in December 2002. Finally, the new law, namely, Competition Act, 2002 (hereinafter referred to as the “Competition Act” or “the Act”) received the assent of the President in January 2003.

**How is the New Act Different from the Precursor?**

The newly enacted Competition Act is at variance with MRTP Act in many ways, including
Journey of Competition Law in India

aims and objectives, scope and structure, dimensions and focus, approach and application, powers and deterrence, etc.

Whereas the MRTP Act sought to prevent concentration of economic power and deemed several kinds of agreements as anti-competitive without enquiry, the Competition Act seeks to promote competition in markets and prevent only those anti-competitive practices that have an appreciable adverse effect on competition.

While the MRTP Act drew from the Directive Principles in the construction, the mandate for enacting the Competition Act is derived from Entry 21, List III of the VII Schedule to the Constitution which empowers the State to control and regulate “commercial and industrial monopolies, combines and trusts”. Unlike the MRTP Act, the role of the Central Government is extremely limited under the new law, which grants a greater degree of independence to the CCI and the Competition Appellate Tribunal.

The MRTP Act was initially applicable only to the private sector. Public sector undertakings were brought under its purview only by amendment in 1991. The Competition Act however, is fully applicable to the PSUs as well as Government Departments engaged in business. The only exemptions are reserved for sovereign functions such as atomic energy, currency, defence and space.

The MRTP Act provides for a single-tier adjudicatory body, namely the MRTPC, and an appeal from its order lies before the Supreme Court, while the Competition Act has established the CCI as a regulatory-cum-advisory body, from which an appeal lies to COMPAT followed by an appeal to Supreme Court.

The focus and structure of the Competition Act is in line with international trends and it has three core enforcement/regulatory areas, namely, (a) anti-competitive agreement; (b) abuse of dominance; and (c) regulation of combination. Additionally, it is required to render opinions on competition issues pertaining to the regulated sector or emanating from any law or policy of the Central/State Government. More so, an obligation to undertake competition advocacy also devolves on the CCI.

In terms of ‘teething’, the new authority has been vested with substantial powers including those to declare agreement void, impose hefty fines and penalties, and modify or even block mergers. The MRTPC however could only pass ‘Cease & Desist’ orders, which in practical terms had little deterrent effect.

Subsequent Amendments to the Act

1. The Competition (Amendment) Act, 2007: The amendment, inter alia, provided for establishment of Competition Appellate Tribunal (“COMPAT”) to adjudicate on appeals from the orders passed by CCI. Further, notification of all “combinations” i.e. mergers, acquisitions and amalgamations to CCI was made compulsory.

2. The Competition (Amendment) Act, 2009: This amendment provided for disposing all pending investigations/proceedings relating to UTP and pending applications for compensation by COMPAT by ordering the Office of DG to conduct fresh investigations into such cases.

Competition Law in India came into full force from the year 2009 and since then the
Commission put itself in between the Indian market and became watchdog of the agreements of big companies to ensure that their agreements and their acts do not create an anti-competitive environment within Indian market.

The Government of India in June, 2011 constituted an expert committee to examine and suggest modifications in the Act. After deliberations the expert committee has come out with suggestion to amend the Act and thus the Competition (Amendment) Bill, 2012 was introduced in the Lok Sabha in December 2012.

**Practices covered under the Competition Act, 2002**

1. *Anti-Competitive Agreements*

   Section 3 of the Act states that any agreement which causes or is likely to cause an appreciable adverse effect on competition in India is deemed to be anti-competitive. Anti-competitive agreements include, but are not limited to:

   • Agreement to limit production and/or supply;
   • Agreement to allocate markets;
   • Agreement to fix price;
   • Bid rigging or collusive bidding;
   • Conditional purchase/ sale (tie-in-arrangement);
   • Exclusive supply/ distribution arrangement;
   • Resale price maintenance; and
   • Refusal to deal

2. *Abuse of Dominance*

   Section 4 prohibits any enterprise from abusing its dominant position. Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumer or the market in its favour. Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for other players to compete with the dominant undertaking on merit.

   Abuse of dominant position includes imposing unfair conditions or price, predatory pricing, limiting production/ market or technical development, creating barriers to entry, applying dissimilar conditions to similar transactions, denying market access and using dominant position in one market to gain advantages in another market.

3. *Regulation of Combinations*

   Combinations can be of three types: Mergers, Amalgamations and Acquisitions. Generally these are discussed under the title of mergers. Mergers can be of three types – horizontal, vertical and conglomerate. Only such horizontal mergers that may lead to reduction in competition substantially need regulation. On the other hand, vertical mergers which involve merger of two companies whose business activities are basically two different stages in production and distribution chain hardly pose any threat to competition as the
object of merger may be to ensure a source of supply or outlet for products, and the
effect may improve efficiency. Similarly, conglomerate mergers do not constitute the
coming together of competitors nor do they have any vertical connection. They generally
involve diversification of business activities and are, therefore, considered to pose no
threat to competition.

The Competition Act prohibits mergers or other combinations that causes or may cause
an appreciable adverse effect on competition. The Competition Act also has prior
notification requirements for transaction that meet a certain financial threshold.

4. Extra-territorial reach

The mandate of CCI extends beyond the boundaries of India. Its arm extends beyond the
geographical contours of India to deal with practices and actions outside India, which
have an appreciable adverse affect on competition in the relevant market in India. CCI
has power to enquire into an agreement entered outside India or any party to such
agreement is outside India, where such agreement has caused or is likely to effect
competition in India.

Enforcement of Competition Law

The main object of competition law is to prevent practices having adverse effect on
competition, to promote and sustain effect on competition, to protect interests of consumers
and to ensure freedom of trade carried on by other participants in markets. In India, basically
there are three institutions to support the enforcement of said objectives, namely: (1)
Competition Commission of India; (2) Director General; and (3) Competition Appellate
Tribunal.

Competition Commission of India (CCI)

CCI is an expert body which functions as a regulator for preventing anti-competitive
practices in the country and also has advisory and advocacy functions. CCI is a quasi-judicial
and corporate body. The jurisdiction of civil courts is barred in respect of those cases where
CCI and COMPAT are having jurisdiction.

CCI shall, for the purpose of discharging its functions under this Act, have the same
power as are vested in a civil court under CPC, 1908, while trying suits in respect of following
matters namely summoning and enforcing the attendance of any person and examining him
on oath, requiring the discovery and production of documents, receiving evidence on affidavit,
issuing commissions for examination of witnesses or documents, subject to provisions of
sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or
document or copy of such record or document from any office.

Director General

The Central Government shall appoint a DG for assisting CCI in conducting inquiry into
contravention of provisions of the Act or to perform other functions as provided by or under
the Act. The Director shall, when so directed by the CCI, assist the Commission investigating
into any contravention of provisions of this Act or any rules or regulations made there under.
The Additional, Joint, Deputy and Assistant Director General or such officers or other
employees so appointed shall exercise his powers and discharge his functions, subject to the
supervision and direction of the DG. The DG shall have all powers as are conferred upon CCI under the Act.

**Competition Appellate Tribunal**

The concept of COMPAT was not included in the Act initially at the time of its enactment. It was only after the filing of case Brahm Dutt v. Union of India, the Competition (Amendment) Act 2007 provided for the establishment of COMPAT. It is a quasi judicial body and consists of Chairperson and not more than two other members appointed by Central Government.

The proceedings before COMPAT are deemed to be judicial proceedings. Appeal against the order of CCI can be filed before COMPAT within 60 days. Appeal can be filed by Central/State Government or by any enterprise or person who is aggrieved by decision, direction or order of CCI. The COMPAT will hear and dispose of appeals against order of CCI and adjudicate claims for compensation and pass orders for recovery of compensation. The tribunal will give opportunity of hearing to other party and then will pass the order. Copy of order will be sent to the parties to appeal and CCI. COMPAT can review its own decisions. In case of contravention of COMPAT’s order without reasonable grounds, punishment of imprisonment upto 3 years and penalty upto Rs. 1 crore can be imposed by Chief Metropolitan Magistrate, Delhi. Appeal against COMPAT’s order can be made to Supreme Court within 60 days.

**Synopsis of Few Case Laws**

I. **Shamsher Kataria v. Honda Siel Cars India Ltd & Others.**

<table>
<thead>
<tr>
<th>Allegations by Informant (Mr. Shamsher Kataria)</th>
<th>Contention of Opposite parties (Honda Siel Cars India Ltd &amp; 16 other car manufacturers)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Genuine spare parts of automobiles manufactured by Original Equipment Manufacturer (OEM) are not available freely in open market. Independent repair workshops are not provided with technological information, diagnostic tools and software programs required to maintain, service and repair the technologically advanced automobiles manufactured by OEMs. The repair, maintenance and servicing of such automobiles could only be carried out at workshops or service stations of authorized dealers of such car companies.</td>
<td>Relevant market in the present case is an indivisible and unified 'system market' of cars. The market of sale of spare parts is not distinctive from market of sale of cars. The restrictions imposed on authorized dealers from sale in open market without the consent of OEM was reasonable condition imposed to protect their IPRs and such agreements are protected from scrutiny of the Commission.</td>
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</table>

**CCI findings**: It was held that primary market of 'manufacture and sale of cars' and aftermarkets 'sale of spare parts, diagnostic tools etc.' and 'service of repair and maintenance' are three separate relevant markets. The contention of unified 'systems market' was rejected and it was opined that Indian car owners do not engage in ‘whole life costing’ because they do not have access to relevant information for such analysis.
OEM is a 100% dominant entity in the aftermarket for its genuine spare parts, diagnostic tools and repair services for its brand of automobiles, since the customer gets ‘locked-in’ after purchasing a car of a particular brand.

Further, the OEMs have ensured that the independent repairers are not able to effectively compete with the authorized dealers of the OEMs in the secondary market for repairs and services by denying them access to required spare parts and tools to complete such repair work. By this, the customers are left with the only option of approaching the authorized dealer network for service options. Such foreclosure of competition in the repairs market allows the car makers to exploit the customers by charging high prices for spare parts and ancillary repair services.

**Order passed**: CCI directed the OEMs to cease and desist from indulging in such conduct which contravenes the provisions of Competition Act and to put effective systems in place to make the spare parts and diagnostic tools easily available through an efficient network. Further, the commission ordered to make available in public domain information regarding spare parts, their MRPs, arrangements for availability over the counter, and details of matching quality alternatives, maintenance costs, provisions regarding any such information which may be relevant for full exercise of consumer choice and facilitate fair competition in the market. Penalty of Rs.2544.65 crores calculated at the rate of 2% of average income for three financial years was imposed for the contravention.

**Analysis of the order**: In this case, CCI passed a landmark decision by holding that each car company is dominant in its respective after sales market and penalized the major car companies for entering into vertical agreements and for abusing their dominance.

II. **Belaire owner’s association v. DLF Limited**

<table>
<thead>
<tr>
<th>Allegations by Informant (Belaire Owners’ Association)</th>
<th>Contention of Opposite parties (DLF &amp; Others)</th>
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<tr>
<td>DLF by abusing its dominant position imposed highly arbitrary, unfair and unreasonable conditions on the informant through its agreements. Various clauses contained in the house agreement were one sided clauses. The conditions imposed include DLF’s right to change the layout plan without consent of allottees, DLF unilateral power to make changes in agreement and power to supersede without any right to allottees.</td>
<td>The agreement would not fall under the jurisdiction of Commission since the agreement was entered before setting up of CCI and before section 4 of the Act was enacted.</td>
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<td>Sale of apartment can neither be termed as sale of goods nor sale of service and hence the Act is not applicable to the present case.</td>
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<td></td>
<td>It was not a dominant player in the relevant market. The high turnover was due to its presence in other markets also.</td>
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<td></td>
<td>Conditions included in the agreement are usual practices adopted by the builders and are part of industry practice.</td>
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</table>
Allottees had various options in respect of making a choice of buying an apartment and they signed the agreement after considering all pros and cons in respect of their investment.

**CCI findings**: The Act applies to all existing agreements which were entered prior to coming into force of section 4 of the Act. Housing activities undertaken by development authorities are considered as service.

DLF’s high end residential building in Gurgaon targets only specific consumers, according to their capacity to pay. It occupies a leadership position as real estate is a sector with natural entry barriers due to high cost of land and brand value of incumbent market leaders.

DLF abused its dominant position by imposing unfair conditions on the buyer through the Provisional Booking agreement, which is signed by buyer after having paid substantial costs, therefore, the buyer is left with no option to object the agreement.

**Order passed**: CCI held that DLF has contravened the provisions of the Act by imposing unfair or discriminatory conditions in the sale of services. CCI imposed a penalty of Rs. 630 crores on DLF calculated as 7% of average turnover of the company in the preceding three years. Further, DLF was directed to cease and desist from formulating and imposing such unfair conditions in its Agreement with buyers in Gurgaon and to suitably modify unfair conditions imposed on its buyers as referred to above within 3 months of date of receipt of order.

DLF went in appeal to the COMPAT against the CCI order. The COMPAT vide its order upheld the penalty imposed by CCI agreeing that DLF had abused its dominant position. Interestingly, the Supreme Court also validated the order directing DLF to deposit the entire amount of penalty before the appeal can be taken up.

**Analysis of the Order**: This is a huge relaxation to all the property buyers who invested huge amount and not satisfied with the service provided by builders. CCI has removed unfair and one sided clauses in Flat Buyer Agreement which were till now common to most of similar agreements of other builders.

**III. Builders Association of India v. Cement Manufacturer’s Association and 11 cement companies**

<table>
<thead>
<tr>
<th>Allegations by Informant (Builders Association of India)</th>
<th>Contention of Opposite parties (Cement Manufacturer’s Association &amp; 11 cement companies)</th>
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<tbody>
<tr>
<td>In spite of the cement manufacturing units being geographically dispersed throughout India having different cost of production and transportation, the cement manufacturing companies increased their prices at the same time which showed allocation of markets;</td>
<td>The trends followed in the process of pricing decision are generally governed by market forces which is determined by market feedback received from marketing offices. The prices keep varying from season to season depending on the demand.</td>
</tr>
</tbody>
</table>
Collectively decided to reduce their capacity utilization/production capacity in spite of increase in their installed capacities in order to artificially increase the demand;

Cement Manufacturer’s Association basic objective is to develop and promote the cement industry in India and also represent the concerns of industry before the appropriate departments of the Governments.

Failure on the part of cement industry to pass the price benefit enjoyed in the form of ‘fly ash’ (raw material to produce cement provided free to the Cement Industry by Thermal Power Plants owned by Government undertakings) to its customers and consumers.

Under the instruction of DIPP, it has been collecting indicative retail and wholesale prices which are historical.

It is incorrect to make general assumptions based on the installed capacity, as production depends upon various factors and lower utilization of capacity is possible if there is lack of demand for the product.

CCI findings

The Commission observed that the cement manufacturers used to meet at the platform of the Cement Manufacturers Association (CMA) and the CMA was collecting both retail and wholesale prices and circulating details of capacity utilization and production among its members thereby establishing co-ordinated act on the part of cement companies to restrict production and supplies in the market in contravention of provisions of the Act.

CCI overruled the objection raised that there was no written agreement or direct evidence from which existence of cartel could be inferred. It observed that written agreement is not necessary to establish common understanding or concerted behavior under the definition of ‘Agreement’ in the Act.

Order passed

CCI directed the cement manufacturers to ‘cease and desist’ from indulging in any activity relating to agreement, understanding or arrangement on prices, production and supply of cement in the market. CMA was directed to disengage and disassociate itself from collecting wholesale and retail prices from members and also from circulating the details of production and dispatches of cement companies to its members. Penalty amounting to Rs.6309.59 crores @ 0.5 times of their annual profits for the years 2009-10 and 2010-11 was imposed for the alleged limiting and controlling supplies in the market and determining prices through anti competitive agreement.

Analysis of the order

CCI decision in this case assumes significance because it is based on circumstantial evidence which according to CCI, has provided the ‘plus factor’ to corroborate the ‘price parallelism’ which indicated controlling of market by major cement manufacturers by under utilization of their installed capacities to create artificial demand.
IV. Shri Surinder Singh Barmi v. Board for Control of Cricket in India

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<tr>
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<tbody>
<tr>
<td><strong>(Shri Surinder Singh Barmi)</strong></td>
<td><strong>(Board for Control of Cricket in India)</strong></td>
</tr>
<tr>
<td>Irregularities in grant of franchise rights, media rights and sponsorship rights in the context of IPL.</td>
<td>BCCI denied the applicability of the Act as it is a ‘not-for profit’ society for promotion of cricket. Their commitments are not driven by commercial considerations and the revenue obtained is utilized in the game of cricket.</td>
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<td></td>
<td>Market for various rights pertaining to IPL viz. franchise rights, media rights are separate markets given these rights are not interchangeable.</td>
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<tr>
<td></td>
<td>As franchise rights were to be awarded to multiple successful bidders, there was a need for non-discriminatory terms to create a level playing field for all.</td>
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</table>

CCI findings

BCCI is an ‘enterprise’ under the Act because its role as ICC governing body for cricket in India was both as a ‘custodian’ for the game as well as of ‘organizer’ of matches. Although BCCI was a ‘not for profit’ society, its activities were revenue generating.

BCCI’s dominance arises inter alia from its regulatory powers, control over infrastructure, control over players, ability to approve/ control the entry of other leagues.

BCCI abused its dominant position by denying market access to potential competitors to IPL by binding itself not to organize, sanction or recognize any private professional domestic leagues/ events other than IPL.

Order passed

Directing BCCI to cease and desist from any practice in future which denies market access to potential competitors. CCI also asked BCCI to desist from using its regulatory powers in any way while considering and deciding on matters relating to its commercial activities. Penalty @ six percent of average turnover of BCCI amounting to Rs.52.24 crores was imposed for abusing its dominant position by restricting competition while conducting IPL tournaments.

Analysis of the order

Order of CCI in this case is quite significant in as much as it rejects the defence of ‘one-federation-per-sport’ put forth by BCCI before the Commission. The Commission rightly held that the principle did not automatically grant monopoly rights to sports federations. The single federation is supposed to lay down the ‘safety guidelines’ or parameters under which the sport will be played and the rules of the game.
V. *MCX Stock Exchange Ltd. v. National Stock Exchange*

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<tr>
<td>(MCX Stock Exchange Ltd)</td>
<td>(National Stock Exchange of India Ltd &amp; Others)</td>
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The concept of fee waivers and low level of deposit requirements by NSE only with respect to its currency derivatives (CD) segment was considered completely at variance with its conduct in other segments. This was aimed at eliminating competition and discouraging potential entrants in CD segment.

This includes a transaction fee waiver on currency future trades executed on NSE, no admission for membership in its CD segment, no annual subscription charges, no fee for providing data feed in respect to its CD segment, refusal to share its CD segment APIC with FTIL, thus disabling O DIN users from connecting to NSE CD segment.

Stock exchange services cannot be relevant market in this case. Each segment of capital market and the debt market is a distinct market with separate trade at stock exchanges.

The waiver was done in the CD segment to encourage larger participation as the currency futures were at a nascent stage.

The requirement for deposit levels is made keeping in line with the nature of segment in terms of risk associated and other factors. Though the deposit requirement for CD segment was set lower, it cannot be said to be unjustifiably low.

### CCI findings

CCI observed that as underlying assets, equities and currencies are entirely different; consequently related derivatives are also different. It was decided that the stock exchange services in respect of CD segment in India are clearly an independent and distinct relevant market.

The Commission examined the market share of NSE and its operations in other segments and found that it has high degree of vertical integration from trading platform, front-end information technology, index services, etc. It was of firm opinion that NSE has a position of strength and enjoys a dominant position in the relevant market.

It was opined that NSE by not charging transaction fee is subsidizing activities in CD segment which is open to competition and is using its monopoly profits to leverage its position.

### Order passed

NSE was directed to modify its zero price policy in the relevant market and to cease and desist from unfair pricing, exclusionary conduct and unfairly using its dominant position in other markets to protect the relevant CD market with immediate effect. The Commission levied a penalty on NSE equivalent to 5% of average turnover amounting to Rs.55.5 crores.

### Analysis of the order

This is the first case, where a major penalty was imposed by CCI for contravention of
provisions of the Act. This is a very important case because there has been no earlier case in India or abroad, in relation to interpretation of different services offered by stock exchanges as separate relevant markets.

Way Ahead

The Competition Act has brought about a systemic transformation in the way competition law operates in India. The Government of India is considering wide-range amendments to the Act and also a National Competition Policy to specifically deal with policy distortions and impediments that deter healthy competition.

The cases to date provide an indication that CCI is actively moving in the direction to defend itself against critics who allege that progress has been slower than optimal, particularly in the area of merger control. The new regulator as it grows in confidence hopes that its pro-active role in India in uncovering cartels and other anti-competitive agreements would go a long way in encouraging fair market practices, deepening competition in markets and contributing to economic growth with equity. This means that companies with operations in, or affecting India, need to take into account the implication of competition law and take appropriate measures to manage the risks and opportunities the law presents for doing business in India.

References

1. Competition Law in India by Nishith Desai Associates
2. Publications by CUTS
3. Competition Law Bulletin(s)

***
The Competition Act, 2002

In India, competition issues are addressed by the Competition Act, 2002 (the Act). The Act seeks to prevent practices having appreciable adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India. The Competition Commission of India (the Commission) has been established to enforce various provisions of the Act.

Exemptions, exceptions and exclusions are common under the competition regime throughout the world. Competition Legislation of every country provides for the same. Of course, the terms ‘exception’, ‘exemption’ and ‘exclusion’ can have specific meanings in the context of particular national legal systems. The exemptions under competition regime in India can be broadly classified into three categories: (a) Exemptions under the Act; (b) exemptions through notifications; (c) exemptions under the Regulations. This paper deals with these exemptions.

**Exemptions under the Act**

Certain exemptions are created under the Act itself. Respective sections exempt certain entities or practices or actions from application of the relevant legal provisions. The same are as follows:

*Sovereign functions of the Government department*

Sub-section (h) of Section 2 states that the Act is applicable to all enterprises engaged in commercial activities. However the provision clearly states that the Act does not apply to any department of the Government if the activities being performed are relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

In the case of Shri Rajat Verma and Public Works (BGR) Department, Government of Haryana and others, the Commission refused to initiate action against the opposite parties. The Opposite Party was one of the departments of the Government of Haryana, entrusted with the responsibility of construction and maintenance of roads, bridges and government buildings in the state. The Commission held that the activities being performed by the
opposite party could not be covered in the definition of ‘enterprise’ because it was not directly engaged in any economic and commercial activities.

*Efficiency enhancing Joint Ventures (JV)*

Sub-section (3) of section 3 provides that in certain cases, an agreement between the competitors or association thereof shall be presumed to have an appreciable adverse effect on competition. However a proviso to this sub-section carves out an exception and states that if the agreement is entered into by way of joint ventures and such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

It was held by the Commission in the information filed by Association of Third Party Administrators against General Insurers (Public Sector) Association of India that the proposed JV is clearly with an object to enhance efficiencies and cannot be construed as cartel like conduit. It is also not causing any appreciable adverse effect on competition between various insurance companies of the nature mentioned in section 19(3) of the Act. If the proposed JV proves to be inefficient, gradually customers would start switching to other insurance companies and the inter-brand competition would resolve the position in the market.

*Agreements related to IPRs or Exports*

Sub-section (5) of section 3 provides for a total exemption to certain agreements relating to intellectual property rights or exports of goods or services from India. The said exemption is available in the following circumstances:

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under (a) the Copyright Act, 1957; (b) the Patents Act, 1970; (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999; (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999; (e) the Designs Act, 2000; (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000;

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

*To meet the competition*

Section 4 prohibits the abuse of dominant position by a group or enterprise. Accordingly a dominant enterprise is prohibited to follow any of the practices listed under section 4(2)(a) to section 4(2)(e). However with regard to the practice listed under clause (a) of section 4(2), an exception is created by way of an explanation which reads as under:

For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition.

In *Dhruv Suri v. Mundra Port & Special Economic Zone Ltd.*, the Commission observed as under with regard to the said exemption.
It is observed by this Commission that there are two container terminals at Mundra Port, one is operated by the opposite party and the other by MICT. There is intense inter-port competition between the opposite party and MICT and others for attracting liner traffic on India's West coast. Commission finds force in the contention of the MPSEZ that the discounts were being offered by the opposite party essentially to meet the stiff competition from MICT, which was the incumbent terminal in Mundra Port and SEZ Ltd., as also from other more established ports on western coast such as Mumbai, JNPT etc. As such as per Explanation to section 4(2) (a) of the Act, any discriminatory condition or price which may be adopted to meet the competition shall not constitute abuse.

Acquisition by certain enterprises

According to section 6 of the Act, no person or enterprise can enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. However sub-section (4) and sub-section (5) provides for an exemption from application of section 6 in certain cases, to a public financial institution, foreign institutional investor, bank or venture capital fund. As a result, section 6 does not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. Of course, such acquirer is duty-bound to file Form III within 7 days from the date of the acquisition, with the Commission giving the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement.

Exemptions through Notifications

Exemptions in public interest etc.

Section 54 of the Act gives a special privilege to the Central Government for granting exemption from application of the Act. The said section reads as under:

The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—

(a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;

(b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;

(c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government:

Provided that in case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions.

Exercising the powers under section sub-section (b) of section 54, the Central Government
has issued various notifications from time to time. Following notifications granting exemption from application of the Act are in force now:

**Vessel Sharing Agreements**

In view of a decision taken by the Central Government, the provisions of section 3 would not apply till 1st March 2017 to the vessel sharing agreements of shipping industry. The notification, reads as under:

The Central Government, in public interest, hereby exempts the Vessels Sharing Agreements of Liner Shipping Industry from the provisions of section 3 of the said Act, for a period of one year from the date of publication of this notification in the Official Gazette, in respect of carriers of all nationalities operating ships of any nationality from any Indian port provided such agreements do not include concerted practices involving fixing of prices, limitation of capacity or sales and the allocation of markets or customers.

During the said period of one year, the Director General, Shipping, Ministry of Shipping, Government of India shall monitor such agreements and for which, the persons responsible for operations of such ships in India shall file copies of existing Vessels Sharing Agreements or Vessels Sharing Agreements to be entered into with applicability during the said period along with other relevant documents within thirty days of the publication of this notification in the Official Gazette or within ten days of signing of such agreements, whichever is later, with the Director General, Shipping.

**Banking Companies**

The Central Government has, exempted certain banking companies from the application of the provisions of sections 5 and 6 of the Competition Act, 2002, for a period of 5 years w.e.f. 8th January 2013. According to the notification, a banking company in respect of which the Central Government has issued a notification under section 45 of the Banking Regulation Act, 1949 will be eligible to get this exemption. Hence this exemption is not available to all banking companies but only such banking companies which are covered by section 45 of the Banking Regulation Act, 1949 only. The Commission has recently approved notice from Sarva Haryana Gramin Bank and Punjab National Bank (Combination Registration No. C-2015/12/344); notice given by Kotak Mahindra Bank Limited and ING Vysya Bank Limited (Combination Registration No. C-2014/12/231); notice given by Rajasthan Marudhara Gramin Bank and State Bank of Bikaner and Jaipur (Combination Registration No.C-2016/02/377).

**Exemption to Group exercising less than 50% of voting rights**

Explanation to section 5 of the Act defines the group. Exercising its powers under section 54, the Central Government has relaxed this definition. Accordingly, this notification exempts the ‘Group’ exercising less than 50% of voting rights in other enterprise from the provisions of section 5 of the said Act for a period of 5 years i.e. till 4th March 2021.

**Target based exemption**

By issuing a notification, the Central Government has exempted acquisition of small enterprises. Accordingly, in case of an enterprise, whose control, shares, voting rights or assets are being acquired, has either assets of the value of not more than Rs.350 crores
in India or turnover of not more than Rs.1000 crores in India, is outside the purview of section 5. The said exemption would remain in force till 3rd March, 2021.

Value of assets/turnover enhanced by 100%

Section 5 of the Act provides the threshold in terms of the value of assets and the turnover. Section 20(3) mandates the Central Government to enhance or reduce these thresholds, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies. Accordingly, the Central Government has in consultation with the Competition Commission of India, issued a notification and enhanced the value of assets and the value of turnover, by 100% for the purposes of section 5 of the said Act.

Exemptions under Combination Regulations

This class of exemptions can certainly be termed as the most corporate-friendly one. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (the Regulations) provide for the procedural framework on regulation of the combinations. Schedule I to the Regulations provides a list of transactions which are ordinarily not likely to raise competition concerns and hence normally exempt from approval requirements. They are known as ‘ordinarily exempt’ transactions. Schedule I which has been brought in force w.e.f. 1st June 2011 has been amended 5 times on 23rd February 2012; 4th April 2013; 28th March 2014; 1st July 2015 and 7th January, 2016. The Schedule I as in force now reads as under:

(1) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty five per cent (25%) or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including shareholders’ agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.

Explanation:- The acquisition of less than ten per cent of the total shares or voting rights of an enterprise shall be treated as solely as an investment:

Provided that in relation to the said acquisition -

(A) the Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders of the enterprise whose shares or voting rights are being acquired, to the extent of their respective shareholding; and

(B) the Acquirer is not a member of the board of directors of the enterprise whose shares or voting rights are being acquired and does not have a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and does not intend to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired.

(1A) An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to acquisition, already holds twenty
five per cent (25%) or more shares or voting rights of the enterprise, but does not hold fifty per cent (50%) or more of the shares or voting rights of the enterprise, either prior to or after such acquisition:

Provided that such acquisition does not result in acquisition of sole or joint control of such enterprise by the acquirer or its group.

(2) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control.

(3) An acquisition of assets, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.

(4) An amended or renewed tender offer where a notice to the Commission has been filed by the party making the offer, prior to such amendment or renewal of the offer:

Provided that the compliance with regulation 16 relating to intimation of any change is duly made.

(5) An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.

(6) An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to acquisition of control.

(7) Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.

(8) An acquisition of shares or voting rights or assets, by one person or enterprise, of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.

(9) A merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group:
Provided that the transaction does not result in transfer from joint control to sole control.

(10) Acquisition of shares, control, voting rights or assets by a purchaser approved by the Commission pursuant to and in accordance with its order under section 31 of the Act.

Conclusion

By granting exemption to certain sectors or transactions or practices the Central Government has ensured that public interest prevails while enforcing the Act. By simplifying the procedures, the Commission has also assured the business world that the Act is an appropriate instrument for creating the level playing field for all the players in the economy.

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Budget Vs. Non Performing Assets

CS K G Saraf*

A Prelude

With the background of weak global economic environment particularly attributable to currency devaluation, receding demand all over China, nervousness among foreign financial institutions witnessing a huge redemption of funds in West Asia owing to oil price crash, Indian economy appears to be demonstrating a fair resilience of its status. The Budget proposals presented by Shri. Arun Jaitley, Hon'ble Finance Minister in the Parliament on 29th Feb, 2016 has offered an overall boost to the economy as it has turned out to be robust. The Finance Minister while effectively carrying out his budget exercise had all along focused his energy and attention to fiscal consolidation by pegging deficit target at 3.5% of GDP and thus provided stimulus to economy thereby boosting investor's confidence. The BSE Index has depicted a steady rise ever since the introduction of Finance Bill 2016-17. FII's have started reposing confidence in the stock markets leave alone the domestic investors.

Non - Performing Asset (NPA)

Non- performing asset is a loan or lease that does not accomplish its stated principal and interest payments. It is defined as a sanctioned facility towards which the interest and/or installments of loan has remained overdue for prescribed time. An asset including leased asset becomes non-performing when it ceases to generate income for the bank. In other words, NPAs are assets which are not producing any income.

Pursuant to RBI Circular of July 2014 is a loan or advances where interest and/or installment of principal is outstanding for a period exceeding 90 days would be grouped as NPA a loan or an advances where the bills remain overdue for a period of more than 90 days in the case of bill purchased and discounted would be classified as non-performing asset.

Since year 2013-14, with a view to moving towards best international practices and to ensure greater transparency RBI has determined '90 days overdue' norm for identification of NPA. This is evidenced by RBI framing guidelines in respect of prudential norms on income recognition, asset classification and provisioning relating to advances and loans to be complied with in the published accounts. It is imperative to mention at this juncture, that the banks are statutorily required to classify an account as NPA only if interest due and charged during any quarter is not serviced fully within 90 days from the end of quarter.

* FCS, Practising Company Secretary. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.
NPA and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has provisions for the banks to take legal course to recover their dues owing to borrowers default in repaying their dues if the account is classified as NPA.

The secured creditors have to issue notice to the borrower giving 60 days to pay the dues. If the dues are not paid the bank can take possession of assets and also can give on lease under this Act. If the bad load remains NPA for 2 years, the banks can also resale the same to ARCs (Eg: ARCIL) who appropriate the proceeds towards the loan amount recoverable.

Financial Sector Reforms vs. Stressed Assets

Financial sector reforms have always been paramount in the minds of our current policy makers. The Finance Minister in his Budget speech delivered on 29th February, 2016 categorically emphasized that “the strength of the financial sector is dependent upon a strong and well-functioning banking system. We already have a comprehensive plan for revamping the Public Sector Banks ‘INDRADHANUSH‘ which is under implementation. We are now confronted with the problem of stressed assets in Public Sector Banks which is the legacy of the past. We are not interfering in lending and personal matters of banks. The banks are putting special efforts to effect recoveries with focus on reviving stalled projects”.

The aforesaid announcements by Finance Minister bring out certain features which if considered will no longer be impediments for banks’ growth. The RBI, the regulator for banking sector would have to supervise and monitor the affairs of state run banks in so far as tackling the problems of Stressed Asset Management is concerned. Apart from receiving the benefits from out of the proposed Bankruptcy Law, the banks will have to harness scope to recover overdue loans from defaulting borrowers.

There are two types of Loan Defaulters, first being wilful defaulters who wish to avoid repaying their loans despite the financial condition of the company or individual promoter being sound or capable of revoking their personal guarantees. Second type of defaulters are defaulters emanating out of sluggishness or downfall in the business activities or erosion of margins or profit. While wilful defaulters persistently default wilfully repayment of their legitimate loan installments with an intent to defraud Banks or Financial Institutions, the NPA defaulters are purely owing to the factors followed by fate accomplice. At times in both the cases there are huge outstanding interests too. Eventually if this scenario persists for a long time, despite continuous reminders and followup, the borrowers refrain from submitting to the lenders the periodical Stock Statements (against Cash Credit facilities), Cash flow Statements, Insurance renewal records and other particulars. The relationship between the company and banks gets strained by revelation of borrowers’ intentions.

The Government is contemplating to make Public Sector Banks very competitive over a period of time since formation of a roadmap for their consolidation is on the anvil. In this pursuit the Government has already begun the process of transformation of Industrial Development Bank of India (IDBI). It is also being contemplated to reduce the stake of Government in IDBI below 50%.
It is quintessential to understand that the true barometer of our economy is the status of state-run Banks. As rightly affirmed by Smt. Arundhati Bhattacharya, Chairperson of SBI, the largest lending banker “the state of Banks is reflection of state of affairs of various sections of economy”. Taking a clue from her statement it may be said that a prudent budget is one that addresses the issue of state- run PSU Banks.

The Govt. during last year had estimated Rs. 1.8 lakh crore sum of capital to be infused over 4 years to tide over NPA situation and consequently promised an allocation of Rs. 70000 crore.

The Bankruptcy Code for enactment would facilitate defaulters without judiciary delaying the process inordinately. To accomplish this, a huge infrastructure will have to be put in place which should be cost effective as well as less time consuming, as otherwise the bad loans would pile up further.

**Prevention is better than Cure..as the say goes**

Banks with the assistance of RBI will have to look for more means of assimilating funds for recapitalization such as selling of assets. It is also imperative to mention here that banks would be able to generate surplus cash for loan funding if RBI gives relaxation to reduce equity capital of banks retained by RBI. The hitherto accumulated contingency fund of RBI could be partially financed for giving additional loans to needy and deserving corporate borrowers. This may be deemed to be a growth stimulating exercise.

**Prevention of Bad Debts & Recovery of Loans**

Banks also should explore own resources to recapitalize and prevent formation of bad debts in future. It is indeed wise to freeze bad debts and delink them from balance sheets as on a fixed date and set them aside under specially designated escrow account confining to recovery measures with all legal remedies. Government’s role to act as guarantor towards bad assets would bear fruits.

In addition, the other conventional means of harnessing recoveries and reducing bad loans have to be strictly adhered to in order to monitor NPAs in close coordination with the regulator RBI.

**Prescriptions for Reducing NPAs**

The Reserve Bank of India has to seriously make banks to conform to or stipulate stricter code for lending operations as enumerated below. These measures to monitor NPAs should be closely watched and controlled. They are:

(1) Not to encourage or pamper or support wilful defaulters. Guarantees in terms of corporate assets as well as personal assets should be fully enforced during the pendency of loan in general and after the loan turns critical. The new legal machinery should be capable of making room for lending Banks to enforce personal guarantees issued by the promoter directors and realize the proceeds out of the sale of properties belonging to the borrower. Provisions for auctioning of properties like land, factories, residential buildings, vehicles, plant and machinery has to be distinctly carved out as a statutory provision. The banks would have to be treated as preferential creditors with reference to the funding or repayment of loans over the other creditors as these amounts were used for the primary business of the borrower.
(2) Restructuring of Bank Board: Inducting professionals with integrity, honesty, knowledge and expertise as directors of PSU Banks. The Board should be able to take judicial decisions in respect of operations of the company and in the best interest of the company. The Board should also be well equipped to deal with crucial matters without any ambiguity.

(3) Exercising control and supervision on borrowing companies by obtaining diligence report as devised by RBI from the Bank’s empanelled Company Secretaries. The PSU Banks invariably call for 6 monthly reports from the corporate clients who in turn get them from the internal practising professionals which are often fabricated or window dressed. As a result of such practices the borrowing companies or units enter the realm of probable NPA initially and later after some period translate into bad loans. The empaneled Company Secretaries would however issue an impartial diligence report which shall be good for all practical purposes to monitor stressed asset. It is also recommended that such a stressed asset has to be put into test through mechanisms of issuance of diligence report before finally declaring them as a non-performing asset.

(4) Ensuring through regular checks and balances system and the cash flow mechanisms that the corporate utilize the borrowed funds exclusively for the purpose for which these are borrowed.

(5) To gracefully allow restructuring and rescheduling of loans. The plea for deferment of loan repayments requested by borrowers has to be earnestly met. Of course the banks will have to ensure that they will not turn into bad loans or risk liquidity. Realistic repayment of schedules may be fixed on the basis of cash flows with borrower. This would go a long way to facilitate prompt payment by the borrowers and thus improve the record of recovery in advances or loans.

(6) To create necessary charge or securities over the fixed assets and/or or immovable properties to enable effective and timely enforcement of secured loans.

Conclusion

Banks will have to consistently follow the practice meticulously to ensure monitoring of bad loans. Reserve Bank of India as a regulator would have to discharge its obligations to chalk out policy guidelines to reduce non-performing asset in coordination with the finance ministry from time to time. Corporate sector owes a lot of responsibility in timely responding to the concerns of banks and reciprocate harmoniously so as to achieve the desired target. A great deal of effort by various agencies dealing with the financial assistance to borrowers and the professionals’ help is solicited in this regard.

Thus the bank lives have to change radically in tune with the times so as to sustain long term development.

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Whether Companies (Amendment) Bill, 2016 Business Friendly?

Ease of Doing Business

CS Divesh Goyal*

India now ranks 130 out of 189 countries in the ease of doing business rankings, moving up four places from last year’s adjusted ranking of 134. India moved up nine spots in the criteria of starting a business, to 155 in 2016 from 164 of last year.

Government of India in order to promote the ease of doing business and boost industrial sector and start ups decided to revisit the Companies Act, 2013 and set up a Company Law Committee (CLC) in the month of June, 2015. The CLC was assigned a task to study and provide solutions to the issues arising out of implementation of Companies Act, 2013. MCA placed CLC report for public comments on its portal for few days. Several suggestions received from stakeholders and professional bodies like ICSI were considered before giving a final shape to the Companies (Amendment) Bill, 2016.

In the past year

— India eliminated the paid-in minimum capital requirement and streamlined the process for starting a business.

— Starting business has become easier in India as the Ministry of Corporate Affairs (MCA) has introduced a new form INC-29 through which a new company can now be incorporated. The newly introduced form known as Integrated Incorporation Form INC-29 will combine the procedure for getting Director Identification Number (DIN), Name Approval Application and Incorporation Application into a single step.

More reforms are ongoing in starting a business and other areas measured by Doing Business though the full effects are yet to be felt.

Carrying forward the spirit of enhancing 'Ease of Doing Business' the Central Government has accepted mostly all the recommendations of the Company Law Committee and represented the Companies (Amendment) Bill, 2016.

The Companies (Amendment) Bill, 2016 to amend Companies Act, 2013 was tabled in the parliament on 16th March, 2016. The Bill proposes to amend about 80 sections of the Act in order to address various issues arising in implementation of the Act.

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**Highlights of some Major Relaxations under Companies (Amendment) Bill, 2016 to make it Business Friendly**

- Formation of universal object companies.
- Apart from Key Management Personnel (KMP) and any officer of the Company, it is proposed that an employee can also be authorized to authenticate documents on behalf of the Company.
- It is proposed to allow issue of sweat equity shares at any time after registration of the Company.
- Simplification of process of Private Placement of Shares.
- Granting of loans to entities in which directors are interested after passing special resolution and adhering to disclosure requirement.
- It is proposed that right issue offer letter can be sent through courier or by delivery through hand.
- It is proposed to omit the requirement of deposit insurance.
- It is proposed that Extraordinary General Meeting (EGM) of wholly owned subsidiary of a Company incorporated outside India can be held outside India.
- Requirement of pre-deposit money in case of appointment of independent directors to be waived off.
- The requirement related to annual ratification of appointment of auditor by members is proposed to be omitted.
- The requirement of consolidation of the account of a Joint Venture is proposed to be omitted.
- Section 194 and 195 is proposed to be omitted.
- It is proposed that the approval of the Central Government shall not be required at the time of payment of remuneration exceeding 11% of net profit of the Company.
- It is proposed to grant a relief to One Person Company (OPC) & Small Companies from charging of penalties. It would be limited to half of the normal fine and imprisonment for certain non filing defaults.

**Objects of the Companies (Amendment) Bill, 2016**

- Ease of Doing Business
- Simplification of Compliances
- Encouragement for Startups

**How the Companies (Amendment) Bill, 2016 is helpful for ‘ease of doing business’ and what are the relaxations proposed under Companies (Amendment) Bill, 2016?**

**A. Incorporation of Company without Specific Objects**

Section 4(1)(c) of the Companies Act, 2013 required a company to mention in Memorandum of Association (MOA) “the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof”, but as
per Companies (Amendment) Bill, 2016, “It is not mandatory to mention any objects in object clause of MOA. Company can pursue any lawful objects.”

If Company wants to do any specific object or want to restrict itself from other objects then it can mention the specific objects in its MOA.

Bill proposes to provide a freeway to business by not defining exact main object in MOA. This may make easy for the business to swiftly changeover its activities without going for any formal approval process.

B. Authentication of Documents

Under Companies Act, 2013 a document or proceeding requiring authentication by a company; or contracts made by or on behalf of a company, may be signed by any key managerial personnel or an officer of the company duly authorised by the Board in this behalf.

But as per Companies (Amendment) Bill, 2016, Company by Board Resolution authorizes any employee of the Company to sign documents and contract on behalf of the Company.

The proposed amendment waters down ‘accountability’ enshrined in the existing provision that requires any officer authorized by the Board to authenticate documents. The scope has been widened also to include the employees of the company.

C. Fast Track Incorporation

Incorporation process is likely to be on fast track mode to enable promoters to form company in one day. Major change proposed for MOA & AOA is conversion from physical to electronic mode. This will definitely reduce the paper work and hectic signature process.

D. Private Placement of Shares

Section 42 related to Private Placement of Shares has been completely substituted by new Section 42.

Relaxation given in Section 42 of Companies (Amendment) Bill, 2016:

— The requirement of clumsy offer letter has been replaced by Private Placement Offer cum application form containing terms and conditions of Private Placement offer.

— Multiple Private placement offers can be made at the same time within the overall limit of subscribers per instrument per year.

— Requirement of filing of private placement of offer letter has been eliminated.

— Now there is only one return to be filed with ROC for Private Placement of Shares.

— The amount of penalty for contravention has been limited to Rs 2 Crores.

— Companies would be allowed to make offer of multiple security instruments simultaneously.

E. Issuance of Shares at discount

As per Section 53(1) of the Companies Act, 2013 a Company shall not issue shares at discount.
But Companies (Amendment) Bill, 2016 provides exception in situation in which shares can be issue at discount.

F. **Sweat Equity Shares**

As per the Companies Act, 2013 newly incorporated company is eligible to issue sweat equity shares only after 1 year of its incorporation.

But in Companies (Amendment) Bill, 2016 this clause has been removed. It allows the newly incorporated Companies to issue sweat equity shares of a class of shares already issued, which is a welcome change. This would facilitate startups structuring and building up promoter’s contribution.

G. **Dispatch of Notice of Right issue of Shares**

As per Section 62(2) of the Companies Act, 2013 notice for right issue of shares can be circulated only through registered post or speed post or through electronic mode.

Section 62(2) of the Companies (Amendment) Bill, 2016 has been relaxed to include courier or other modes of delivery capable of providing proof of delivery. It can be interpreted that notice may be hand delivered subject to obtaining an acknowledgement from the receiving shareholder.

H. **Deposit Related Provisions**

— The existing requirement of depositing 15% of the amount of deposit maturing during a financial year and the financial year next following on or before 30th April of the financial year is proposed to be amended to 20% of the amount of deposit maturing during a financial year. This will strike the perfect balance between security and liquidity and will reduce the cost of borrowing.

— Requirement of deposit insurance proposed to be eliminated.

— Life time ban on a Company that defaulted in repayment of deposit accepted or interested thereon under the Companies Act, 2013 or under any previous Act is proposed to be relaxed by amending conditions of section 73(2)(d). Instead a five year cooling period has been proposed from the date the default is made good.

I. **Registration of Charge**

Earlier there was a list of transactions on which charge was required to be created. With the enactment of the Companies Act, 2013, entire list of charges requiring registration was done away with. Thus, in the absence of a specific list of charges to be registered, and the wide definition of the word ‘charge’, ‘pledges’ and ‘liens’ were also required to be registered.

The Companies (Amendment) Bill, 2016 insert the proviso in section 77(1) “provided also that this section shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India”.

With the insertion of the 4th proviso to section 77(1), a negative list is expected to be provided in consultation with the Reserve Bank of India, on which creation of charge need not be required. This might exclude registration of charges once again for pledges etc. as was there in the erstwhile Act, 1956.
J. *Satisfaction of Charge*

In the Companies Act, 2013, a company shall give intimation to the Registrar in the prescribed form, of the payment or satisfaction in full of any charge registered under this Chapter within a period of thirty days from the date of such payment or satisfaction.

The Companies (Amendment) Bill, 2016 insert the proviso in section 82(1). As per proviso the Registrar may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within a period of three hundred days of such payment or satisfaction on payment of such additional fees as may be prescribed.

The provisions pertaining to registration of modification and satisfaction of charges erroneously omitted the power of the Registrar to grant extension of time upto 300 days. The Bill seeks to amend sec. 82 to correct this anomaly.

K. *Annual Return*

The Companies (Amendment) Bill, 2016 insert the proviso in section 92(1). As per proviso Central Government may prescribe abridge form of Annual Return for One Person Company and small Company.

L. *Return to be filed with ROC for change in Stake*

The return of changes in promoter’s stake & submission of advance copy of special resolution for place of keeping register etc is proposed to be removed.

M. *Annual General Meeting*

The Bill 2016, has proposed to allow unlisted companies¹ to hold their AGMs in any place in India provided that all the members of such company should give their consent in advance either in electronic mode or in writing.

This will save the time and energy of many Companies in completing the formalities of holding meeting at the registered office by traveling from various places.

N. *Extra Ordinary General Meeting*

It is proposed to allow such wholly owned subsidiaries of a company which are incorporated outside India to hold its EGM anywhere in the world.

This is a welcome change since the present provision of holding an EGM in India was never a Law, neither present in the erstwhile Act nor in the Act, 2013. Rather the same had been mistakenly/advertently mentioned in the Rules by way of an Explanation to Rule 8(3)(ix) of Companies (Management and Administration) Rules, 2014. Also the same was reiterated in the Secretarial Standard 2.

As per the above clarification EGM of wholly owned foreign subsidiary can be held outside India.

O. *Relaxation in the items restricted to be transacted through only Postal Ballot*

It is proposed to allow such items of business to be passed at a general meeting of a

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¹ Exemption to unlisted public Company automatically includes the private company.
company which are otherwise mandatorily required to be passed by postal ballot provided the company is required to provide e-voting facility.

Clarity is proposed to be provided that if any business is required to be transacted by Postal Ballot, then it could also be transacted at a general meeting having a facility of electronic voting. This move will enable maximum shareholders to participate in the meeting and discussions and then vote electronically and will also save the cost of conducting postal ballot and general meeting.

P. Resolution and agreement required to be filed with ROC

There is a proposal to grant exemption to banking Companies from submitting Board resolution passed by it for granting loans or giving guarantee or providing securities in its ordinary course of business.

Q. Interim Dividend

The Bill, 2016 proposes to amend section 123(3) of Act, 2013 and provided that the provision of declaration of Interim Dividend can be declared even after closure of financial year till holding of AGM.

R. Statutory Auditor

As per first proviso of section 139 of the Companies Act, 2013 the company shall place the matter relating to appointment of statutory auditor for Ratification by members at every annual general meeting.

In Companies (Amendment) Bill, 2016, ratification of appointment of auditors in every General Meeting during his tenure is proposed to be removed. As it defeats the objective of giving five year term to the auditors. But this may lead to depriving of shareholders right to appoint or reject the appointment of auditor in every annual general meeting.

S. Resident Director

As per section 149(3) of the Companies Act, 2013, every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.

The Companies (Amendment) Bill, 2016 provides that in case of newly incorporated Company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated.

T. Deposit of amount on appointment of Director

Proviso added in section 160 provides that in case of appointment of ID and Directors recommended by the NRC the requirements of Section 160 shall be dispensed off. Therefore, ID and director recommended by NRC are proposed to be exempted from the requirement of making a directorship election deposit.

U. Disqualification of Directorship

The disqualification of a director on account of non filing of returns and repayment of deposits is proposed to be operated after a gap of 6 months from the date of appointment. This will provide a required window to directors to take step to recover from the non
compliances in the Company. The disqualification occurring due to court or tribunal order for disqualification or conviction will continue to apply even if appeal or petition is preferred.

V. No. of Directorship

As per Section 165(1) of the Act, 2013 no person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time.

The Companies (Amendment) Bill, 2016 proposes that for reckoning the limit of directorship of 20 Companies the directorship in a ‘Dormant Company’ shall not be included.

W. Filing requirement of DIR-11

As per Section 168(1) of the Act, 2013 a director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in DIR-11.

The Companies (Amendment) Bill, 2016 seeks to amend section 168 to provide that the requirement for forwarding of copy of resignation by the resigning director in e-form DIR 11 to the Registrar shall be optional.

This is a welcome change for those companies where the resignation is with mutual consent unlike where there are management disputes. In such companies, the directors still have an option to file DIR 11.

X. Participation of Director through video conferencing

As per first proviso of section 173(1) of the Act, 2013 presence of director through video conferencing was restricted in the Board Meeting in which restricted items were in agenda to be discussed.

The Companies (Amendment) Bill, 2016 seeks to propose the provision of participation easier. As per bill if in a Board Meeting physical quorum of director is present, any other director may participate through video conferencing or other audio visual means in such meeting on any matter specified under the first proviso.

This also gives a relief to non resident directors to participate in the discussion and voting on important matters like approval of financial statements etc without traveling to the place of meeting.

Y. Audit and Nomination Committee

The Companies (Amendment) Bill, 2016 proposes that the Board of Directors of every public listed company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee.

This brings ease and relief to such private companies having their debt securities listed as the companies were surely falling within the meaning of listed but were not public. The requirement of the committee has now been restricted to only public companies which are listed. Therefore, lot of debt listed companies will be out of the preveiw of this
section. This is also in line with the SEBI (LODR) Regulations, 2015.

Z. *Loan to Director*

The Bill, recommended, that it may be considered to allow companies to advance a loan to any other person in whom director is interested subject to prior approval of the company by a special resolution. Further, loans extended to persons, including subsidiaries, falling within the restrictive purview of Section 185 should be used by the subsidiary for its principal business activity only, and not for further investment or grant of loan.

After 1st April, 2014 corporates are facing many issues because of restriction under section 185. In Companies (Amendment) Bill, 2016 section 185 is completely substituted to relax norm to make this Act Business Friendly.

AA. *Loan and Investment by the Company*

Restriction on subsidiary investment layers is proposed to be removed. For Loan and Investment by the Company, clarity is proposed by exempting employees from applicability. Exemption is proposed to be provided for loan, guarantee or security to its WOS or joint venture Company or for acquisition of share in WOS.

BB. *Related Party Transactions*

As per the Companies Act, 2013 no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party.

Addition of new provision under section 188(1) by Companies (Amendment) Bill, 2016 provided also that nothing contained in the second proviso (mentioned above) shall apply to a company in which ninety percent or more members, in number, are relatives of promoters or are related parties.

Companies are also allowed to enter into contract or arrangement with related party if 90% or more members, in number, are relatives of promoters or are related parties. It is a welcome step to smooth the related party transactions.

CC. Provisions relating to Forward dealing and Insider Trading are proposed to be omitted. It is a rightful move by the government to grant relief to Companies in which public money is not involved.

DD. *Remuneration to Managerial Personnel*

In the Companies Act, 2013

— The company in general meeting may, with the approval of the Central Government (CG), authorize the payment of remuneration exceeding eleven per cent of the net profits of the company, subject to the provisions of Schedule V:

— Remuneration in case of no profit or adequate profit requires approval of Central government.

— The company shall not waive the recovery of any sum refundable to it under sub-section (9) unless permitted by the Central Government
Under Companies (Amendment) Bill, 2016

The words “with the approval of Central Government” are removed from every place under this section.

Benefits of this is that there is no need of approval of CG for payment of remuneration of more than 11% of net profit, no need of CG approval for remuneration in situation of no profit or inadequate profit and no need of CG approval for recovery of any sum refundable from director.

This is also a welcome step and business friendly for the business men to get remuneration from Company without Central Government Approval.

EE. Fee for Filing

Necessary changes have been proposed to be made in the Act to bring clarity that the requirement of filing with additional fee for 270 days under first proviso to Section 403 is applicable only to the six sections.

Conclusion

The Companies Act, 2013 its rules, notifications and clarifications issued thereunder are too fresh to have a sequel. However it appears that government is determined to ease doing business in India and provide corporate sector in India with new ways and means to excel. The Companies (Amendment) Bill, 2016 is an effort in this direction. The Companies (Amendment) Bill, 2016 is expected to provide relief to the corporate sector from various issues arising in the implementation of the Companies Act, 2013.

***
Goods and Services Tax – An Overview

CS (Dr.) Sanjiv Agarwal*

What is GST

GST stands for “Goods and Services Tax”, and is proposed to be a comprehensive indirect tax levy on manufacture, sale and consumption of goods as well as services at the national level. Its main objective is to consolidate all indirect tax levies into a single tax, except customs (excluding SAD) replacing multiple tax levies, overcoming the limitations of existing indirect tax structure, and creating efficiencies in tax administration.

Simply put, goods and services tax is a tax levied on goods and services imposed at each point of sale or rendering of service. Such GST could be on entire goods and services or there could be some exempted class of goods or services or a negative list of goods and services on which GST is not levied. GST is an indirect tax in lieu of tax on goods (excise) and tax on service (service tax). The GST is just like State level VAT which is levied as tax on sale of goods. GST will be a national level value added tax applicable on goods and services.

A major change in administering GST will be that the tax incidence is at the point of sale as against the present system of point of origin. According to the Task Force under the 13th Finance Commission, GST, as a well designed value added tax on all goods and services, is the most elegant method to eliminate distortions and to tax consumption.

One of the reasons to go the GST way is to facilitate seamless credit across the entire supply chain and across all States under a common tax base. It is a tax on goods and services, which will be levied at each point of sale or provision of service, in which at the time of sale of goods or providing the services the seller or service provider can claim the input credit of tax which he has paid while purchasing the goods or procuring the service. This is because they include GST in the price of the goods and services they sell and can claim credits for the most GST included in the price of goods and services they buy. The cost of GST is borne by the final consumer, who can’t claim GST credits, i.e. input credit of the tax paid.

* FCA, FCS. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.
### Taxes/Duties Likely to be subsumed in GST

<table>
<thead>
<tr>
<th>Central Taxes/Levies</th>
<th>State Taxes/Levies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central excise duty under Central Excise Act, 1944</td>
<td>Sales Tax/Value Added Tax (VAT)</td>
</tr>
<tr>
<td>Additional excise duties – Under Additional Duties of Excise (Goods of Special Importance Act, 1957)</td>
<td>Entertainment tax</td>
</tr>
<tr>
<td>Excise Duty under Medicinal &amp; Toiletries Preparation Act, 1955</td>
<td>State excise duty</td>
</tr>
<tr>
<td>Service Tax under Finance Act, 1994</td>
<td>Luxury tax</td>
</tr>
<tr>
<td>Additional Customs Duty (Countervailing Duty - CVD)</td>
<td>Taxes on lottery, betting &amp; gambling</td>
</tr>
<tr>
<td>Special Additional Duty of Customs (SAD)</td>
<td>Entry tax (not in lieu of Octroi)</td>
</tr>
<tr>
<td>Surcharges (e.g. national calamity contingent duty)</td>
<td>Purchase tax</td>
</tr>
<tr>
<td>Cesses (e.g., Cess on rubber, Cess on tea etc)</td>
<td>State Cesses and surcharges</td>
</tr>
<tr>
<td>Central Sales tax (to be phased out)</td>
<td>State Octroi</td>
</tr>
</tbody>
</table>

### Taxes/Duties not likely to be subsumed in GST

<table>
<thead>
<tr>
<th>Central Taxes/Levies</th>
<th>State Taxes/Levies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic Customs Duty</td>
<td>Taxes on Liquors</td>
</tr>
<tr>
<td>Excise Duty on Tobacco products</td>
<td>Toll Tax/ Road Tax</td>
</tr>
<tr>
<td>Export Duty</td>
<td>Environment Tax</td>
</tr>
<tr>
<td>Taxes on petroleum products</td>
<td>Property Tax</td>
</tr>
<tr>
<td>Stamp Duties</td>
<td>Purchase tax on food grains</td>
</tr>
<tr>
<td>Specific Central Cess like Oil Cess etc</td>
<td>Taxes on motor spirit &amp; high speed diesel</td>
</tr>
<tr>
<td></td>
<td>Tax on Consumption or Sale of Electricity - Not certain</td>
</tr>
<tr>
<td></td>
<td>Stamp Duty - Not certain</td>
</tr>
</tbody>
</table>

Therefore, GST is a broad based and a single comprehensive tax levied on goods and services consumed in an economy.
Salient Features of the GST Model

1. The GST shall have two components: one levied by the Centre (Central GST), and the other levied by the States (State GST), besides Integrated GST for inter-state transactions.

2. A separate legislation would be drafted for Central GST and IGST. Each State would have its own legislation to levy and collect SGST.

3. Rates for Central GST and State GST would be prescribed appropriately, reflecting revenue considerations and acceptability. This dual GST model would be implemented through multiple statutes (one for CGST and SGST statute for every State).

4. The Central GST and the State GST would be applicable to all transactions of goods and services made for a consideration except the exempted goods and services, goods which are outside the purview of GST and the transactions which are below the prescribed threshold limits.

5. The Central GST and State GST are to be paid to the accounts of the Centre and the States separately. It would have to be ensured that account-heads for all services and goods would have indication whether it relates to Central GST or State GST (with identification of the State to whom the tax is to be credited).

6. Since the Central GST and State GST are to be treated separately, taxes paid against the Central GST shall be allowed to be taken as input tax credit (ITC) for the Central GST and could be utilized only against the payment of Central GST. The same principle will be applicable for the State GST.

7. A taxpayer or exporter would have to maintain separate details in books of account for utilization or refund of credit. Further, the rules for taking and utilization of credit for the Central GST and the State GST would be aligned.

8. Cross utilization of Tax Credit between the Central GST and the State GST would not be allowed except in the case of inter-State supply of goods and services under the IGST model which is explained later.

9. Ideally, the problem related to credit accumulation on account of refund of GST should be avoided by both the Centre and the States except in the cases such as exports, purchase of capital goods, input tax at higher rate than output tax etc. where, again refund/adjustment should be completed in a time bound manner.

10. To the extent feasible, uniform procedure for collection of both Central GST and State GST would be prescribed in the respective legislation for Central GST and State GST.

11. The administration of the Central GST to the Centre and for State GST to the States would be given. This would imply that the Centre and the States would have concurrent jurisdiction for the entire value chain and for all taxpayers on the basis of thresholds for goods and services prescribed for the States and the Centre.

12. The taxpayer would need to submit periodical returns, in common format as far as possible, to both the Central GST authority and to the concerned State GST authorities.
13. Each taxpayer would be allotted a PAN-linked taxpayer identification number with a total of 13/15 digits. This would bring the GST PAN-linked system in line with the prevailing PAN-based system for Income tax, facilitating data exchange and taxpayer compliance.

14. Keeping in mind the need of tax payer’s convenience, functions such as assessment, enforcement, scrutiny and audit would be undertaken by the authority which is collecting the tax, with information sharing between the Centre and the States.

Model GST Law

The draft of model law on proposed Goods and Services Tax (GST) has since been released by the Empowered Committee of State Finance Ministers (in short, EC) on 15th June, 2016 in its last meeting held.

Thus, called as 'Model GST Law', it shall comprise of two pieces of legislation, viz,

- Goods and Service Tax Act, 2016 (year may change)
- Integrated Goods and Services Tax Act, 2016 (year may change)

GST Act

The model GST Act comprises of –

- 25 Chapters
- 178 Sections (including numeric - alpha section)
- 4 Schedules
- GST Valuation (Determination of Value of Supply of Goods and Services), Rules 2016
- 109 definitions in section 2

IGST Act

The Model IGST Act comprises of –

- 11 Chapters
- 33 Sections
- 8 Definitions

It may be noted that EC had already issued four reports on different business processes in October 2015 which pertains to registration, payment, returns and refund under the GST regime. These business processes in fact lay down the procedural aspects in relation to such activities. (may take shape of Rules on finalization).

The model of GST law envisages certain concepts or provisions which were not in vogue earlier, either in Service Tax or Central Excise or Value Added Tax. Some of these are as follows:

- Address of delivery and address on record
- Taxable person
• Non-resident taxable person
• Time of supply of goods
• Time of supply of services
• Taxable supply
• First return
• Tax deduction at source
• Collection of tax at source
• GST compliance rating
• Business vertical principal place of business casual taxable person
• Zero rated supply, etc

However, provisions relating to registration, threshold exemption, taxability, point of taxation, valuation principles etc still shall continue and are guided by extant provisions.

The dealer is required to take registration under this law if his aggregate turnover in a financial year exceeds Rs.9 lakhs. However, dealers conducting business in any North Eastern State are required to take registration if their turnover exceeds Rs.4 lakhs.

The dealer has to take registration in the State from where taxable goods or services are supplied. Every person already registered under extant law will be issued a certificate of registration on a provisional basis. This certificate shall be valid for period of 6 months. Such person will have to furnish the requisite information within 6 months and on furnishing of such information, final registration certificate shall be granted by the Central/State Government.

It may be noted that the person registered is liable to pay tax if his aggregate turnover in a financial year exceeds Rs 10 lakhs. However, a dealer conducting business in any of the North Eastern region will be required to pay tax if his aggregate turnover exceeds Rs. 5 lakhs.

A negative list has also been prescribed for transactions and activities of Government and Local Authorities which shall be exempt from GST levy, like activities of issuance of passport, visa, driving license, birth certificate or death certificate, etc.

The taxable event under GST regime will be supply of goods or services. Supply includes all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration. It also includes importation of service, whether or not for a consideration.

The salient feature of model GST law are enumerated hereunder:

(1) **Threshold limit for registration**

The dealer is required to take registration under this law if his aggregate turnover in a financial year exceeds Rs.9 lakhs. However, dealers conducting business in any North Eastern State are required to take registration if their turnover exceeds Rs.4 lakhs.
(2) **Place of registration**

The dealer has to take registration in the State from where taxable goods or services are supplied.

(3) **Migration of existing taxpayers to GST**

Every person already registered under extant law will be issued a certificate of registration on a provisional basis. This certificate shall be valid for period of 6 months. Such person will have to furnish the requisite information within 6 months and on furnishing of such information, final registration certificate shall be granted by the Central/State Government.

(4) **GST compliance rating score**

Every taxable person shall be assigned a GST compliance rating score based on his record of compliance with the provisions of this Act. The GST compliance rating score shall be updated at periodic intervals and intimated to the taxable person and also placed in the public domain.

(5) **Levy of Tax**

The person registered is liable to pay tax if his aggregate turnover in a financial year exceeds Rs 10 lakhs. However, a dealer conducting business in any of the North Eastern is required to pay tax if his aggregate turnover exceeds Rs. 5 lakhs.

A negative list has also been prescribed for transactions and activities of Government and Local Authorities which shall be exempt from GST levy, like activities of issuance of passport, visa, driving license, birth certificate or death certificate, etc.

(6) **Taxable Event**

The taxable event under GST regime will be supply of goods or services. Supply includes all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration. It also includes importation of service, whether or not for a consideration.

(7) **Point of taxation**

CGST/SGST shall be payable at the earliest of the following dates, namely:

(i) Date on which the goods are removed for supply to the recipient (in case of movable goods).

(ii) Date on which the goods are made available to the recipient (in case of immovable goods).

(i) Date of issuing invoice by supplier; or

(ii) Date of receipt of payment by supplier; or

(iii) Date on which recipient shows the receipt of the goods in his books of account.

(8) **TCS on online sales of goods or service**

Every E-commerce operator engaged in facilitating the supply of any goods and/or services (like Amazon, Flipkart, etc.) shall collect tax at source at the time of credit or at the time of payment whichever is earlier.
(9) **Valuation Rules**

Valuation Rules shall apply to the supply of goods and/or services under the IGST/CGST/SGST Bill. Some of the methods prescribed for valuation are:

(a) Transaction value

(b) Transaction value of goods or services of like kind

(c) Computed value method:

(d) Residual method

(10) **Utilization of credit**

Utilization of IGST: The amount of input tax credit on account of IGST available in the electronic credit ledger of dealer shall first be utilized towards payment of IGST and the amount remaining, if any, may be utilized towards the payment of CGST and SGST, in that order.

Utilization of SGST: The amount of input tax credit on account of SGST available in the electronic credit ledger shall first be utilized towards payment of SGST and the amount remaining, if any, may be utilized towards the payment of IGST.

Utilization of CGST: The amount of input tax credit on account of CGST available in the electronic credit ledger shall first be utilized towards payment of CGST and the amount remaining, if any, may be utilized towards the payment of IGST.

The input tax credit on account of CGST shall not be available for payment of SGST.

(11) **Payment**

Any tax, interest, penalty, fee, etc., shall be paid via internet banking or by using credit/debit cards or NEFT or RTGS. This amount shall be credited to the electronic cash ledger of dealer.

(12) **TDS**

The Central or a State Government may mandate certain departments (viz, local authority, Govt. agencies) to deduct tax at the rate of one percent on notified goods or services, where the total value of such supply, under a contract, exceeds Rs 10 lakhs.

(13) **Refund**

A person can claim refund of any tax and interest by making an application in that regard to the prescribed officer of IGST/CGST/SGST within two years.

(14) **Returns**

Dealers shall be required to furnish following returns-

(a) Monthly return

(b) Return for composition scheme

(c) TDS return
(d) Return for input service distributor
(e) First return
(f) Annual return
(g) Final return

These returns are for different periods / or frequencies / at intervals.

(15) **Transitional provisions**

These will ensure smooth migration to GST.

**The Constitution (122nd Amendment) Bill, 2014**

The GST Bill – The Constitution (One Hundred and Twenty-second Amendment) Bill, 2014 has been discussed and passed by Rajya Sabha on 3rd August, 2016 after a 7 hours long debate by members of Rajya Sabha. The discussion on the GST bill came after months of discussions between the ruling party and the opposition – with both sides meeting multiple times to negotiate amendments.

The momentous Bill, which marks the first parliamentary step towards implementation of a “one country, one market, one tax” framework, was cleared by a two-thirds majority, which is required for any Constitution Amendment Bill, following a division of votes.

The Bill has been passed unanimously and the journey to GST from now onwards will inter alia, involve the following steps –

- The bill will be sent for presidential reference.
- Subsequent to that, the Bill will be transmitted to the Lok Sabha (possibly on Thursday), which also needs to approve the amendments by two-thirds majority.
- The President will then refer it to the state assemblies.
- At least half the state assemblies, that is 15, would need to ratify the Bill by two-thirds majority.
- It will then go for presidential assent before being notified in the gazette
- After all these procedures, Parliament would take up the actual GST Bill (possibly in the winter session).

Assurances that opposition has sought from the Government are:

- The actual GST Bill should take care of concerns about state Government’s being allowed to raise revenue in emergency situations.
- The subsequent GST Bill should not be categorized as Money Bill, by passing Rajya Sabha.
- Cap on GST rates of 18%
- Improved dispute resolution mechanism
## GST: THE JOURNEY SO FAR

**Chronology of major events in progress of Goods & Service Tax in India**

<table>
<thead>
<tr>
<th>Year</th>
<th>Milestone</th>
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<tbody>
<tr>
<td>1974</td>
<td>LK Jha Committee suggests VAT</td>
</tr>
<tr>
<td>1986</td>
<td>MODVAT introduced in India from 1st of March on select commodities</td>
</tr>
<tr>
<td>1991</td>
<td>Chelliah Committee recommends VAT</td>
</tr>
<tr>
<td>1999</td>
<td>FM announces decision to introduce VAT in India.</td>
</tr>
<tr>
<td></td>
<td>Formation of Empowered Committee on VAT</td>
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<tr>
<td>2002</td>
<td>Task Force on Indirect Taxes report headed by Kelkar</td>
</tr>
<tr>
<td></td>
<td>CENVAT introduced on all commodities at central level</td>
</tr>
<tr>
<td>2003</td>
<td>VAT introduced in first Indian State of Haryana</td>
</tr>
<tr>
<td>2005</td>
<td>VAT in 24 States/UTs including Punjab, Chandigarh, HP, J&amp;K and Delhi.</td>
</tr>
<tr>
<td>2006</td>
<td>VAT implemented in 5 more States including Rajasthan.</td>
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<tr>
<td>2007</td>
<td>FM announces GST introduction in India from April 01, 2010.</td>
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<tr>
<td></td>
<td>Parthasarathi Shome submits a study paper on GST.</td>
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<tr>
<td></td>
<td>Empowered Committee of State Finance Ministers constitutes the Joint Working Group.</td>
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<tr>
<td></td>
<td>VAT implemented in Tamil Nadu &amp; Puducherry.</td>
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<tr>
<td></td>
<td>Central Sales Tax (CST) phase out starts, CST cut to 3%.</td>
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<tr>
<td></td>
<td>Joint Working Group set up for proposing GST roadmap and structure.</td>
</tr>
<tr>
<td>2008</td>
<td>VAT introduced in the last Indian State of UP from January 01, 2008.</td>
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<tr>
<td></td>
<td>EC finalises its views on a broad GST structure with consensus on Dual GST (Central &amp; State GST), separate legislation, levy and administration.</td>
</tr>
<tr>
<td></td>
<td>CST reduced to 2%</td>
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<tr>
<td></td>
<td>Report of Task Force on GST of 13th Finance Commission in December</td>
</tr>
<tr>
<td></td>
<td>Report of 13th Finance Commission (TFC) (Chapter 5 on GST) in December</td>
</tr>
<tr>
<td>2010</td>
<td>Proposed date to introduce GST in India postponed to April 01, 2011.</td>
</tr>
<tr>
<td>2011</td>
<td>Government introduces Constitution Amendment Bill on GST in Lok Sabha</td>
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<tr>
<td>2013</td>
<td>Parliament Standing Committee submit reports on GST Constitutional Amendment Bill</td>
</tr>
<tr>
<td></td>
<td>Standing Committee recommendations incorporated in Bill</td>
</tr>
<tr>
<td>Year</td>
<td>Milestone</td>
</tr>
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</tr>
<tr>
<td>2014</td>
<td>Standing Committee on Finance tables its report on GST Bill. EC rejects Central Government’s proposal to include petroleum products under GST.</td>
</tr>
<tr>
<td></td>
<td>March: Revised Bill incorporating recommendations of Standing Committee sent to EC for examination</td>
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<td>Previous Constitution Amendment Bill lapses.</td>
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<td>Newly-elected Government sets April, 2016 as new date for GST roll-out.</td>
</tr>
<tr>
<td></td>
<td>GST sub-committee in the EC proposes a revenue–neutral rate of 26.7%.</td>
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<tr>
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<td>Alcohol to be kept outside the purview of GST.</td>
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<tr>
<td></td>
<td>All entry taxes proposed to be subsumed under GST, whether collected by States or local bodies.</td>
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<tr>
<td></td>
<td>Petroleum and petroleum products to be subsumed in GST, with nominal or zero-rated tax.</td>
</tr>
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<td></td>
<td>GST compensation to States pegged at around Rs. 11,000 crore.</td>
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<td></td>
<td>Centre to provide three year compensation on the revenue loss incurred by States after GST roll-out.</td>
</tr>
<tr>
<td></td>
<td>December : GST Constitutional Amendment Bill moved in Lok Sabha</td>
</tr>
<tr>
<td>2015</td>
<td>06.05.2015 Lok Sabha passes GST Bill</td>
</tr>
<tr>
<td></td>
<td>12.05.2015 Bill on GST not passed by Rajya Sabha ; referred to Select Committee</td>
</tr>
<tr>
<td></td>
<td>17.06.2015 Committees Constituted to recommend tax rates and to monitor progress of IT preparedness / mechanism of GST / drafting of rules.</td>
</tr>
<tr>
<td></td>
<td>22.07.2015 Select Committee of Rajya Sabha tabled its report on GST Bill</td>
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<tr>
<td></td>
<td>29.07.2015 Union Cabinet approves Select Committee recommendations</td>
</tr>
<tr>
<td></td>
<td>11.10.2015 Discussion papers to on business processes on registration, payment, returns and refunds under GST made public</td>
</tr>
<tr>
<td></td>
<td>03.12.2015 Committee on Tax rates submits reports</td>
</tr>
<tr>
<td></td>
<td>04.08.2016 Revised draft presented in Parliament / approved by Rajya Sabha</td>
</tr>
<tr>
<td>August 2016</td>
<td>Revised Constitutional (122nd Amendment) Bill, 2014 to be approved by Lok Sabha</td>
</tr>
</tbody>
</table>
Professional Opportunities in GST

Possible Role of Professionals

The Professionals can provide the following services in GST regime -

- For Tax planning
- Advisory services
- Audit of books of Accounts/Compliance Audit
- Tracking GST developments / impact studies
- Review of draft legislation and impact analysis
- Industry Consultation for improvement in business process
- Interpretation of legal provisions and procedures
- Implementation assistance and post implementation support
- Developing systems and procedures/MIS
- Advisory and consulting services
- Certification works
- Procedural compliances
- Record keeping
- Return verification/filing of returns
• Negotiations with suppliers
• Representations before Authorities
• Appellate work
• Providing opinions / clarifications

Be Prepared For GST

Preparedness for GST in next few months will involve Tax Planning Review, Transactions Review, Training Manpower, Cost Effectiveness in Inventory, logistics & final goods, business planning with anticipation of new tax structure with competition, fastest implementation & transition to GST, Procurement and purchase orders implementation, invoicing patterns, proper implementation of GST transition in input stage credit, tax management versus business operations, various misc provisions, etc.

One has to take all steps to ensure that no dispute arises during transition and thereafter. If precautions and safeguards are not taken, well in time, during the pre and post implementation period of GST regime, then the possibility of litigation, due to ignorance and/ or non implementation, cannot be ruled out.

The Hope

It is expected that GST would add to GDP of the country by about 2 percent. It is hoped that to get GST rolling by April, 2017, Union Government and all State Governments will have to work hard and act fast to have GST in place by this date. The target is ambitious but achievable. Let's hope that collective wisdom of all members of Parliament (including the opposition) and the legislative assemblies shall prevail to allow the GST to see the light of the day. Equally important is the training of all stake holders including tax payers.

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With Best Compliments from

Virender Sharma & Associates
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Extends Warm Welcome to all Professionals

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THE INSTITUTE OF COMPANY SECRETARIES OF INDIA
Statutory body under an Act of Parliament

44th National Convention of Company Secretaries

Days
Thursday-Friday-Saturday
Dates
17-18-19 November, 2016
Venue
Mahatma Mandir Convention Centre, Gandhinagar (Ahmedabad), Gujarat
Theme
Powering Governance - Empowering Stakeholders
CS - The Governance Professionals

Kindly block these dates in your diary.
Details being hosted on ICSI website shortly.