

Recent developments in Company Law: MCA circulars and notifications

January to Sept, 2011

Last updated 27 Sept 2011

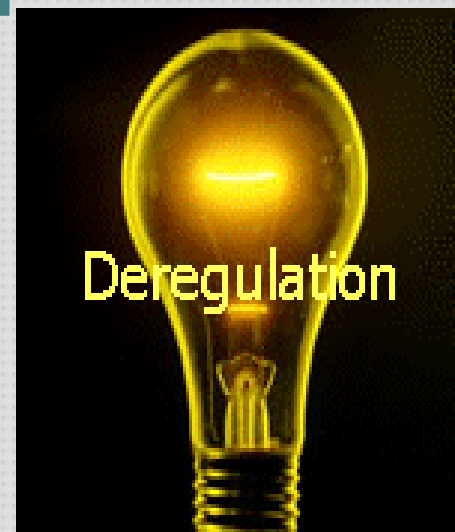
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Highlights of the year 2011

- ❑ Most striking feature is the pace at which the circulars are coming – some 38 circulars, 68 notifications and 5 amendment to Rules in the 9-month period
- ❑ And most of them are towards speeding up things, relaxing unwanted controls, making approvals automatic, etc.
- ❑ More responsibility on the practicing professionals, as in case of name approvals and DIN applications, incorporation etc
- ❑ MCA using state-of-art methods – electronic mails, video-conferencing, remote location participation in general meetings, and so on
- ❑ Independent directors spared from prosecution unless clear case of lack of diligence in board process
- ❑ On footsteps of RBI, SEBI, now MCA also in practice of issuing master circulars; so far issued on Prosecution of Independent Directors
- ❑ Cleaning up the deadwood- allowing companies to go off the books of the Registrar by way of a fast track exit scheme – a permanent feature now.



Major Amendments

Simplification/standardisation of existing Rules and Regulations

- Exemption u/s 212 (8)
- Simplified DIN Process
- Online incorporation of companies in 24 hours
- Filing of Annual Accounts in XBRL Mode
- Enhancement of monetary limits for appointment of relatives
- Enhancement of remuneration limit for employees whose details are to be mentioned in Directors Report
- Relief to Independent directors from prosecutions

New Amendments/ new guidelines

- Guidelines for declaring financial institutions as PFI u/s 4A
- Guidelines for Fast Track Exit Mode u/s 560
- Standardisation of guidelines for processing mergers/amalgamations
- Integration of DIN with DPIN
- Inclusion of LLP in the definition of “Body Corporate”
- Name Availability Guidelines, 2011
- Making winding up move master
- Company Law Settlement Scheme

Contd...

Simplification of existing Rules and Regulations

- Delegation of certain powers from RD to RoC
- Approval u/s 17 move from CLB to RoC – yet to be implemented
- Rectification of register of charges u/s 141 – approval moves from CLB to RoC - yet to be implemented
- Online procedure for STP approval u/s 297
- Pro-active action in pending winding up petitions and scrutiny inspection
- Green Initiatives by allowing electronic mode of communication

Analysis of some major amendments



MANAGERIAL PERSONNEL

Changes in Schedule XIII

- Vide Notification no. GSR 70 (E) dated 8th February, 2011 and GSR 534(E) dated 14th July, 2011 amendment in para (c) of Part II in section II of the Schedule
- Provisions of the said Part to the Schedule XIII made applicable only to listed companies and their subsidiaries
- Approval for subsidiaries also not required provided

Approval of Remuneration Committee and BoD to the effect that such amount deemed to have been paid by holding co. and is included within the limit of sec 198 by holding company



Passing of SR



All members of subsidiaries to be body corporate

Contd..

- Meaning of Remuneration committee as provided in Explanation IV to the said Part amended to limit the requirement of three non-executive independent directors to listed companies only; for others a remuneration committee of directors may approve the proposed remuneration
- Approval waived for payment to professional managerial personnel provided:
 - Such person is not having interest in capital or other directors of the company directly or indirectly
 - Having graduate level qualification with expert and specialized knowledge in his profession

Analysis of the amendment

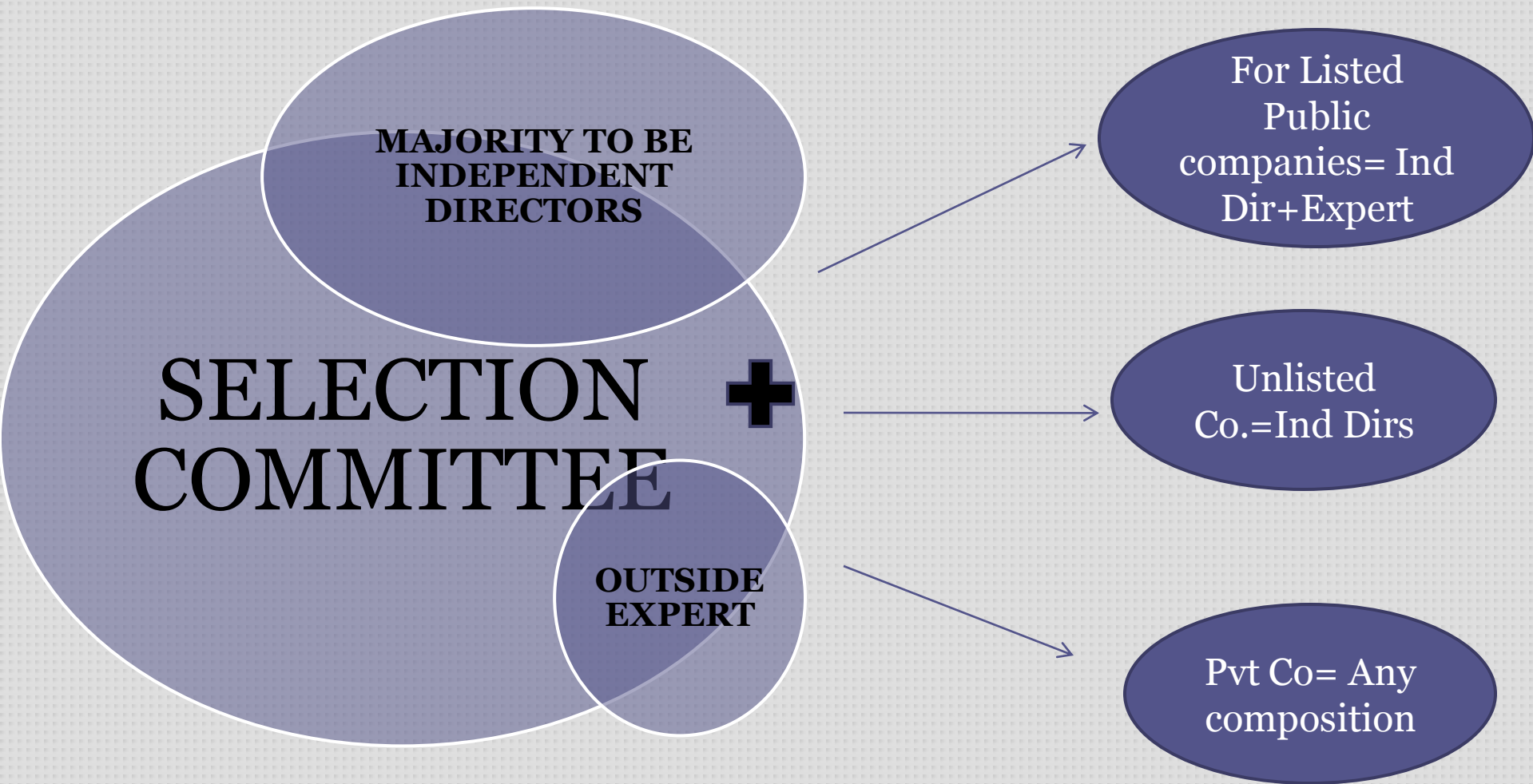
- So the situation that now emerges for managerial remuneration is:
 - Private companies – no controls
 - Public, unlisted companies – central govt sanction not required; remuneration committee approval required
 - Public, listed companies – Central Govt sanction called in terms of (C) of Part II, Section II
- However, the constitution of the committee is not controlled in case of unlisted companies
 - i.e. it may not have independent directors
- Listed Companies are to mandatorily have at least three independent directors in the committee



The Directors' Relatives (Office or Place of Profit) (Amendment) Rules, 2011

- Vide Notification no. GSR 614(b) dated 6th April, 2011 Rule 3 and Rule 7 amended
- In Rule 3, previous limit of Rs. **50,000/- p.m.** for taking CG's approval enhanced to Rs. **2,50,000/- p.m.**
- Rule 7 amended to include scope of selection committee to every company which was previously for public companies only
- For public listed companies , selection committee should majorly consist of independent directors and an expert from outside the company
- For unlisted public companies, outside expert not needed in the selection committee
- **For private companies, approval of selection committee is required whatever may be the constitution.**





So, the position that now emerges is

- Appointment of a director to an office or place of profit (other than as whole time director) – SR always required
- Appointment of directors' relatives to office/place of profit with monthly remuneration of upto Rs 50000/- board resolution only
- Appointment of directors' relatives to office/place of profit with monthly remuneration of Rs 50000 - Rs 250000/- SR only
- Appointment of directors' relatives to office/place of profit with monthly remuneration of Rs 250000 or more - SR + CG sanction

Contd....

Critical Analysis

- The proviso above talks about the selection of a “director”, which is not covered by the existing rules and also section 314 (1B). The sub section (1B) as we know, deals with appointment of “relative of” a director. This, however, seems to be a clerical error and Ministry might come up with a clarification in this regard.



Payment of Commission to Non-Whole Time Directors

- Payment u/s 309(4) (b) of the Companies Act, 1956
 - Companies to apply to Central Government for payment of remuneration in form of commission to Non-Whole Time Directors even if the total commission to be paid was within 1% or 3% of net profit of the company u/s 198 as this payment was in addition to the sitting fees paid to the directors
 - Companies were in confusion if such commission leads to raising of remuneration. There was also a department clarification dated 23.03.1964 which laid that such payment of commission constitutes an increase in remuneration and hence, needs approval
- Vide Circular no. 4/2011 dated March 4, 2011, it has been clarified that companies need not seek Central Government's approval if the total commission to be paid to all the Non-Whole time Directors does not exceed 1% or 3% of its net profit

Prosecution of Independent Directors

- Very important point – independent directors not to be prosecuted unless involvement/diligence can be established.
- Onus is on prosecution.
- Master Circular issued on 28th July, 2011 incorporating all the earlier Circulars
- Clarifying that the general duties and responsibilities are the same for each director. There is no distinction between the position of executive and non executive directors – however, immunity from prosecution



Independent Directors

Directors on behalf of
respective Government

Nominee Directors

Directors nominated by
Govt u/s 408 of the Act

Prosecution of independent directors - contd

- However, RoC to take due care now in examining cases by verifying the records (like Form 32, Annual Returns etc) available with him before initiating prosecutions against the above mentioned directors.
- The onus of proving the default of above directors lies on the RoC after all verifications and examinations required
- proper application of mind on the part of RoC in deciding whether a person to be implicated is an ‘officer in default’

Prosecution of independent directors

Contd 2....

- Directors not to be held liable for any act of omission or commission by the company which occurred -
 - Without his knowledge attributable through board process
 - Without his consent or connivance
 - Where he has acted diligently in the board process
- **Circular having retrospective effect and pending cases against such Director to be relooked.**
- This also suggests that not only in case of prosecution but also in case of compounding, similar view and steps need to be taken and cases to be relooked. The circular is silent on the issue and thus, it can be interpreted as above. Alternatively, the Bench can ask for token money as penalty. As it seems prudent to apply the above provisions not only in case of prosecutions but also in cases of compounding.

Our analysis on prosecution of directors with some rulings

- ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another***

The Supreme Court in this case held that the conditions contained in sec 141 of NI Act are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company.

- ***Union Carbide of India***

In this case, the non-executive chairman was booked by the Central Bureau of Investigation under the same sections as the managing director, executive director, works manager and others directly involved in the day-to-day running of the company. Even in this, he was singled out. Mr. Mahindra was the only non-executive director of the company to be so charged.

- ***Asia Securities and Investment Commission v. MacDonald***

The Australian Court decided that non-executive directors could not simply rely on the information provided by the management or by the executive directors and hence held liable.

ACCOUNTING ISSUES

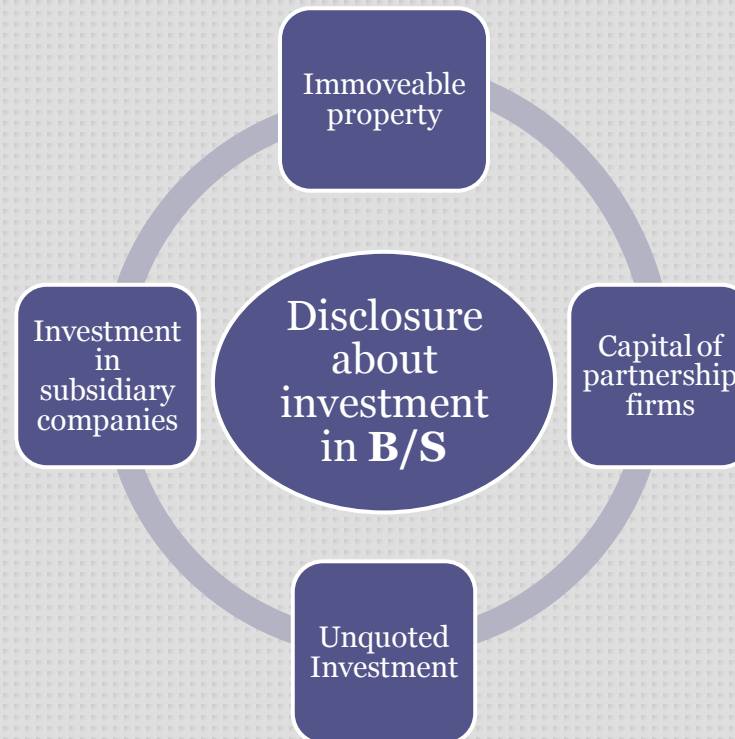
Exemption from application under Section 211 and 212 of the Companies Act, 1956



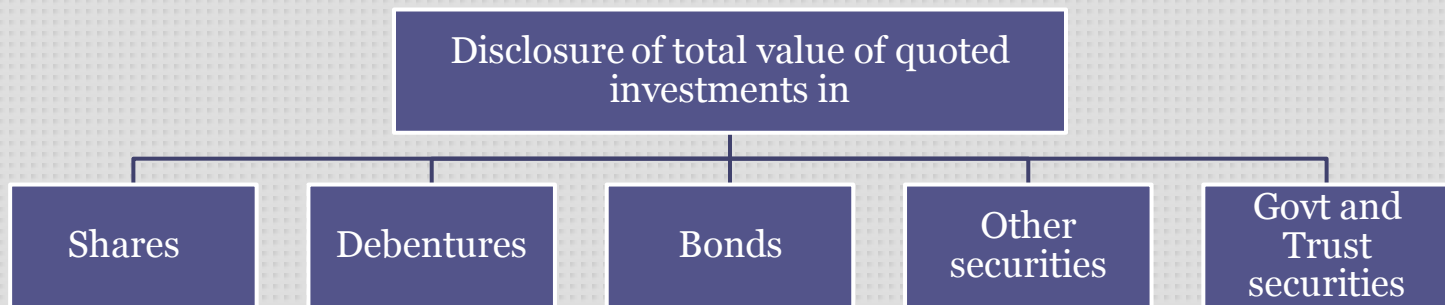
- Notification No. S. O. 301(E) dated 8th February, 2011 and effective from FY 31st March, 2011
 - Certain class of companies being granted general exemption from paragraphs of part II of Schedule VI, i.e.
 - detailed disclosure for aggregate amount of sales,
 - class wise and item wise break up of raw materials consumed.
 - Companies producing defence equipments
 - Export Oriented Company (export more than 20% of turnover)
 - Shipping Companies (including Airlines)
 - Hotel Companies (including Restaurants)
 - Manufacturing Companies/Multi Product Companies
 - Trading Companies
- Worth noting that construction companies are out of the purview.

Contd....

- Further, the notification exempts public financial institutions from disclosing investments as required under para (1) of note (1) of part 1 of Schedule VI in their balance sheet subject to following conditions:



Contd..



Exemption under section 212 (8)

- Notification No. 2/2011 dated 8th February 2011 effective for accounts prepared for 31st March, 2011 and onwards
- Companies not to require to file an application seeking exemption u/s 212(8) provided it fulfills the following conditions:



Important conditions for availing exemptions

- BR has been passed giving consent for not attaching the balance sheet
- Presentation of consolidated financial statements of holding and all subsidiaries companies in the annual report duly audited by its statutory auditors and should be in compliance with AS and Listing Agreements
- Disclosure of following information in aggregate for each subsidiary including subsidiaries of subsidiaries:-
 - (a) capital
 - (b) reserves
 - (c) total assets
 - (d) total liabilities
 - (e) details of investment (except in case of investment in the subsidiaries)
 - (f) turnover
 - (g) profit before taxation
 - (h) provision for taxation
 - (i) profit after taxation
 - (j) proposed dividend
- Undertaking that the company shall provide the copies of Annual Report of holding as well as of its subsidiaries as and when asked for

Conditions:

BR has been passed giving consent for not attaching the balance sheet

Presentation of consolidated financial statements of holding and all subsidiaries companies in the annual report duly audited by its statutory auditors and should be in compliance with AS and Listing Agreements

Disclosure of information relating to capital, reserves, assets, liabilities etc. in aggregate for each subsidiary including subsidiaries of subsidiaries

Undertaking that the company shall provide the copies of Annual Report of holding as well as of its subsidiaries as and when asked for

Analysis

- The conditions prescribed are such that the Central Government was anyways laying while granting specific case by case approvals. Thus, the only relieve is from making the application and awaiting the approval.
- It is unclear if the general exemption is also under sub section (3) and (5) of sec 212
- As per SEBI guidelines the condition no. (ii) in the notification is applicable only to listed companies. However, Ministry came up with a clarification on 2nd May, 2011 that the scope of SEBI guidelines is limited, and hence, to ensure transparency in cases where balance sheets of subsidiary are not attached, the conditions stipulated are both for listed and unlisted companies
- It is further interesting to note that accounting consolidation rules require consolidation of accounts and that requirement is not done away by section 212

Ministry moving towards XBRL

- Circular no. 9/2011 dated 31.03.2011, 25/2011 dated 12th May, 2011, 26/2011 dated 18th May, 2011, 37/2011 dated 7th June, 2011, 43/2011 dated 7th July, 2011, 57/2011 dated 28th July, 2011
- To be effective for results of financial year 2010-11 onwards
- Certain class of companies mandated to file financial statements in XBRL (eXtensible Business Reporting Language) mode
- **Phase I companies:**

All listed companies and their subsidiaries

All companies having paid up capital of Rs. 5 crore or more

All companies with turnover of Rs. 100 crore or more

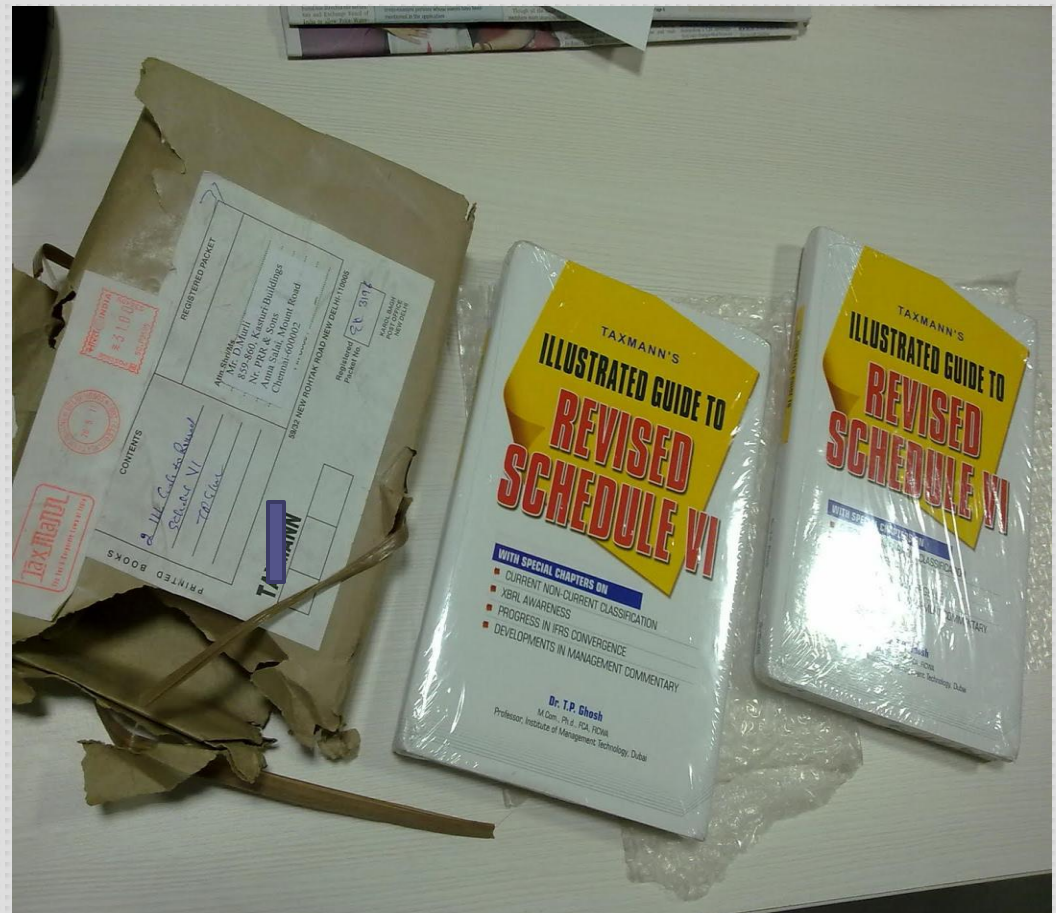


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- Phase I companies to file their Financial Statements without any additional fees up to 30.11.2011 or within 60 days of their due date, whichever is later.
- Exempted companies:
 - **Banking companies**
 - **Insurance Companies**
 - **Power Companies**
 - **NBFCs**
- Practicing professionals to ensure integrity of documents filed by them with MCA
- Statutory auditor to certify the financial statements prepared in XBRL Format
- Verification and certification of XBRL documents in e-Forms to be done as previous i.e. by authorized signatory of the company and practising professional



Revised Schedule VI



Key Highlights

- Effective date: Financial year commencing on or after 1st April, 2011, vide S.O. No. 447(E), dated 28th February, 2011
- The change are unrelated to convergence to IFRS
 - Nevertheless, the changes to a large extent indicate move towards IAS 1
 - India did not have a local standard equivalent of IAS 1
 - The revised Schedule VI fills that gap
- The process of revision started in Nov 2008 when a Memorandum of revision of Schedule VI was put on MCA site
- Main differences between proposed draft and the revised Schedule VI
 - In the proposed draft, there were two formats of Schedule VI, one for SMCs (so-called Saral Schedule VI), and one for other companies
 - Current Schedule VI is common for all companies

Key Features



- **Presentation**
 - Horizontal or T form of balance sheet gone – vertical form laid down
 - Existing Schedule VI did not have a format for P/L account
 - Revised Schedule lays a multi-step format
- **Classification of assets, liabilities and provisions is based on liquidity rather than nature**
 - Existing distinction between fixed assets, investments, etc. goes away
 - Even provisions distinguished based on long-term and short-term provisions
- **Classification of expenses**
 - Based on function, rather than nature
- **Prominence to accounting standards**
 - Gen Ins 1 grants primacy to accounting standards:
 - Even in future, if accounting standards change, leaving a conflict between the AS and the Schedule, AS shall prevail
 - Schedule VI shall stand modified according to changes in accounting standards
 - Disclosures required by ASs and by the law to be made by way of notes, unless required on the face of the financial statements

Contd....

- General Instructions laid down, unlike to the previous schedule
- Presentation in horizontal or T-shape format gone and a vertical form has been laid down
- Consistent rounding off rules based on turnover
- Earlier Companies required special approvals for putting numbers in millions for international comparison
- A reserve specifically represented by earmarked investments shall be termed as a 'fund'.
- Receivables to be classified as Trade Receivables and Trade Payables
 - A receivable shall be classified as a 'trade receivable' if it is in respect of the amount due on account of goods sold or services rendered in the normal course of business.
 - A payable shall be classified as a 'trade payable' if it is in respect of the amount due on account of goods purchased or services received in the normal course of business.

Contd...

- Borrowings to be classified as:
 - Long term and short term
 - Further sub classified as Secured and unsecured
- Meaning of subsidiaries, associated and joint ventures to be taken as per Accounting Standards
 - Word “subsidiary” Is not to be taken as per Companies Act
- Classification provided for long term loans and advances
- In respect of a company other than a finance company revenue from operations shall be disclosed separately in the notes
- In respect of a finance company, revenue from operations shall include revenue from (a) Interest; and (b) Other financial services
- Conspicuously Absent:
 - Details of managerial remuneration and computation of profits under sec 349,350
 - Licensed Capacity, installed capacity and actual production

Depiction of the liability side of balance sheet

- Shareholders' funds
 - Share Capital
 - Reserves and surpluses
 - Share warrants
- Share application money pending allotment
- Non current liabilities
 - Long term borrowings
 - Deferred tax liabilities (net)
 - Other Long term liabilities
 - Long-term provisions
- Current liabilities
 - Short-term borrowings
 - Trade payables
 - Other current liabilities
 - Short-term provisions

Depiction of the asset side of the balance sheet

- Non-current assets
 - **Fixed assets**
 - **Tangible assets**
 - **Intangible assets**
 - **Capital work-in-progress**
 - **Intangible assets under development**
 - **Non-current investments**
 - **Deferred tax assets (net)**
 - **Long-term loans and advances**
 - **Other non-current assets**
- Current assets
 - **Current investments**
 - **Inventories**
 - **Trade receivables**
 - **Cash and cash equivalents**
 - **Short-term loans and advances**
 - **Other current assets**

Format of P/L Account

- Meaning of exceptional and extra ordinary item
- Extra ordinary items are those that arise other than from ordinary activity of the company
- Exceptional items arise from ordinary activity, but are not expected to be recurring
 - Note that IAS 1, para 87 prohibits presentation of extraordinary items in comprehensive income

I.	Revenue from operations
II.	Other income
III.	Total Revenue (I + II)
IV.	Expenses: Cost of materials consumed Purchases of Stock-in-Trade Changes in inventories of finished goods work-in-progress and Stock-in-Trade Employee benefits expense Finance costs Depreciation and amortization expense Other expenses Total expenses
V.	Profit before exceptional and extraordinary items and tax (III-IV)
VI.	Exceptional items
VII.	Profit before extraordinary items and tax (V - VI)
VIII.	Extraordinary Items
IX.	Profit before tax (VII- VIII)
X	Tax expense: (1) Current tax (2) Deferred tax

Contd....

- Meaning of discontinuing operations:
 - IFRS 5 deals with what is discontinued operations – where the cashflows of an asset are likely to come from disposal rather than from continuing use of the asset

XI	Profit (Loss) for the period <u>from</u> continuing operations (VII-VIII)
XII	Profit/(loss) from discontinuing operations
XIII	Tax expense of discontinuing operations
XIV	Profit/(loss) from Discontinuing operations (after tax) (XII-XIII)
XV	Profit (Loss) for the period (XI + XIV)
XVI	Earnings per equity share: (1) Basic (2) Diluted

See accompanying notes to the financial statements

Additional information in case of specific types of companies

- In case of manufacturing companies:
 - Raw materials under broad heads.
 - goods purchased under broad heads.
 - Note that the comprehensive information required about raw materials, components etc by existing Schedule VI has been dropped
 - On the contrary, revised Schedule VI states – it shall be sufficient compliance if the items are shown under “broad heads”
- In the case of trading companies, purchases in respect of goods traded in by the company under broad heads.
- In the case of companies rendering or supplying services, gross income derived from services rendered or supplied under broad heads.
- In the case of other companies, gross income derived under broad heads.

Conspicuously absent

- Details of managerial remuneration and computation of profits under sec 349,350
- Licensed Capacity, installed capacity and actual production
 - For an analyst, this was quite a useful information to project the growth of the company
- Balance sheet abstract – completely goes away



GREEN INITIATIVES

Service of documents through electronic mode

- Clarification vide Circular No. 17/2011 dated 21st April, 2011
- Documents can be served electronically instead of serving under “Certificate of Posting”, provided
 - Co. has obtained email address of its member for servicing the documents
 - In case email id is not registered with company then the company to follow other modes under section 53 of the Act

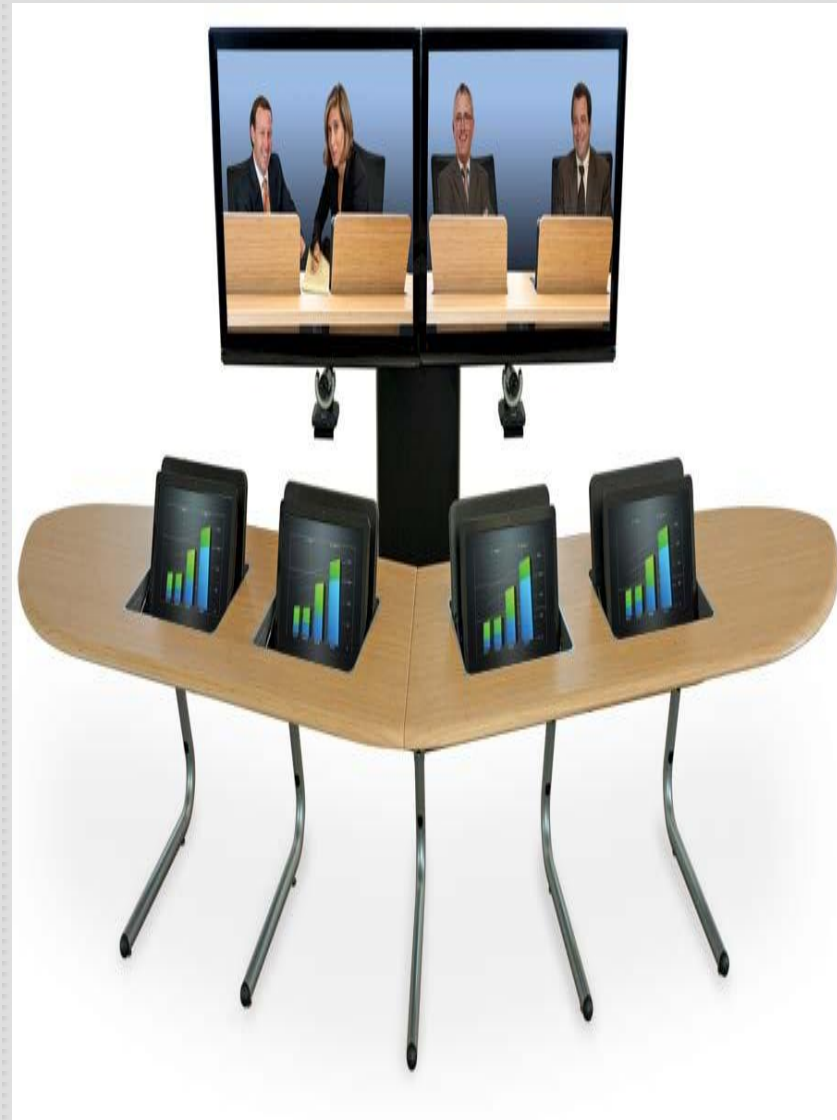


Sending copies of balance sheets, directors' report, auditor's report etc.

- Circular no. 18/2011 dated 29th April, 2011
- Clarification with regard to section 219 of the Companies Act
- Companies now may send balance sheets, profit and loss accounts, director's report and reports by electronic mode, provided
 - Co. has obtained email address of its member for servicing the documents
 - Company's website to display full text of the documents in advance prior to mandatory period
 - Issue advertisement in prominent newspapers
 - in vernacular and English that the docs are available on the website and also for inspection at the Regd office
 - In case email id is not registered with company then the company to follow other modes under section 53 of the Act
 - That is, send notices physically

Participation of Directors in meetings of Board/Committee through electronic mode

- MCA vide **General Circular No. 28 dated 20-05-2011** has allowed participation in BM by electronic mode
- In our view, amendments are required in Articles also
 - Articles lay the basic procedural rules on board meetings
 - In our view, without amendment of articles, the circular cannot be of much help as lots of things depend on internal rules
- What is electronic mode
 - Audio-video conferencing facility which allows participants to participate effectively, without an intermediary
 - Can something like skype/gtalk qualify as video conferencing?
 - Our answer is NO
 - However, depends on articles
 - Going forward, even a 3G cell phone may allow VC



Requirements:

Video conference facility *i.e.* audio-visual electronic communication facility to be employed



Directors to attend the meeting of Board/Committee of directors personally at least one meeting a financial year



Chairman and Secretary to ensure video conference equipment and no one other than the concerned director or other authorized participants are attending the meeting through electronic mode



The notice of the meeting must inform directors about the various requisites

Board meetings through video conferencing

- Video conference facility *i.e.* audio-visual electronic communication facility to be employed enabling all persons participating in that meeting to communicate concurrently with each other without an intermediary
- Directors to attend the meeting of Board/Committee of directors personally at least one meeting a financial year:
 - That is, a director cannot entirely be depending on video conferencing only
 - This requirement seems to have been put loosely – there is nothing that requires a director to attend meetings at all, if he seeks leave.
 - Therefore there is nothing to force a director to attend personally

Contd....

- **Key issues**

- Where a company has adopted VC as a mode of attending board meetings-

• Can a director opt to attend through VC rather than personally?

Yes



• Who will bear the expenses of the VC facility

Company



• Whether company has to arrange for VC at all places where directors ordinarily reside

No. Will depend on Articles



- **Integrity issues**

- How to ensure that outsiders are not being allowed to get access to discussions-
 - **Company must make its own arrangements, with proper security**

Board meetings by Video conferencing

- Chairman and Secretary to ensure all the proper video conference equipment/facilities and no one other than the concerned director or other authorized participants are attending the meeting through electronic mode
- The notice of the meeting must inform directors regarding:
 - availability of participation through video conference
 - provide necessary information to enable directors to access the available facility of video conferencing.
 - seek confirmation from the director as to whether he will attend the meeting physically or through electronic mode and shall also contain the contact number(s)/e-mail addresses of the Secretary/designated officer to whom the director shall confirm in this regard.
- In the absence of any confirmation from the Director, it will be presumed that he will physically attend the Board meeting.
- Place of the meeting
 - The place where the Chairman is participating from

Contd....

- Director participating in a meeting through use of video conference shall be counted for the purpose of quorum. A roll call should be made at the starting and conclusion of the meeting or at re-commencement of the meeting after every break to ensure presence of quorum throughout the meeting.
- The place where the Chairman or Secretary is sitting during the Board meeting shall be taken as place of meeting in terms of section 288 of the Act
- If a motion is objected to and there is a need to vote, the Chairman/Secretary to call the roll and note the vote of each director who should identify himself.
- Chairman to announce the summary of the decisions taken in that meeting in respect of each agenda item and names of the directors who have consented or dissented to those decisions.

Contd....

- Draft minutes of the meeting to be circulated in soft copy not later than **7 days** of the meeting for comments/confirmation to the directors who attended the meeting to dispel all doubts on matters taken up during the meeting.
- The **minutes to disclose the mode of attendance** of every Director of the Company during last three meetings whether personally or through electronic mode.
 - This is a strange requirement
 - One understands noting the mode of participation for the meeting but what is the relevance of noting the mode of participation for last 3 meetings?
- Video recording of the part of the meeting where the Chairman makes a summary of the discussions to be preserved by the company for **one year** from the conclusion of that meeting.
 - From this, it is apparent that the VC facility must have an option of recording

Participation of shareholders in General Meetings through electronic mode

- Vide Circular 27/2011 dated 20th May, 2011;
- Highlights
 - Optional for listed companies in FY 2011-12
 - Becomes mandatory for general meetings from next year
- Company to comply with the following requirements:
 - Notice to mention upfront regarding availability of participation through video conference.
 - Quorum shall be Five members (in case of public company) and two members (in case of private company) and the chairman of the meeting shall be physically present at the place of the general meeting.
 - This is a strange requirement
 - There are only 2 ways of participating in meetings
 - Personally
 - Or by proxy
 - Members participating through VC are participating personally and not by proxy
 - Hence, no question of not counting them for quorum
 - A roll call to be made by the chairman/ secretary at the beginning of the meeting.

Video conferencing for GMs - contd

- **The chairman/ secretary to :**

Safeguard the integrity of the meeting via video conferencing;

Prepare the minutes of the meetings;

Ensure proper functioning of video conferencing equipment;

Ensure that no one other than the concerned shareholder is attending the meeting;

Contd....

- Where all to provide for VC centers?
 - at atleast five places in India
 - Recommendable-
 - top five States/UTs based on maximum number of members or at least 1000 members, whichever is more, residing as per the address registered with the depositories.
- In the case of e-voting in general meetings, the Ministry has presently authorized only NSDL and CDSL as agencies for providing and supervising electronic platforms for electronic voting (General Circular 35 dated 06-06-2011)

General meetings by Video conferencing - lots of questions

- **Can proxies participate**
 - Our answer is clearly yes
 - All procedure for depositing proxy at the Regd office of the company etc will be the same as in general meetings
- **In order to ensure that at remote places, only members/proxies are attending**
 - The Regd office has to equip each of the remote centers with records of members and proxies
- **The rules as to participation of members in remote centers will also be the same as in case of ordinary meetings**
 - Members attending in person are taken to be personally present; those attending by proxy are taken as proxies
- **Attendance records etc**
 - The facility provider (NSDL/CDSL) provide facility for counting attendance
- **Applicability**
 - All general meetings or only AGM – apparently applicable to al general meetings
 - General meetings only or class meetings as well – circular applicable to general meetings only; optional in case of class meetings

Our analysis - seeking the sense of the meeting - several options

- For seeking the sense of the general body of members, companies now have various options
 - Meeting in physical mode
 - Meetings in electronic mode from remote locations
 - Postal vote
 - Electronic voting – technology permits shareholders to cast votes without having to attend either a meeting or a remote center. Enabling provisions already exist in Postal Ballot Rules 2001
 - Hence, electronic participation at remote centers may not be necessary at all if companies allow for electronic voting



Issue of Certificate by RoC using DSC

- Regulation 24 provided -every certificate or copy granted to companies or other stakeholders under the provisions of Companies Act, to be signed, dated by Registrar and bear his official seal and issued by post
- Vide Circular No. 29/2011 dated 20th May, 2011, Department has allowed paperless compliances by the companies
- All Certificates and standard letters issued by the ROC now to be issued electronically under the Digital signature of the ROC.

MISCELLANEOUS PROVISIONS

Clarification regarding Loan to Public Companies U/S 295

- Circular No. 24/2011 dated 12th May, 2011 restricting unnecessary filing of applications for getting prior approval u/s 295
 - Though the issue was anyway quite obvious
- If the beneficiary of the loan/security/guarantee is a Public Limited company, approval of Central Government to be sought only if provisions of sub-section (d) or (e) of section 295 are attracted.
- The application to clearly bring out the facts in this regard.
- This clarification will remove unnecessary ambiguity in the minds of the companies and simplify their work and will save the time and resources of the government in terms of such recurring applications.

So-called “Simplified procedure” for approval u/s 297

- Circular 52/2011 dated 25th July, 2011 likely to be implemented with effect from 24th September, 2011
 - This is a unique concept of online approval based on self-declaration, affirmed by special resolution
- Online application to be made online in a new e-Form with prescribed fee giving details of relevant information
- online approval of Central Government under section 297 provided:
 - SR has been passed approving the contract
 - Note that section only requires a board resolution. So, passing of special resolution is only optional for seeking online approval under the new system
 - E-form is certified by a practising professional
 - SR affirming the fact that proposed contract is competitive and at arm’s length price, and applicability of relevant sections
 - The company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon and has filed its up to date Balance Sheets and Annual Returns
 - Section 198, 269, 309, 314 and 295 are not applicable in the proposed contract.

Contd....

- Penal action u/s 297 and 628 if any of the information or declaration given by the company or certificate given by the professional in the e-form is found to be wrong
- **Critique**
 - For any company of significant size, obtaining consent of general meeting is time taking and costly
 - The Dept has misunderstood the significance of SR – SR is meant only for structural changes in the company. Not intended for routine issues

Our analysis - someone has goofed up here

- The whole purpose of the so-called online approval u/s 297 is that companies do not lose time in seeking approval for contracts
- However, the “simplified procedure” requires special resolution
 - Which is far more time taking, far more costly
 - This frustrates the very purpose of the simplification
 - This is completely out of tune with the rest of the MCA circulars
 - Seems like someone has inadvertently put “special resolution” while section requires board resolution only
- Companies may still choose the normal process – board resolution with physical approval of the RoC

Companies (Particulars of Employees) Rules, 1975

- Notification dated 31st March, 2011- applicable to all Director's report approved by the Board of Directors on or after 1.4.2011, irrespective of the accounting year of the annual account, being approved by the Board
- Amendment in Rule 1A wherein the limit of employee's salary to be disclosed in Directors Report **was raised from Rs. 24 lakh to Rs. 60 lakh per annum.**
- Amendment in Rule 2A and thus, Government companies have also been brought into the purview.



Companies (Directors' Identification Number) (Amendment) Rules, 2006

- Vide Notification dated 26th March, 2011, DIN procedure simplified
- **General time taken previously was 10 days, now reduced to a single day**
- Application to be made online and sending of physical copies not required
- E- form DIN 1 to be verified by either the applicant or a practicing professional
- Immediate approval of DIN if signed by a professional, else approval in a day or two
- DIN application fee to be paid online, unlike previously by challan/internet banking/credit card
- Furnishing of PAN made mandatory for every director vide **General Circular No. 11/2011 dated 7.04.2011**
- Onus of verification of documents provided by the applicant is on the professionals
- **Penal action is provided for in case of wrong information or certification**

Companies (Name Availability) Rules, 2011

- While applying for a name through e-Form 1A, applicant to furnish a declaration to the effect that
 - He has used search facilities on the portal to ensure the proposed name does not resemble an existing name
 - The proposed name is not infringing the registered trademarks or a trademark
 - The proposed name is are not in violation of the provisions of Emblems and Names (Prevention of Improper Use) Act, 1950
- E-form 1A can also be certified by practicing professionals, if certified, name approval in a single day
- Circular 45/2011 dated 8th July, 2011
- Revised e-form 1A to be filed backed by fee of Rs. 1000/-, vide circular dated 48/2011 dated 22nd July, 2011

Forcing filing of annual returns/ annual reports - defaulting companies/directors hit a dead block

- Forcing companies to file their Informational documents – they cannot file event-based documents unless they file informational documents
 - That is, annual report, annual return
 - Circular no. 17/146/2011-CL-V dated 12th May, 2011 further amended by 33/2011 dated 1st June, 2011
- Hence, if the company does not file
 - Balance sheet/profit and loss account within due date
 - It cannot file any event-based documents, except some
 - The directors of these companies cannot file any documents for any other companies too
- Restricted companies to file other forms unless they have filed their updated Statutory annual accounts/Annual Report with the ROC; however, following forms can be filed even in case of default:
Form 32, 20B, 21A, 21, DIN-3, 1AA, 62, 23AC, 23ACA, 23B and Form related to Cost Audit Branch and Form for deposit of money into IEPF.
- Directors, Company Secretaries and Auditors of defaulting companies shall not to be allowed to sign or certify any document for filing with MCA-21 system
- Action against the defaulting companies in co-ordination with RBI and SEBI

Contd....

- Circular 63/2011 dated 6th September, 2011
- Ministry amended the earlier circular 33/2011 by inserting event based forms that could be filed by:
 - Filing by Directors of defaulting companies now includes various other eforms and defaulting companies being now categorized and accordingly event based forms allowed.
- Said circular to be implemented from 25th September, 2011 instead of 18th sep, 2011 as clarified vide circular 64/2011 dated 20th September, 2011

Contd....

Filing by directors of defaulting companies

- Form 2
- Form 3
- Form 5
- Form 23
- Form 61

Filing by directors of defaulting companies in case of dormant companies

- Form 21
- Form 32
- Form 61
- DIN 3
- Form FZE

Filing by directors of defaulting companies having status as active

- Form 2
- Form 3
- Form 3
- Form 20B
- Form 21
- Form 21A
- Form 23
- Form 23AC/ACA
- Form 32
- Form 61
- Form 66
- DIN 3
- Form FZE

Company Law Settlement Scheme, 2011 (CLSS)

- Re-introduction of CLSS to file belated returns granting waiver of 75% of actual additional fees.
- CLSS shall remain in force from 12th August, 2011 up to 31st October, 2011
- Immunity certificate for withdrawing prosecution
- Proceedings against companies not availing the scheme
- Scope of the scheme
 - Includes delay in filing of specified documents – annual return, annual accounts and compliance certificate
 - Pertains to documents which were due for filing by 30th June 2011
- Operational aspect
 - Company files documents online, waiver of additional fees
 - If company desires immunity certificate
 - It obtains board resolution
 - Files application for immunity certificate in the form appended to the Scheme, giving particulars of SRNs
 - If there is any appeal against prosecution pending, the same is withdrawn
- Note the threat – on conclusion of the Scheme, action will be taken against defaulting companies

What is CLSS?

- Settlement of additional fee/penalty/prosecution for delayed filing of statutory documents
 - Without compounding/condonation/prosecution
 - Hence, this is an additional way of dealing with filing-related offences
- Hence, CLSS pertains only to offences relating to filing of documents
- Implications of non filing of documents
 - Prosecution
 - Additional fee
 - Blocking filing of any other documents by companies or their directors – 1st June circular

Blocking of DIN consequent to non-filing of Statement of Affairs(SoA)

- General Circular 56/2011 dated 28th July, 2011
- Process of liquidation being delayed due to late filing of SoA u/s 454
- Where winding up orders given, Ministry to give
 - One month notice to be given for filing SoA before blocking of DIN to the-
 - Company
 - Directors of such company(ies)
- OL to furnish list of all such directors who have failed to furnish SoA to the Ministry on 3rd working day of every month by e-mail to respective RD, ROC, e-Governance Cell and Insolvency Section of this Ministry.
- Effective from 5th September, 2011

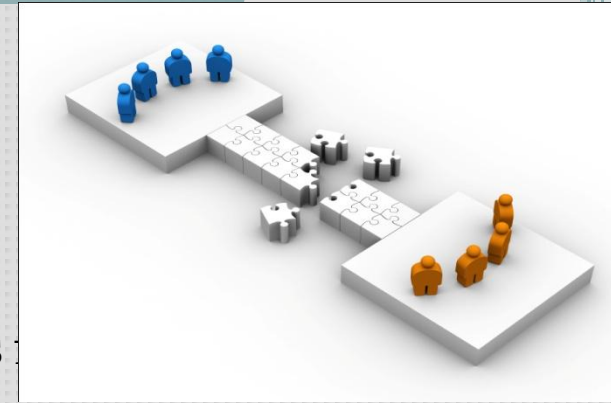
LLP to be considered as a Body Corporate

- Circular dated 23rd May, 2011
- Principal notification previously published vide notification no. G.S.R. 1883 dated 20th December, 1965.
- Ministry circulated that LLP will be regarded as a body corporate.
- But, then it was proving contrary to the provisions of sub section 3(a) of section 226 as this sub section states that a body corporate shall not qualify for appointment as auditor of a company.
- Clarification vide another circular dated 26th May, 2011 that u/s 226(3) of Companies Act 1956, a body corporate is disqualified from appointment of auditor of a company, and hence LLP of CAs will not be treated as body corporate.



Amalgamation of Government Companies

- Circular no. 16/2011 dated April 20, 2011
- The procedures laid under the Company Court Rules 1956 now simplified
- Every Central Govt Co applying to Central Govt for amalgamation to obtain the approval of cabinet to the effect that the amalgamation is in public interest
- In case of State Govt Companies, approval of State Council of Ministers is required
- Where both Central and State Cos. Are involved then approval of both State and Central Cabinet is necessary
- May amalgamate with another Govt Company by a resolution passed at General Meeting, provided
 - Resolution shall be passed by members holding 100% of the voting power
 - Company to give notice of not less than 30 days in writing of the proposed resolution to its members and creditors



Contd....

- A resolution shall not be effected unless
 - Assent of all creditors has been obtained and company shall be deemed to have been dissolved
 - Assent of 90% of creditors by value has been received
 - Company certifies that there is no objection from any other creditor
- Where one Govt Company is amalgamated with another Govt Company, the registration of transferor company to stand cancelled and company shall be deemed to have been dissolved

Speedy disposal of winding up cases of other companies

- Circular no. 54/2011 dated 26th July, 2011, 55/2011 dated 26th July, 2011, 58/2011 dated 1st August, 2011
- OL to take steps for speedy disposal of pending as well as new winding up petitions
- OLs to get details of all winding up applications instituted, and request court to direct companies to file requisite information
- Company to file the certain information duly verified by practicing professionals
- Duty of the RD to ensure that all the pending applications are moved before the Court before the next date of hearing and in all new cases, these are filed before the Hon'ble Court before the second hearing of the case

Contd....

- Stringent guidelines have been provided for inspection and investigation for winding up petitions of malpractice and mismanaged companies
 - On filing of winding up application, RoCs to send scrutiny report to Ministry, within 7 days, containing comprehensive information about the company
 - MCA will take a view whether investigation needs to be launched
 - If investigation conducted, report to be sent to OL, who shall place it before the court
 - If found guilty, action to be taken against the directors, ex-directors and other KMPs
- One of the commonest reasons for delay in winding up
 - Statement of Affairs not filed by companies
 - DINs of directors who have not filed SOAs will be disabled

Defaulters hit to a dead-end

- A 1st June circular laid that directors of defaulting companies will not be allowed to file any event-based information by e-filing or otherwise
- Lots of relaxations have been given in this requirement
 - Effective prospectively from mid- Sept

Streamlining responses to mergers/amalgamations

- Circular of 26th July 2011 has created an elaborate standardised list of issues to be examined by RD/ ROC in case of petitions u/s 391/393
- The circular says the circular supersedes all previous guidelines
- Lays timelines for the central government's comments to sec 391/393 petitions
- There is a list of 26 items to be seen by the RD's office
- Hopefully, the merger process will get speeded up with these guidelines

Lok adalats

- Two Lok Adalats are to be held by the RD each month, on Saturdays
- The objective of the Lok Adalats
 - Not only is a Lok Adalat meant for compounding, it is also meant for representing on behalf of a director/KMP/company that a case is wrongly filed against him
 - The director in question may represent himself or through an AR
 - Cases for withdrawal will be recommended

Review of prosecutions

- All pending prosecutions against independent directors will be withdrawn
- All pending prosecutions for non-filing against directors/officers who are non traceable will also be dropped
- Prosecutions against companies that have filed for Easy Exit Scheme will also be dropped

Fast Track Exit Scheme

- Effective 3rd July, a Fast Track Exit Scheme is being implemented by the Dept
- Defunct company
 - Either never commenced business
 - Has ceased business for 1 year past – that is, one year before making the application
 - Has nil assets and nil liabilities
- Not applicable to
 - listed companies;
 - companies that have been de-listed due to non-compliance of Listing Agreement or any other statutory Laws,
 - Section 25 Companies
 - vanishing companies;
 - companies where inspection or investigation is ordered
 - companies where order u/s 234 has been issued by the Registrar and reply thereto is pending
 - companies against which prosecution for a non-compoundable offence is pending in court;
 - companies accepted public deposits which are either outstanding or the company is in default
 - company having secured loan ;
 - company having management dispute;
 - company in respect of which filing of documents have been stayed by court or Company Law Board (CLB) or Central Government or any other competent authority;
 - company having dues towards income tax or sales tax or central excise or banks and financial institutions or any other Central Government or State Government Departments or authorities or any local authorities.
- Desirous companies may make application with a fee of Rs 5000/-
- Application to be signed by a practising professional
- Application backed by affidavit and indemnity by directors

Management dispute companies

- This is an internal marking of companies used by the RoCs
- The essence is that companies which have internal disputes – their documents such as appointment/removal of directors are not taken on record without clearing the dispute
- A circular of 2nd May 2011 says that the RoC will mark a company as management dispute company only where there is an order/injunction issued by a court/CLB

Some changes being effective

Effective 24th Sept 2011

Shifting of registered office

- Currently, under sec 17, shifting of registered office from one state to another, requires confirmation of the CLB
- Amendment was made in 2003 to move this to Central Govt (RoC)
- The amendment is proposed to be made effective now
- From 24th Sept 2011

Rectification of Register of Charges

- Sec 20 of the Companies (Second Amendment) Act 2002 to be enforced
 - Effective 24th Sept
- Applications for rectification of register of charges u/s 141 to be moved from CLB to Central Govt
- What does this imply
 - Currently, for failing to register creation/modification/satisfaction of charges, we go CLB for condonation of delay
 - Now, once the amendment made in 2003 is enforced, we can have rectification done by ROC
- However, sometimes there are contentious and contested cases
 - Transfer of loans by banks to ARCs – without concurrence of the borrower
 - Several of these cases are currently contested before the CLB
 - Issue is – will RoC be able to handle contested cases?

Change in eform 5- for payment of stamp duty in National Capital Delhi

- Notification dated 23rd September, 2011
- Effective from 25th September, 2011
- On 21st April 2011 Delhi High Court in the case of SE Investments Ltd vs. Union of India and others held that no stamp duty is to be paid for any increase in authorised capital as the Delhi Stamp Act has no provision in relation to the same.
- The Delhi HC's judgment was passed relying on the SC's views in *AV Fernandez v. State of Kerala AIR 1957 SC 657* and *Commissioner of Wealth Tax, Gujarat-III, Ahmedabad v. Ellis Bridge Gymkhana (1998) 1 SCC 384*. In the above Rulings, SC expressed that no one can be taxed by implication. A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all. In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law.

Contd....

- The ruling has made clear that the Articles in the Indian Stamp (Delhi) Amendment Act relating to stamp duty payable on the MOA and AOA are specifically applicable at the time of registration of the MOA and AOA. The said existing Articles in the Stamp Act in force in Delhi do not cover the levy of stamp duty on any subsequent increase in authorised share capital.
- The Delhi HC has passed this judgment as the charging articles of the Stamp Act were not clear. However, the same will not be applicable in Madhya Pradesh, Rajasthan and other few states as these states have adopted the Indian Stamp Act with relevant amendments in the Articles relating to the duty payable on the MOA, AOA on incorporation as well as on subsequent increase in authorised share capital.

A bit of flip flop

- needless to say, at the speed at which MCA is surging, there would be rethinking on certain announcements made in the past
- Example is the STP, online processing of incorporation
 - A circular of 23rd Jul 2011 said there would be online processing of incorporation documents if certified by practising professionals
 - Vide circular of 5th Sept 2011, this has been taken off
 - That is, there would not be any STP of incorporation documents