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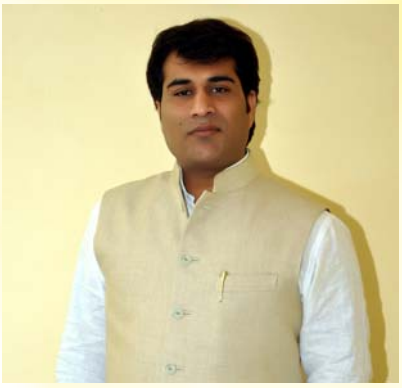
NIRC-ICSI *Insight*

NEWSLETTER

Theme of NIRC - 2014: Change, Emerge & Lead

National Best Regional Council (2004, 2007, 2008, 2009, 2010, 2011 & 2013)



Dear Professional Colleagues,

Wish you a vibrant and prosperous New Year....!!!!

My heart is filled with emotions when writing this last piece of official communication as the Chairman of NIRC. This has been both a turbulent and an eventful year for the profession and the members. But, indeed our profession touched greater heights, achieved acclaim and left its imprint on the various stakeholders of the society.

When the young and vibrant Northern India Regional Council Members took over the oath in the year 2011 and committed themselves to henceforth work as a team for its mandated tenure, all the members had a vision for the development of the profession which encompassed infrastructure, compliance, governance, transparency and personal development.

The year 2014 saw huge prospects of development in the infrastructural space with the inauguration of new chapter at Bikaner, new building at Bhilwara and foundation stone being laid at Udaipur and Faridabad. Recommendations for new buildings have been sent for Agra, Kanpur, Lucknow, Chandigarh, Gurgaon and Ghaziabad.

Several initiatives were undertaken concerning the professional development of the members and students with several programs being run for them.

To bring better transparency in the proceedings of the Institute several new mechanisms were initiated to create an ambivalent atmosphere for the officials to work.

I hope that with all these new initiatives we have been able to live upto the expectations of the members and have been successful in leaving a mark on the professional lives of the members and students.

I thank all my fellow colleagues from the Central Council, Regional Council and Chapters to have supported me at all times.

Officials and Staff at ICSI, NIRC and Chapters have been instrumental in extending my thought into action.

Last but not the least, I pay my gratitude towards all the members and students for having given me the opportunity to serve them.

Thank you.

CS Shyam Agrawal
Chairman

The Regional Council

Chairman	• CS Shyam Agrawal	09314923451
Vice-Chairman	• CS NPS Chawla	09958535300
Secretary	• CS Manish Gupta	09212221110
Treasurer	• CS Dhananjay Shukla	09873347280
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NIRC-ICSI CONGRATULATES THE FOLLOWING MEMBERS (in the order elected) ON THEIR ELECTION TO ICSI COUNCIL/REGIONAL COUNCILS FOR FOUR YEARS TERM 2015-2018

COUNCIL ELECTIONS-2014

(Elected to the Council of ICSI from the respective constituencies)

Northern India Regional Constituency

1. CS Pandey Ranjeet Kumar (FCS- 5922)
2. CS Chaudhary Vineet K. (FCS- 5327)
3. CS Agrawal Shyam (FCS- 6624)
4. CS Singh Satwinder (FCS- 2752)
5. CS Bajaj Rajiv (FCS- 3662)

REGIONAL COUNCIL ELECTIONS-2014

(Elected to the Regional Council of ICSI from the respective constituencies)

Northern India Regional Council

1. CS Chawla N P S (FCS- 6987)
2. CS Gupta Manish (FCS- 5123)
3. CS Kalia Saurabh (FCS- 7331)
4. CS Shukla Dhananjay (FCS- 5886)
5. CS Singh Avtaar (FCS- 5905)
6. CS Gupta Amit (FCS 5478)
7. CS Kohli Monika (Ms.) (FCS-5480)
8. CS Aggarwal Manish (FCS- 6714)
9. CS Sinha Nitesh Kumar (FCS-7536)
10. CS Arora Deepak (FCS-5104)
11. CS Debnath Pradeep Kumar (FCS- 6654)
12. CS Bhambri Rajeev (FCS-4327)

IN THE ORDINARY COURSE OF BUSINESS - AN ENIGMA UNRESOLVED

–CS S.Srinivasan

One of those few phrases which has tickled professionals, corporates and the corporate lenders alike in the Companies Act, 2013, is the phrase ".....in the ordinary course of business..." which appears in several sections of the Act. The following are the sections which have in their texts this phrase :

1. S.67: Restrictions on purchase of shares by a company or giving of loans by it for purchase of its shares
2. S.179(3) Powers of the Board;
3. S.181(1) (c) :Restriction on Powers of the Board;
4. S. 185:Loans to its directors;
5. S.186(11): Loans and Investments by Company;
6. S.188(1): Related Party Transactions;
7. S.189(5) Register of Contracts or Arrangements in which directors are interested;
8. S.195(1): Prohibition on insider trading of securities;
9. S.327(6) :Preferential Payments;
10. S.329.: Transfers not in good faith to be void;
11. S.336(1)(a)&(d): Offences by officers of Companies in Liquidation.

In this article an attempt is being made to ascertain the meaning of the phrase in so far as it appears in section 185 of the Companies Act,2013. It is not as if this phrase is new in the Companies Act. Companies Act, 1956 had also several sections which had this phrase included. But they were fewer in number there. This phrase has suddenly assumed significant attention particularly in the context of interpreting the phrase inter-alia in section 185 of the Companies Act, 2013.

It would not have drawn much attention of the corporate lender, in whose interest this article is written, if the restriction was confined to only loans to directors or to persons in whom the director is "interested" . The section drags along with it in its fold, as it used to in the earlier Act, the act of giving guarantee or providing of security by one company in favour of the corporate lender for a loan availed of by another company in which any of the directors of the latter company is "interested" in the former company or vice-versa. The relevant restriction imposed by the section as it pertains to the corporate lender is given hereunder for easy reference:

185(1):Save as provided in this Act, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person:

PROVIDED that nothing contained in this sub- section shall apply to-

(a) the giving of any loan to a managing or a whole-time director-

(Ias a part of the conditions of service ended by the company to all its employees; or

(ii) pursuant to any scheme approved by members by a special resolution; or

(b) a company which in the ordinary course of its business provides loans or guarantees or securities for the due repayment of any loan

and

in respect of such loans an interest is charged at a rate not less than the bank rate declared by the Reserve Bank of India.

Explanation- For the purpose of this section, "to any other person in whom the director is interested" means-

[a] any director of the lending company, or of a company which is its holding company or any partner or relative of any such director;

[b] any firm in which any such director or relative is a partner;

[c] any private company of any such is a director is a director or member;

[d] any body corporate at a general meeting of which not less than twenty-five percent of the total voting

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power may be exercised or controlled by any such director, or by two or more such directors, together; or

(e) any body corporate, the board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors of the lending company.

PENAL PROVISIONS

Unlike in section 180 where the penal provisions were directed at the corporate lender by which any violation of the provisions would result in the debt becoming invalid or ineffectual, there is no such provision in section 185 by which the debt will become invalid or ineffectual nor any mention is there in the section to make the guarantee or security unenforceable. The company which gives the guarantee or providing the security and the director or any other person who is termed as interested would be penalized. That gives room for the credit manager to take it little easy. It is pertinent to point out that section 295 of the Companies Act, 1956, corresponding to section 185 of the Companies Act, 2013, had the following provision in section 295(4):

Every person who is knowingly a party to any contravention of sub-section (1) or (3), including in particular any person to whom the loan is made or who has taken the loan in respect of which the guarantee is given or the security is provided, shall be punishable either with fine which may extend to thousand rupees or with simple imprisonment for a term which may extend to six months:

Such a provision is clearly absent in section 185 of the present act, which allows the banks/FIs/NBFCs to goes scot free. However, the credit manager cannot feign ignorance of the non-compliance of the provisions of the section simply because the Doctrine of Constructive Notice would come into play. He cannot take umbrage under the Doctrine of Indoor Management. He can always find out from the MCA site whether the yardsticks are met by the company in giving of the guarantee or providing security. That is going to be a daunting task if he has to probe. A prudent credit manager would take the help of a professional, especially a practicing company secretary, whose certificate on compliance would be good defence to push his case forward and insulate himself from the rigors of law if his action in his accepting the corporate guarantee or the security is challenged in a court of law on technical grounds. But no petition can make the lending of money non-recoverable or make the loan unsecured or the security unenforceable.

Let us now look at the whole issue from the corporate borrower's angle. It has the two options. Either it should do a jugglery on the parameters set out by the section to ensure that no director of the companies involved have common directors or in their respective shareholding or is interested in the transaction in any way e.g. a director stepping down from a company or bringing down his shareholding in a company etc., which, perhaps, may be construed as a sham exercise. A well-run company adhering strictly to good Corporate Governance cannot engage itself in such jugglery. For such companies, a better option would be to try to fit the transaction into the exemptions provided in the Act or its Rules.

The exemption provided in sub-rule (2) of rule 10 of the Companies (Meeting of Board and its Powers) Rules, 2014 is confined to giving of guarantees and providing security only to its subsidiary company and that too only if the loans for which the guarantee is given or security provided are utilized by the subsidiary company for its principal business activities. Such cases may be far and few.

Another exemption provided under Section 185 is that the Company should not, directly or indirectly, give any guarantee or provide its assets as security for a loan availed by another company where a director /s is/are involved as interested director/s unless the Company does so in its ordinary course of business. Once it can be established that the exercise was done in its ordinary course of business, then the credit manager should ensure that the loan carries an interest rate which is not be less than the bank rate declared by the Reserve Bank of India.

For the Company to establish that the giving of the corporate guarantee or providing of the security was in the ordinary course of its business and more importantly convince the corporate lender as such is going to be a tall order unless the Company is already a NBFC, since many of these NBFCs may in

the normal course give guarantee or provide security in relation to loans availed by other companies.

The moot point, therefore, is -What is the meaning of the phrase "…in the ordinary course of its business"? Neither the new act nor the old Act has defined this phrase. Even the General Clauses Act, 1897, has not defined the phrase. Ironically, as reported recently in one of the financial dailies, the Ministry of Corporate Affairs, which monitors the Companies Act and regulates the companies has shied away and has declined to define the term presumably leaving it to be defined by the persons concerned in the context in which it appears in various sections of the Act and under the facts and circumstances of each case. This has left lot of subjectivity in the interpretation of this phrase. In fact, this phrase is not unique to the Companies Act. It appears in several cases of Income Tax and Service Tax laws. These Acts have also not defined the phrase. But, that is of not much relevance to us, since the context in which these laws deal with the phrase may not be in sync with what is expected for the purpose of the Companies Act.

Understanding the legal meaning of this phrase has become utmost important in the context of particularly the provisions of section 185 of the Companies Act,2013, since the ramifications due to the absence of this definition is serious and has given rise to enormous difficulties in putting in place the utility of corporate guarantees to be issued and collateral securities to be provided by "Associate Companies" and "Sister Companies" in running the business.

Before we attempt to dissect the meaning of the phrase, let us first understand what circumstances prevailed prior to the enactment of Companies Act, 2013, and why all of a sudden this phrase is drawing so much attention of the industries, bankers and the professionals alike now.

S.295 of the Companies Act, 1956 which is the corresponding section to S.185 of the Act of 2013, did not kick up so much dust since the section did give some leeway in complying with the provisions of the section so as to ensure that the business of commercial enterprises run smoothly. A major sop was that the provisions of the section were not applicable to a private company simpliciter. Also, the companies could also seek prior approval of the Central Government on an appropriate application by the company for such a transaction should a necessity arise. These two comforts made things so easy. What is being stated here is from the angle of the industries .Let us see what the Government's view is on this; after all, it has a duty of taking care of the welfare of the public.

If the words in the statute are ambiguous, we have to see the intent of the legislature. Generally the intent of the legislature is reflected in the Statement of Objects and Reasons which precedes the introduction of any bill in the parliament. As we are all aware, what has come as law in the form of the Companies Act, 2013, has been based heavily on the recommendations of the J.J Irani Committee which was assigned the task of recommending reforms in the Companies Act in India. The Committee in its wisdom had the following to say in this matter:

"Restrictions on loans to Directors

5.1 Generally the directors should not be encouraged to avail of loans or guarantees from companies. They should be allowed remuneration or sitting fees only. In case company decides so, loans to directors should be allowed only when company by special resolution approves such loans. Disclosures to be made to shareholders through the explanatory statement should be specified in the rules

[Quasi loan is a transaction where one party - the creditor agrees to pay or pays otherwise than in pursuance of an agreement, a sum for another (the borrower) or agrees to reimburse, or reimburses otherwise than in pursuance of an agreement expenditure incurred by a third party for the borrower on terms that the borrower would reimburse the creditor or in circumstances that give rise to a liability for the borrower to reimburse creditor.]"

Great emphasis has been laid by the Committee in ensuring that the minority interest is addressed adequately by proper and timely disclosure by the management of the companies. In keeping with these recommendations, perhaps, it would have been only fair that giving of guarantee and providing securities by companies for loans to companies where directors are "interested" could have been allowed with a condition that a special resolution

be passed by those companies giving guarantees or providing securities or through a stricter measure under an unanimous resolution by the members. Doing away with the exemption totally in section 185 to even private limited companies has been a big blow to such companies. One must not lose sight of the fact that in India, unlike in the west, business is intricately connected within families and extended families in the guise of private limited and unlisted companies. Many medium and small scale industries are family owned and close knit by share contributions not only from promoters but also from their friends and relatives. They are essentially run on partnership lines to meet business exigencies and the form of entity is only to suit the requirements of law. The corporate lenders, whether they are commercial banks, financial institutions or NBFCs, were comfortable in accepting securities for loans extended by them to any person including other companies as long as the securities were adequate. The source of the securities did not matter much as long as the securities were legally enforceable. Ironically, the bank would insist that there was a nexus between the company availing the loan and one which is providing the securities. [Rank third party security was taboo.] These companies now have to reorient themselves to the new paradigm in law. The Rules of the game have changed and the corporate lenders have to now visualize beyond securities.

The Government is serious. Good Corporate Governance has been the buzz word in developed and developing countries across the globe. India is also trying to be in line with the concept in the last two decades or so, so that Indian companies could be competitive in the global arena of business. The Companies Act, 2013, is framed in that direction. But such adherence to good corporate governance will also bring along with it certain compliances of the law which if strictly followed would help companies achieve their objectives. Good Corporate Governance is sin-qua-non for a corporate lender in pursuit of healthy lending.

With this in the background, we will attempt to ascertain how best within the framework of law, a company can get around this phrase under discussion by convincing itself and the corporate lender, that the act of giving the corporate guarantee and /or the provision of the assets of another company as security where any of the director is "interested" is well within the realm of the ordinary business of company giving such security. If this can be established then the transaction can be pulled out of the rigors of Section.185. The interpretation of the phrase is very subjective. One has to take the facts and circumstances under which the guarantee was given or the security was provided and the context in which it was given. We are a Common Law country where if there is an ambiguity in the terms or phrase used in the Act, the judges can create law by citing precedence in earlier judgments handed down by appropriate courts. Unfortunately, there are no precedents in the subject with reference to Companies Act in India and in particular with reference to section 185 of the Companies Act, 2013, which is new or even in Companies Act, 1956, while interpreting the provisions of section 295. The judgments by high Courts or Tribunals which have taken a call on this phrase relates to statutes such the Income Tax Act or Service Tax which hardly have any relevance to the subject under discussion.

The exercise starts with the verification of the clauses in the Memorandum of Association of the company which has offered to give corporate guarantee or provide the security. The corporate lender has to identify the clause in the MoA which gives power to extend a guarantee or provide its assets as security for a loan granted to another company. If it is already included in the objects clause classified as "Main" as per the earlier Act, or "the objects" under the new Act and the company is, in fact engaged in giving of corporate guarantees and/or providing security of its assets for loans granted to other companies as a normal practice charging a fee as consideration for it, then such giving of guarantee or providing of such security can be construed as given or provided in the ordinary course of its business and would be sufficient compliance of law, even as one or more directors can be considered as "interested" in the parlance of section 185. In all probability this company would be a NBFC. It is difficult to conceive NBFC engaged purely in this activity. Such activity may be incidental to its business of extending financial assistance to companies. Even practically it is difficult for a NBFC to be regularly engaged in this business of providing security since the NBFC has to have a large security bank and its Net Worth has to be so high that it can engage in extending

corporate guarantee repeatedly and regularly to the satisfaction of a corporate lender. This is true even if the NBFC has included this kind of activity in objects "incidental to its main object" or "furtherance to its object" as the case may be. Though, technically the transaction may be within the precincts of law, practically such cases may be far and few in number.

We shall now consider the case, where the giving of guarantee or providing of security for loans availed by other companies as one of the objects "incidental or ancillary to its main object" or "furtherance to the object" being included in MoA of the Company. This is fairly common in the MoAs of most of the companies. These two words 'incidental' and 'ancillary' are used synonymously. Till the introduction of Section 185 there was no occasion to dwell on the exact differences, if any , between these two words. Ancillary business means a business or non-trade activity that is not associated with the core activities of a firm though it is incidental to the main business of the company. For example, provision of consultancy services by a manufacturing company, say, cement, is a business ancillary to its main business. Contra distinctly, a business which is "incidental" to the main business has to have a nexus between that business and the "main" business. In the example cited, if the company were to trade in lime also, it would amount to "incidental" business since lime is a raw material for the manufacture of cement. Therefore, if the company can establish with enough documentary proof that the giving of guarantee or providing security for a loan availed by another company in which the directors are "interested" is an ancillary business of the company, mind you not incidental, then perhaps the courts may look at it as an activity carried out in the ordinary course of business. As stated earlier there is no precedence in Indian courts. The courts elsewhere has dealt with the subject in relation to bankruptcy which may not be relevant to the subject under discussion. If the company is able to establish that there have transactions and business relationship as quid-pro co between the companies and which have been at arms length though technically coming under the definition of "Related Party", takes further precautions to ensure that an unanimous resolution which could involve a postal ballot also, (both though not prescribed under law), has been obtained by both companies to take care of minority interest, and also the company which avails the loan executes a co-indemnity bond in favour of the company giving security involving the corporate lender as part of a tripartite agreement, and establishes that the practice is prevalent and customary in Indian industries, a positive Indian Court may look at it as a genuine transaction and may perhaps consider the transaction as one which has been entered into "in the ordinary course of business". But the company would require a tough lawyer to present the case and a corporate lender with nerves of steel to accept it. There is a tendency in Indian banks/FIs to refer such matter to superiors. After all, for the corporate lender, the consequence of the court deciding otherwise would not mean that the loan becomes unsecured or not recoverable since section 185 does not say so unlike section 180(5)). If it means good business to accept of such guarantee and security, a prudent banker should take the risk. At best he can insist on a board resolution and an unanimous general meeting resolution resolving that the giving of guarantee/providing security of its assets for a loan to be availed by another company where the director(s) are "interested" is in fact in the ordinary course of business of the company as authorized by the MoA and has the necessary approval. As stated earlie, the assessment of whether a transaction is in the ordinary course of business is very subjective, judgmental and can vary on a case-to-case basis giving consideration to the nature of business and objects of the entity. It is not expected of a credit manager to form such an opinion. After all, the directors are presumed to be aware of their duties which are elaborated under Section 166. The credit manager can always take shelter under the Doctrine of Indoor Management. As a matter of comfort, the credit manager can obtain an informed opinion in the matter from an independent professional such as a practicing company secretary or a lawyer who are at an arms lengths distance with the company.

Conclusion: As long as it can be established with sufficient proof that giving of guarantee and/or providing of security is, in fact, in the ordinary course of business of the company and the management is confident of proving the same before any court of law, then perhaps it is possible to overcome the rigors of section 185 and there is no reason why the credit manager should not accept the guarantee or security.

NEGATIVE LIEN ON SHARES OF COMPANIES - HOW EFFECTIVE IN PRACTICE

–CS S.Srinivasan

Introduction

This is a subject of great interest to a banker since he is always on the prowl of how to tighten the noose over the borrowing company by involving the stakes of the promoter directors.

Before we deal with the subject of ' negative lien', it would only be logical to understand the meaning of the term "lien" particularly in the context of commercial transactions that are entered into in India.

Lien is a French word meaning 'knot or binding' that was brought to Britain with the French language during the Norman Conquest in 1066.

Black's Dictionary, 6th edition defines the word, 'lien' as a claim, encumbrance or charge on property for the payment of some debt, obligation or duty.

Webster's New Collegiate Dictionary defines 'lien' as a charge upon real or personal property for the satisfaction of some debt or duty ordinarily by operation of law.

Ramanathan Law Lexicon defines lien as a right by which a person in position of the property wholes retains it against the other in satisfaction of demand due to the party retaining it.

Before we enter into a full scale discussion on 'negative lien on shares', it would not be out of place to understand briefly the usage and custom of addressing the term 'lien' in other parts of the world particularly in the Common Law countries. That brings us to a question of which are Common law countries and which are not and also what is meant by Common Law and what is meant by Civil Law.

Common Law

One of the major legal systems of the modern western world is the Common Law system, the other being the Civil Law. Common Law originated in UK. In Old England, there were two types of Courts----law, and equity or Court of Chancery, In the law court the Judge applied statutes. As time went on, situations that were not covered by statutes, were uncovered and Judges 'created' law, usually in the form of equity. This is Common Law.

Common Law forms a major part of the legal systems of many countries, especially those which had been British territories or colonies. Initially, Common Law was founded on common sense as reflected in the social customs. Over the centuries, it was supplanted by statute law, that is, rules enacted by a legislative body such as a parliament and clarified by the judgments of the higher courts that set a precedent for all courts to follow in similar cases. These precedents are recognized, affirmed, and enforced by subsequent court decisions, thus continually expanding the common law. In contrast to Civil Law (which is based on rigid code of rules) Common Law is based on broad principles.

Civil Law

Civil Law (or Civilian Law) is a system inspired by Roman Law, the primary feature of which is that laws are written into a collection, codified, and not (as in Common Law) interpreted by judges. Precedents take a back seat unlike in Common Law. The principle of Civil Law is to provide all citizens with an accessible and written collection of laws which apply to them and which judges must follow. It is most wide spread type of legal system in the world, applied in various forms in approximately 150 countries and the oldest surviving system in the world.

Apart from the Common Law and Civil Law there are other legal systems in the world such as Socialist Law and Islamic Law. Since India was under British Rule we have fallen in line with Common Law (except for the State of Goa which follows the Civil Law because of Portuguese Dominance then) but

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with a tendency to shy away from equity which is the hallmark of English Law.

Some of the countries which follow the Common Law are: Australia, UK(except Scotland), India(except Goa), Ireland, Hong Kong, U.S.A. (except Louisiana), Canada(except Quebec), Pakistan, Malaysia, Norway(to some extent).

Some of the countries which follow Civil Law or its modified version: All European Union States except UK(excluding Scotland) and Ireland, Brazil, Canada(Quebec only) China, Japan, Mexico, Switzerland, Turkey, U.S.A (Louisiana only), India(Goa only).

Russia and some of the Communist countries follow Socialist Law and some of the Middle East countries follow Islamic Law.

Equity is the name given to the set of legal principles in Common Law jurisdictions which supplement strict rules of law where their application would operate harshly. Equity is commonly said to "mitigate the rigors of common law". In India, the Common Law doctrine of equity had traditionally been followed even after it became independent. Judges had some discretionary power to look beyond the law. However, the "Specific Relief Act, 1963" was passed by the Parliament in India repealing the earlier "Specific Relief Act" of 1877 by which most equitable concepts were codified and made statutory rights, thereby ending the discretionary role of courts to grant equitable reliefs. In fact, in a not too distance past against the Kerala High Court judgment, the Supreme Court has held that law should prevail over equity and that the judge should not legislate as it would be violative of basic democratic principles. The apex court in that case said, "The Full Bench and single judge have relied on equity, justice and good conscience, rather than law which is incorrect. We are of the opinion that when there is a conflict between law and equity, it is the law which has to prevail"

With this background on the legal systems, we shall now proceed to describe the term lien as commonly understood and in particular in the Indian context.

In common law, a lien is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. The owner of the property, who grants the lien, is referred to as the "lienor" and the person who has the benefit of the lien is referred to as the "lienee". In U.S.A. which is a Common Law country, the term generally refers to a wide range of encumbrances and would include other forms of mortgage or charge

Classification of Lien

Lien can be classified into two broad categories---General and, Particular or Special Lien. Under this classification one can have possessory and non-possessory lien also. Apart from these there are several nomenclatures which go according to the context under which the lien is taken. Some of them are Banker's lien, Mechanic's lien, Solicitor's lien, Mariner's lien, equitable lien etc. Liens can also be consensual or non-consensual. Consensual liens are imposed by a contract between the creditor and debtor e.g. agreement to pledge or mortgage. Non-consensual liens typically arise by statute or by the operation of the common law e.g Banker's lien. Section 171 of the Indian Contract Act, 1872, specifically vests the banker with such a right. The right of lien is granted upon the banker by force of law and it helps to avoid the need to have a separate agreement. However, to be in a safe position it would be advisable that the banker takes a letter of lien stating that the goods/properties are entrusted as security for a loan at present and in future and that the banker can exercise his lien on them.

Banker's lien is an enforceable right of a bank to hold in its possession any money or property belonging to a customer and to apply it to the repayment of any outstanding debt owed to the bank, provided that, to the bank's knowledge, such property is not part of a trust fund or is not already burdened with other debts. The banker can insist on lien only in the absence of an agreement to the contrary. Banker's lien is both a possessory lien and a special lien. Why is it called a possessory lien? The bank has the right to seize and sell the defaulting borrower's property

in its possession, after giving a reasonable notice to the borrower. Hence it is called a possessory lien. It is a legal claim against an asset in order to secure payment of the debtor's obligation. In contrast, in a non possessary lien, the lienor does not hold possession of the asset in question, but only a legal right. e.g. a banker can place a non-possessory lien against a borrower's piece of real estate in order to recoup his/her loan amount once the property is sold. This type of lien may take the form of hypothecation, charge, or mortgage on a different set of conditions. It is a broader term as compared to a pledge, charge or mortgage. Why is it called a Special Lien? The bank can exercise its lien without going through the foreclosure procedure, like seeking a court's order. Therefore, it is called also a Special Lien.

Enforcement of a banker's lien, however, may depend on the type of the property and the reason it was handed over to the bank. Bills of Exchange and Pro notes may be claimed under this lien. However, the borrower's property handed over to the bank for a specific purpose, such as for safe custody for sale through a department of the bank cannot be claimed under banker's lien.

Negative Lien and Shares

Having broadly understood the meaning of "lien", we shall try to understand the meaning of "negative lien". The subject of lien can stretch over a large canvas and, therefore, the discussion on the subject of "Negative Lien" is being confined in this article to creation of negative lien on shares of companies registered under the Companies Act, 1956 or under the Companies Act, 2013 and their enforcement.

In a lender-borrower relationship, several modes of securing the advances is attempted by the lender to include them as requirements in the letter of sanction and one of them is a right to the banker to have a lien on the assets of the borrower including a pledge on the shares of a promoter-director in a company. A mere lien sometimes does not adequately add to the comfort of the banker. Generally, a Banker's lien is purely possessory and does not transfer the right of ownership to the banker. By usage and statute, however, a banker's lien tantamounts to an implied pledge conferring upon him the power of sale in certain circumstances. The exercise of the lien, however, is made subject to several qualifications but whenever it can be validly exercised, the lien stands on the same footing as pledge. A negative lien is, therefore, sometimes referred to as a "negative pledge".

Pledge of Shares of Promoters of Companies

Lending to companies and securing assets against the moneys lent is a different ball game altogether to a banker. This exercise involves awareness of the provisions of several statutes and the procedures involved therein by the personnel of the bank who form the baseline-face of the bank which interacts with the borrowing company. And, therefore, generally not being qualified legally, these personnel in the banks tend to follow rigidly the one-size- fit-for-all procedures evolved by legally qualified personnel of the bank. One of the contentious demand which often a small sized company confronts is the furnishing of a personnel guarantee by the directors of these borrower-companies that are generally registered as private limited companies in India and also in pledging of shares of the directors in that Company in favour of the bank.

Companies Act and Lien on Shares: Though the Companies Act,1956 did not directly deal with the right of lien of a company on its shares held by members, Regulations 9 to 12 of Table A, Schedule I to the Act contain detailed provisions which a company may adopt to exercise lien which in such a case is understood to be a non-possessary lien. The rights of the Company whose shares may be pledged with the banker have to be studied by the latter by going through its articles of association thoroughly before they become a subject matter of pledge in favour of the bank simply because, the enforcement of pledge may become difficult if the company itself has a prior lien. One more important precaution the banker ought to take is that the face value of the shares which are the subject matter of pledge does not exceed thirty percent of the paid up capital, NOT NET-WORTH, of the Company or the bank's own

paid-up capital whichever is lower. (S.19 of the Banking Regulation Act, 1949). With such restrictions, pledging of shares by the directors of their shares as a security may sometimes pose a problem to the banker since he will be unable to tighten the noose over the neck of small company borrower in case of necessity considering the quantum of loan proposed and the availability of the paid up shares as security. Therefore, a cozier route is to take an undertaking of a 'negative pledge' from the directors of their shares in the Company over and above the shares that can be legally pledged so that personal stakes of the directors are involved and the recovery on a default becomes easier. Or does it? Is the enforcement of negative lien on shares for the purpose of recovery that easy? These are questions which are being attempted to be answered in the following paragraphs

What does 'negative lien' mean?

It is a undertaking by the owner of assets to a lender not to sell these assets on which a charge or a lien has already been created in the lender's favour for the repayment of all dues to the lender and not to create further lien or charge or security interest in anybody else's favour without the prior permission of the lender who has lent moneys to the owner of these assets for the purchase of these assets or otherwise. It is an undertaking of convenience and has no legal force but only a moral pressure unless properly documented. Once documented properly, like all other legally valid undertakings, on the event of default, it will attract the rigors of law and the lender has a recourse to recover the money only through a civil suit.

Registration

Under Registration Act, 1908

The negative lien can be registered under this Act if it can be framed as an agreement paying ad valorem stamp duty.

Under Companies Act 1956

The term 'negative lien' is not defined under any legislation in India. Thus, a recourse is needed to the judicial pronouncements to consider as to how Indian courts have construed the term 'negative lien', and particularly, whether a negative lien is also a subset or a type of lien. Set out below are extracts of two Judgements of the Honourable High Court of Bombay wherein 'negative lien' has been dealt with.

In Bank of India Ltd v. Rustom Fakirji Cowasjee, AIR 1955BOM419 the Honourable High Court of Bombay has stated the following:

"In the course of his arguments learned Counsel for the defendant laid stress on the words "security" and "negative lien" used in the resolution. I need scarcely observe that these words must be given full effect in ascertaining the intention of the parties, and the resolution must be read as a whole. The writing itself says that the negative lien was to constitute a security for the payment of the loan. Lien, strictly, is neither a jus in rem nor a jus ad rem, but is simply a right to possess and retain property until some claim attaching to it is satisfied or discharged. (Story on Equity Jurisprudence p. 508.) There are some kinds of lien which are to be found in enactments such as the Companies Act, but most of the different kinds of lien, both particular and general, recognised by our law are to be found stated in the Indian Contract Act. It is true that the provisions of the Contract Act relating to lien are not exhaustive and Section 1 of that Act in terms saves all usages and customs of trade which may be found inconsistent with the provisions of the Contract Act. Then there are some exceptional liens, such as the common law lien of a solicitor. Such exceptional liens apart, the general rule may be stated to be that a lien whether an offspring of statute or arising by any usage or custom is essentially a right of retention. Under our law there is not, in case of a lien, any right of bringing the property to sale unless it is expressly conferred by statute.

There are some kinds of lien where such right of sale is expressly recognised, e.g. the lien of an unpaid seller or of a pawnee of goods. But in case of many liens expressly recognised by statute there is no such right of bringing the property to sale and the right remains simply one of retention. It may be that in

case of any lien which may be established by any usage or custom of trade there may be this additional right to bring the property to sale. But such usage or custom would have to be pleaded and strictly proved. Such is not the case before me. Here I am concerned with a lien in favour of a bank (emphasis applied), and it is indisputable that the general lien of a banker expressly recognised by Section 171 of the Contract Act (which is a possessory lien) does not confer on the banker any right to bring the property to sale. There is no pleading, and no issue, before me relating to any negative lien of a banker which by usage or custom may be said to confer any such right of bringing the property to sale. It is difficult for me to see that when the positive general lien of a banker does not confer on him any power of bringing the property to sale, how such power can reasonably be implied in case of a negative lien, when the parties have not chosen to state that it was their intention that there was to be such, right and there are no other words from which such intention could be inferred. The words "negative lien" in the resolution, in my judgment, does not in any way add to the effect of the assurance whereby the airline company became bound to keep its assets unincumbered. But as I have already observed the negative lien is given in the form of a declaration and an assurance contained in the resolution itself and, if anything, the expression "negative lien" seems rather incompatible with any implied right to bring the property to sale."

In The Commissioner of Income Tax v. Roshanbabu Mohammed Hussein Merchant, 2005(3)BomCR756 the Honourable High Court of Bombay has stated the following:

"As the said company failed to pay the loan, the Bank filed a suit against the company and on November 19, 1986 consent terms were arrived at in the said suit and as per the said consent terms, the bank was to have a negative lien over the assessee's aforesaid plot of land which was given as collateral security for the loan and the said lien was to remain operative till the bank's dues were fully paid."

The above judgements of the Honourable High Court of Bombay the term 'negative lien' has been referred to as 'lien' and the said court has used both the terms interchangeably. Further, the said court has also applied the principles applicable to a 'lien' under the Indian Law to a 'negative lien'.

In view of this the term 'lien' as used in the definition of the 'Charge' in Section 2(16) of the Companies Act, 2013 would also include a 'negative lien' since a 'negative lien' is a subset of a 'lien'. Thus, in terms of Section 77 of the Companies Act, 2013 a 'Charge' created by a company in favour of a Corporate Lender over its assets, including shares which is form of a 'negative lien' will have to be registered with the Registrar of Companies.

Registering a negative lien over the assets of a company as stated above will also act as a public notice, on behalf of banks /FIs/NBFCs/in whose favour such negative lien is created, to others which can prevent a company from creating encumbrance over the assets over which it has conferred such negative lien in favour of the Banks/FIs/NBFCs and can also discourage others from registering a charge over such assets. It will thus give an additional security to the banks and/or financial institutions advancing loan to a company by giving them a right void a latter charge over such assets as against their loan under Section 77 of the Companies Act, 2013.

CHAPTERS OF NIRC-ICSI

Agra, Ajmer, Allahabad, Alwar, Amritsar, Bareilly, Bhilwara, Bikaner, Chandigarh, Dehradun, Faridabad, Ghaziabad, Gurgaon, Jaipur, Jalandhar, Jammu, Jodhpur, Kanpur, Karnal-Panipat, Kota, Lucknow, Ludhiana, Meerut, Modinagar, Noida, Shimla, Sonepat, Srinagar, Udaipur, Varanasi & Yamuna Nagar.

"A PRACTICAL INSIGHT TO MERGER VALUATION"

–CS ANUPAM BATRA

Behind every Google Map, there is a much more complex map that's the key to your queries but hidden from your view. The same applies to the Mergers and Acquisitions. Apart from intricacies in Companies Act, FEMA Act, Competition, SEBI takeover code and other approvals, a question always haunted me- "Why Did they Do it". In this article, I have tried to illuminate the key drivers for the strategy makers of acquirer-company while valuing a target company.

(I) Key terms

Enterprise Value- It is the effective cost to the acquirer company while buying a target company. It is denoted as:

"Equity(Market Cap)+ Minority interest+ Debt and Debt equivalents- Cash & Cash Equivalents"

It is to be noted that Enterprise value represents the value of the target company as a whole, and not the value of transaction. For example, if a XYZ co has to buy 25% stake in ABC co which has two subsidiaries, then Enterprise value of ABC would be 100% consolidated value of ABC and its subsidiaries and transaction value would be consideration paid for the deal.

Cash & Cash Equivalents is deducted in calculation of EV, because it is assumed that acquirer would use these cash to pay off the debts of the target company.

EBITDA- EBITDA denotes Earnings before interest, tax and Depreciation and amortization. In valuation, EBITDA is preferred test of operational efficiency of a company. It set asides the effect of capital expenditure done in the recent years, thus giving a better comparability among possible targets.

(II) Valuation Techniques

Trading Comparables
Deal Comparables
Discounted Cash Flow
Leverage Buy out.

There are several other techniques of valuing a company, however the first three are the most widely used.

Let us try to apply the techniques on the deal of Jet and Etihad Airways, which was announced in April 2013, in which Etihad Airways agreed to buy 24% stake in Jet Airways for USD 379Mn Dollars and cash infusion of further 350Mn dollars in the form of Debt and Foreign Direct Investment in Jet Airway's run Jet priviledge.

Trading Comparable Technique

Step -1 Calculate EV of all the peer group companies.
Step 2- Calculate EBITDA, EBIT of peer group companies
Step 3- Calculate Valuation Multiples.
The following table illustrates the multiples of peer group of Jet-Airways:

Peer Group	*EV*	*EV / EBITDA*	
	USD (Mn)	LTM	FY 1
Jet Airways Ltd.	2800	9.55x	9.8x
Spice Jet Ltd.	497.03	10.31x	10.11x
Air China	1100.16	7.8x	6.8x
Air Arabia	1432.54	7.90x	7.51x
High		10.31	10.11
Low		7.8	6.8
Median		8.75	8.55

LTM – Last twelve months trailing
FY1- Forward year numbers- available on research portals.

The peer group has been selected taking into consideration the market cap, segment operated and analysis of the valuation experts. EV/EBITDA multiple shows that how many times the acquirer is ready to pay for EBITDA generated by target company. As an analyst, the lower the multiple is, the cheaper the target company, however there are several other multiples which can be calculated by the acquirer company to analyze and justify the deal value.

The median of the multiples denote the industry multiple. The deal can be justified by comparison of the multiple of target company to that of the industry multiple. Though the multiple is higher for jet, Eitihad went for the deal due to the synergy that would flow in the future years. Eitihad wanted to enter the Indian Aviation market and after FDI upto 49% was allowed in aviation, Jet Eitihad deal became the first respondent to it. Also, the passenger traffic in India is expected to grow around 13% every year, thus synergy in the form of increased revenue could be one of the factor for buying Jet at an expensive value.

Some of the other widely used multiples are:
EV/EBIT multiple
P/E Multiple
EV/Sales

EV/EBIT multiple is used where the industry is capital intensive and huge depreciation and amortization expense is inherent in nature. For example in a steel industry, it would be more relevant to take EBIT instead of EBITDA.

EV/Sales or EV/subscribers is relevant in the case where the company is in growth stage, thus the earnings are not huge or expected to come in future. For example Flipkart has been incurring losses for the past few years but it is still valued at USD 7Bn.

**Views expressed by the Author are solely his own view and the Firm, NIRC of ICSI does not accept any responsibility.*

P/E multiple is generally relevant for the financial services industry and is also largely used by the retail investor.

Thus the best multiple is based upon industry to industry and depends upon the growth drivers.

Deal Comparables.

The other technique of valuation is to take Deal comparables. In this technique, the enterprise value is calculated by using the equity value based on offer price. Thus the diluted market cap of the company would be calculated by using offer price given by the acquirer instead of current market price of the target company. As per analyst reports the deals in the aviation industry in the past 4 years were done at a premium range of 10% to 26%. Etihad acquired the shares at a premium of 24% on current market price at the date of announcement. Thus the premium and EV multiples of precedent comparable transactions are taken into consideration for justifying a deal.

Discounted Cash flow

DCF analysis uses *future free cash flow projections* and discounts them using weighted average cost of capital to arrive at a present value, which is then used to evaluate the potential for investment. If the value arrived at through DCF analysis is higher than the current cost of the investment, the opportunity may be a good one. The formula for calculating DCF is usually given something like this:

PV = CF1 / (1+k) + CF2 / (1+k)2 + … [TCF / (k - g)] / (1+k)n-1

Where:
PV = present value
CFi = cash flow in year i
k = discount rate
TCF = the terminal year cash flow
g = growth rate assumption in perpetuity beyond terminal year
n = the number of periods in the valuation model including the terminal year.

Free cash flows to the firm -
This is a measurement of a company's profitability after all expenses and reinvestments. It's one of the many benchmarks used to compare and analyze financial health. A positive value would indicate that the firm has cash left after expenses. A negative value, on the other hand, would indicate that the firm has not generated enough revenue to cover its costs and investment activities. The purpose of DCF analysis is simply to estimate the money you'd receive from an investment and to adjust for the time value of money.

The following assumptions can be taken to value Jet Airways:
(as on announcement date April 2013)

Assumptions				
Year to march	*FY12*	*FY13E*	*FY14E*	*FY15E*
GDP(y-o-y%)	*6.5*	*5*	*6.5*	*7*
Inflation	*8.8*	*7.8*	*6*	*6*
Repo Rate(exit rate)	*8.5*	*7.5*	*6.8*	*6.0*
USD/INR(Avg)	*47.9*	*54.5*	*55.0*	*53.0*

GDP index is a very important factor for cyclical commodities. The prices of coal has been the imperative factor for the losses of the companies in the aviation sector.
The other factor contributing to the losses in the aviation sector has been the falling rupee value. The hope to the aviation sector is the increasing revenues in the form of increasing passenger growth, which is estimated to be around 12-15% by 2016.
Thus keeping in mind the above assumptions, the following income statement can be drawn for Jet Airways

Year to March	*FY12*	*FY13E*	*FY14E*	*FY15E*
Net Profit	***(14201)***	***25***	***3463***	***3986***
Depreciation	***12050***	***14881***	***15898***	***15664***
Deferred Tax	***(336)***			
Others	***8043***	***3104***	***(1125)***	***(620)***
Gross Cash Flow	***5555***	***18010***	***18236***	***19029***
Less changes in WC	***(17377)***	***3845***	***(1606)***	***(2215)***
Operating cash flow	***22932***	***14165***	***19843***	***21244***
Less Capex	***661***	***600***	***600***	***600***
Free Cash flow	***22271***	***13565***	***19243***	***20644***

The above free cash flows are then discounted at weighted average cost of capital to the firm to calculate the free cash flows to the firm. Thus total free cash flows to the firm would be sum of cash flows up-till year 5 and terminal value. Terminal value is calculated by applying the expected perpetuity growth rate to the free cash flows at the end of year 5. Terminal value is sum of all the future cash flows that would be generated by the firm in the future indefinite period. The free cash flows are then used to calculate the intrinsic value per share and ultimately justify the offer price per share. The above intrinsic value is calculated by running a sensitivity analysis using perpetuity growth and cost of capital as the factors.

Football Field

The valuation outputs generated from the above valuation techniques are put together in an integrated graphical sheet which is termed as football field. All the outputs generated from various valuation techniques plotted in a graphical manner which gives a negotiation range.

The above valuations are subjective to the assumptions of the investment bankers hired by the acquirer company. The target company also values its shares. The ultimate conclusion is drawn by negotiations entered into by the strategy makers of both the companies.

COMPLIANCE CHECKLIST FROM 1ST JANUARY TO 10TH FEBRUARY, 2015

Compliance Checklist

Central Excise Related Compliance					
S. No.	**Activities**	**Sections/Rules/ Clauses, etc.**	**Acts/Regulations etc.**	**Compliance Due Date**	**To whom to be submitted**
1.	Last Date for payment of Excise Duty Non SSI units (December) *(in case of Payment through Internet banking)	Rule 8	Central Excise Rules, 2002	05th January *06th January	Central Excise Authorities
2.	Last Date for payment of Excise Duty SSI units for the Quarter ended 31st December *(in case of Payment through Internet banking)	Rule 8	Central Excise Rules, 2002	05th January *06th January	Central Excise Authorities
3.	Monthly Return of information relating to Principal Inputs (December, 2014) (Form No. ER-6)	Rule 9A	CENVAT Credit Rules, 2004	10th January	Central Excise Authorities
4.	Filing of Return of Central Excise and Cenvat Credit for the month of December, 2014 (Form No. ER-1) (Non SSI Units)	Rule 12 / Rule 9(7)	Central Excise Rules, 2002/ CENVAT Credit Rules, 2004	10th January	Central Excise Authorities
5.	Monthly Excise return by EOU for the month of December, 2014 (Form No. ER-2)	Rule 17(3)	Central Excise Rules, 2002	10th January	Central Excise Authorities
6.	Filing of Return of Central Excise and Cenvat Credit for the Quarter ended 31st December, 2014 (Form No. ER-3) (SSI Units)	Rule 12(1) Second Proviso	Central Excise Rules, 2002	10th January	Central Excise Authorities
7.	Last Date for payment of Excise Duty Non SSI units (January) *(in case of Payment through Internet banking)	Rule 8	Central Excise Rules, 2002	05th February *06th February	Central Excise Authorities
8.	Monthly Return of information relating to Principal Inputs (January, 2014) (Form No. ER-6)	Rule 9A	CENVAT Credit Rules, 2004	10th February	Central Excise Authorities
9.	Filing of Return of Central Excise and Cenvat Credit for the month of January, 2014 (Form No. ER-1) (Non SSI Units)	Rule 12 / Rule 9(7)	Central Excise Rules, 2002/ CENVAT Credit Rules, 2004	10th February	Central Excise Authorities
10.	Monthly Excise return by EOU for the month of January, 2014 (Form No. ER-2)	Rule 17(3)	Central Excise Rules, 2002	10th February	Central Excise Authorities
Service Tax Related Compliances					
S. No.	**Activities**	**Sections/Rules/ Clauses, etc.**	**Acts/Regulations etc.**	**Compliance Due Date**	**To whom to be submitted**
11.	Pay Service Tax in Challan GAR – 7, collected for the month of December 2014 by persons other than individuals proprietors and partnership firms. *(in case of Payment through Internet banking)	Section 68 Read with Rule 6	Finance Act, 1994 Service Tax Rules, 1994	05th January *06th January	Service Tax Authorities
12.	Pay Service Tax in Challan GAR – 7, collected for the Quarter ended 31st December 2014 by individuals proprietors and	Rule 6	Service Tax Rules, 1994	05th January *06th January	Service Tax Authorities

	partnership firms. *(in case of Payment through Internet banking)				
13.	Pay Service Tax in Challan GAR – 7, collected for the month of January 2015 by persons other than individuals proprietors and partnership firms. *(in case of Payment through Internet banking)	Section 68 Read with Rule 6	Finance Act, 1994 Service Tax Rules, 1994	05th February *06th February	Service Tax Authorities
Income-tax Related Compliances					
S. No.	**Activities**	**Sections/Rules/Acts/Regulations Clauses, etc.**	**etc.**	**Compliance Due Date**	**To whom to be submitted**
14.	Contractor's Bill / Advertising / Professional service Bill - TDS collected for the previous month Section 194J (December, 2012)	Section 194C Section 194J	Income-tax Act, 1961	07th January	Income Tax Authorities
15.	Monthly payment of TCS (December, 2014)	Section 206	Income-tax Act, 1961	07th January	Income Tax Authorities
16.	TDS from Salaries for the previous month (December 2014)	Section 192	Income-tax Act, 1961	07th January	Income Tax Authorities
17.	Quarterly payment of TDS for payments with the prior approval of the Joint Commissioner	Section 192, 194A, 194D or 194H	Income-tax Act, 1961	07th January	Income Tax Authorities
18.	Quarterly Statement of deduction of tax at source (TDS) on salary for the Quarter ended 31st December 2014 (Form No. 24Q)	Section 192	Income-tax Act, 1961	15th January	Income Tax Authorities
19.	Quarterly Statement of deduction of tax at source (TDS) on Contractor's Bill / Advertising / Professional service Bill for the Quarter ended 31st December 2014 (Form No. 26Q)	Section 192	Income-tax Act, 1961	15th January	Income Tax Authorities
20.	Quarterly Statement of collection of tax at source (TCS) (Form No. 27EQ)	Section 192	Income-tax Act, 1961	15th January	Income Tax Authorities
21.	Quarterly issuance of certificate of tax deducted at source (other than salary) (Form No. 16A)	Section 192	Income-tax Act, 1961	30th January	Income Tax Authorities
22.	Quarterly issuance of certificate of tax collected at source (Form No. 27D)	Section 192	Income-tax Act, 1961	30th January	Income Tax Authorities
23.	Contractor's Bill / Advertising / Professional service Bill - TDS collected for the previous month Section 194J (January, 2012)	Section 194C Section 194J	Income-tax Act, 1961	07th February	Income Tax Authorities
24.	Monthly payment of TCS (January, 2012)	Section 206	Income-tax Act, 1961	07th February	Income Tax Authorities
25.	TDS from Salaries for the previous month (January 2015)	Section 192	Income-tax Act, 1961	07th February	Income Tax Authorities
26.	Monthly payment of TCS (January)	Section 206	Income-tax Act, 1961	07th February	Income Tax Authorities
27.	Deposit TDS from salaries for the previous month in Challan No.281 (January)	Section 192	Income-tax Act, 1961	07th February	Income Tax Authorities

RBI Related Compliances					
S. No.	**Activities**	**Sections/Rules/Acts/Regulations Clauses, etc.**	**etc.**	**Compliance Due Date**	**To whom to be submitted**
28.	Monthly return (NBS-6) on exposure to capital market	Para 13B	NBFC Prudential Norms (Reserve Bank) Directions, 1998	07th January	RBI
29.	Monthly Return on Important Financial Parameters	DNBS (RID) C.C. No.57/02.05.15/ 2005-06 dated Sep 6, 2005	Circular	07th January	RBI
30.	Reporting of actual transactions of ECB in form ECB-2 within 7 working days (December)	ECB Rules	FEMA, 1999	08th January	RBI through Authorized Dealer
31.	Monthly statement of short term dynamic liquidity in Form ALM-I	DNBS (PD).CC.No.15 /02.01/2000-2001 dated June 27, 2001	Circular	10th January	RBI
32.	Quarterly submission of Monetary and Supervisory Return (Form NBS- 5)	DNBS.PD.CC. No. 227/03.10.042/ 2011-12 dated July 01, 2011	Master Circular	10th January	RBI
33.	Quarterly return on Details of Assets and Liabilities in Form NBS-1	Master Circular	DNBS.PD.CC.No. 282/03.10.042/201 2-13 dated July 02, 2012	15th January	RBI
34.	Quarterly return on Capital Funds, Risk Assets, Asset Classification in Form NBS-2	Master Circular	DNBS.PD.CC.No. 282/03.10.042/201 2-13 dated July 02, 2012	15th January	RBI
35.	Quarterly return on Statutory Liquid Assets in Form NBS-3	Master Circular	DNBS.PD.CC.No. 282/03.10.042/201 2-13 dated July 02, 2012	15th January	RBI
36.	File a quarterly result on frauds outstanding	Circular dated 26.10.2005	Department of Non Banking Supervision	15th January	RBI
37.	Quarterly Return of Capital Funds, Risk-Asset Ratio from NBFCs-ND-SI (Supervisory Return) rm NBS-7	Master Circular	DNBS.PD.CC.No. 282/03.10.042/201 2-13 dated July 02, 2012	15th January	RBI
38.	Quarterly Return by NBFC	DNBS.PD.CC. No. 227/03.10.042/ 2011-12 dated July 01, 2011	Master Circular	30th January	RBI
39.	Quarterly Return of overseas investment	DNBS.PD.CC. No. 227/03.10.042/ 2011-12 dated July 01, 2011	Master Circular	30th January	RBI
40.	Monthly return (NBS-6) on	Para 13B	NBFC Prudential	07th February	RBI

	exposure to capital market		Norms (Reserve Bank) Directions, 1998		
41.	Monthly Return on Important Financial Parameters	DNBS (RID) C.C. No.57/02.05.15/ 2005-06 dated Sep 6, 2005	Circular	07th February	RBI
42.	Reporting of actual transactions of ECB in form ECB-2 within 7 working days (January)	ECB Rules	FEMA, 1999	08th February	RBI through Authorized Dealer
43.	Monthly statement of short term dynamic liquidity in Form ALM-I	DNBS (PD).CC.No.15 /02.01/2000-2001 dated June 27, 2001	Circular	10th February	RBI
Economic, Industrial & Labour Law Related Compliances					
S. No.	**Activities**	**Sections/Rules Clauses, etc.**	**Acts/Regulations etc.**	**Compliance Due Date**	**To whom to be submitted**
44.	Monthly payment of Provident Fund (PF) (Non Corporate)	(a) Paragraph 38 of Employees Provident Funds Scheme, 1952 (b) Section 418 of the Companies Act, 1956	(a) Employees' Provident Funds and Misc. Provisions Act, 1952 (b) Exempted Scheme	15th January	Provident Fund Authorities Trustees of Provident Fund
45.	File monthly return for employees leaving / joining during the month of December (Form No.5)	Pragraph 20(2) read with Paragraph 36(1) & (2)	The Employees Pension Scheme, 1995 (For exempted establishments under Employees Provident Fund and Misc. Provisions Act, 1952)	15th January	Provident Fund Commissioner
46.	i) File monthly Return of employees entitled for membership of Insurance Fund (Form No.2(IF)) ii) File monthly Return for members of Insurance Fund leaving service during the month of December (Form no. 3(IF)) iii) File monthly return of members joining service during the month of December (Form no.F4(PS))	Paragraph 10	The Employees Deposit Linked Insurance Scheme, 1976 (For exempted establishments under Employees Provident Fund and Misc. Provisions Act, 1952)	15th January	Provident Fund Commissioner
47.	Payment of ESI contribution for the previous month	Regulation 31	Employees' State Insurance Act, 1948 and Employees State Insurance (Gen.) Regulations, 1950	21st January	ESIC Authorities
48.	Monthly return of Provident	Paragraph 38 of	Employees	25th January	Provident Fund

	Fund for the previous month (December) Provident funds	Employees' Provident Act, 1952	Provident Funds and Misc. Scheme, 1952		Authorities
49.	Monthly return of Provident Fund for the previous month with respect to International Workers.	Paragraph 36	The Employees' Provident Funds Scheme, 1952	25th January	Provident Fund Authorities
50.	In case of graduate, technician (vocational), send a record of work for each quarter in Form Apprenticeship 3 in Schedule III	Section 2 Rule 14(11)	Apprentices Act, 1961 and Apprenticeship Rules, 1962	30th January	Director Regional Board of Apprenticeship Training
Stock Exchange / Listing Compliance					
S. No.	**Activities**	**Sections/Rules/ Clauses, etc.**	**Acts/Regulations etc.**	**Compliance Due Date**	**To whom to be submitted**
51.	Quarterly Corporate Governance Compliance Certificate/Report	Clause 49	Listing Agreement	15th January	Securities & Exchange Board of India
52.	Submission of Shareholding Pattern as at the end of the previous quarter	Clause 35	Listing Agreement	21st January	Securities & Exchange Board of India
53.	Reconciliation of Share Capital Audit	Regulation 55A	SEBI (Depositories and Participant) Regulation 1996	30th January (within 30 days from the end of the Quarter)	Securities & Exchange Board of India
54.	Intimation of date of Board Meeting for taking on record quarterly results advance	Clause 41	Listing Agreement	7 Days in Advance	Securities & Exchange Board of India
55.	Submission of three copies of quarterly results signed by the Managing Director and newspaper cuttings of quarterly	Clause 41	Listing Agreement	Promptly on publishing quarterly results in newspapers	Securities & Exchange Board of India
56.	Issue of press release about Board Meeting to consider quarterly results	Clause 41	Listing Agreement	Immediately on informing the Stock Exchange	One National Newspaper and One Regional Newspaper
57.	Announcement of Quarterly Results alongwith limited Audit Review of the same by the Auditors	Clause 41	Listing Agreement	Within 15 minutes of the closure of the Board Meeting in which the results are placed	Securities & Exchange Board of India
58.	Publish Quarterly Results	Clause 41	Listing Agreement	Within 48 hours of the Closure of the Board Meeting	One National Newspaper and One Regional Newspaper
59.	Uploading of Shareholding Pattern and Quarterly Results to SEBI EDIFAR website	Clause 41	Listing Agreement	Within such time as specified by SEBI	SEBI CFD website
Depositories					
S. No.	**Activities**	**Sections/Rules Clauses, etc.**	**Acts/Regulations etc.**	**Compliance Due Date**	**To whom to be submitted**
60.	Submit monthly statement on substitution of names of depositories in the previous	Regulation 54(5)	SEBI (Depositories & Participants)	07th January	Depositories

	quarter.		Regulations, 1996		
61.	Quarterly certificate for demat/ remat of shares done during previous quarter	Regulation 54(5) read with NSDL Circular No. NSDL/SG/015/ 99	SEBI (Depositories & Participants) Regulations, 1996	07th January	Depositories
62.	Submit monthly statement on substitution of names of depositories in the previous quarter.	Regulation 54(5)	SEBI (Depositories & Participants) Regulations, 1996	07th February	Depositories

Note : While every care has been taken in the preparation of this Compliance Check List for the Month of November, 2014, to ensure its accuracy at the time of publication, NIRC - ICSI assumes no responsibility for any errors which despite all precautions, may be found therein. Members are requested to check the latest position with the original sources before acting upon on the information published in this newsletter. Neither this Newsletter nor the information contained herein constitutes a contract or will form the basis of a contract. The material contained in this document does not constitute/ substitute professional advice that may be required before acting on any matter.

LIGHTER SIDE OF THE PROFESSION

"Where is your last year's Employee of the year, Paramjeet Singh?"
"Sir , he has been transferred to Jhumri Talaiyya."
"Why?".
"After he became "Employee of the Year of the Company",the expectations of the Chairman had increased manifold and hence his performance was far below the expectations."

"Why you have not been found fit for the job for which you were interviewed yesterday?"
"Because I did not fulfil their requirement."
"What was the requirement of the job?"
"Ability to work hard for a very meagre salary."

"What happened to the job of Yes Man Private Secretary of the Chairman?"
"His services has been dispensed with by the Chairman."
"Why?"
"Because once he said "I think so" instead of saying "Yes Sir."

—CS PARAMJEET SINGH, pslawadvisers@yahoo.com

Members may send their contribution for this column at e-mail niro@icsi.edu for publication in the NIRC Newsletter-Insight. Decision of the Editorial Board of Newsletter in this regard will be final.

LEGAL UPDATES

DISCLOSURE OBLIGATIONS BY PROMOTERS: Are promoters under obligation to disclose encumbered shares or company can be made liable for non-disclosure of encumbered shares???

Securities Appellate Tribunal (SAT) in a recent case (Golden Tobacco Ltd. Versus SEBI Appeal No. 183 of 2013), had to deal with two separate situations pertaining to the disclosure of pledge or other encumbrance over shares. The SAT found that the acquisition of shares by a public financial institution (PFI) through the invocation of a pledge was required to be disclosed in accordance with SEBI's Takeover Regulations. Separately, in another order involving Golden Tobacco Limited, SAT directed listed Companies to disclose to the Stock Exchanges details of shares that are otherwise encumbered by the promoter/ promoter group, without making it obligatory on part of promoter/promoter group to disclose such details to the listed Companies.

SEBI has created an anomalous situation, because, promoter/ promoter group who have details of shares that are 'otherwise encumbered' are not obliged to disclose the same to the listed Company, whereas, listed Companies to whom such details are not furnished by the promoter/ promoter group are made to disclose such details to the Stock Exchanges. The order of Adjudicating officer was overturned as SAT observed that neither clause 35 of the Listing Agreement nor any other clause in the Listing Agreement requires the promoter/ promoter group to disclose to the Company the shares that are 'otherwise encumbered'.

Brief Facts

- In the Golden Tobacco case, SEBI alleged that the company failed under clause 35 of the listing agreement to disclose to the stock exchange that by an arbitration order dated July 23, 2009, nine promoter entities of the company were restrained from selling transferring or creating third party interest in any manner in the shares of the company held by such promoters.
- Clause 35 requires the company to disclose to the stock exchange the details of "shares pledged or otherwise encumbered". On account of such failure, SEBI's adjudicating officer imposed penalties under section 23E of the Securities Contracts (Regulation) Act, 1956 and section 15HA of the Securities and Exchange Board of India Act, 1992. It is against this order that the company preferred an appeal to SAT.
- A peculiar situation arose in this case. Normally, disclosures regarding shareholding (as well as pledge or encumbrance) have to be made by the relevant shareholders to the company, which in turn has to notify that information to the stock exchanges.
- The peculiarity arose here because clause 35 imposes a unilateral obligation on the company to initiate disclosures without being aided by information from the shareholders. Using this logic, SAT came to the conclusion that it would not be possible to impose such an obligation on the company given that it creates an incongruous position under the listing agreement. On this aspect, SAT observed as follows:

SAT OBSERVATIONS

SAT observed that it is surprising that the format attached to clause 35 of the Listing Agreement casts an obligation on the listed Companies to disclose to the Stock Exchanges details of the shares that are otherwise encumbered by the promoter/ promoter group, without making corresponding obligation on the promoter/promoter group to make such disclosures to the listed Company. This way SEBI has created an anomalous situation, because, promoter/promoter group who have details of shares that are 'otherwise encumbered' are not obliged to disclose the same to the listed Company, whereas, listed Companies to whom such details are not furnished by the promoter/ promoter group are made to disclose such details to the Stock Exchange.

This conclusion is entirely reasonable that the primary disclosure ought to come from the shareholders who are best placed to make these disclosures. Moreover, the expression "or otherwise encumbered" must be read in the context of a pledge. In other words, the encumbrance must be in the nature of a security interest or something similar over the shares.

Amendments to Listing Agreement

This case raised some issues regarding the legal veracity of the listing agreement as a regulatory instrument, and more particularly the manner in which it can be amended.

As per the press release issued by SEBI on January 21, 2009, and as per regulation 8A of Takeover Regulations, 1997, what is to be disclosed by the listed Companies to the Stock Exchanges is the information received by the listed Company from the promoter/promoter group. As per regulation 8A(1)/8A(2) what is to be disclosed by the promoter/promoter group to the listed Company is only details of shares that are pledged/revoked/ invoked and there is no obligation cast upon promoter/ promoter group to disclose shares that are otherwise encumbered.

In amending clause 35 to introduce its current language, it was argued that while SEBI's circular merely advised the stock exchanges to amend the clause, there was no actual evidence of amendment by the exchanges. However, based on statements provided by the stock excahnges that they have amended the listing agreement, SAT "proceeded on the basis that the amendments have been carried out in accordance with law".

Although the issue did not emerge to the forefront in this case, the manner of regulating corporate governance and disclosure norms through the listing agreement is bound to raise some consternation. While the listing agreement is essentially contractual in nature between the issuer company and the stock exchange, it derives its legal validity from the Securities Contracts (Regulation) Act. Despite its contractual foundations, it can be amended at SEBI's instance so as to bind the listed companies without their concurrence. In that sense, it begets unilateral alteration to which issuers are implicitly bound. Matters of procedure regarding the announcement and effectuation of amendments ought to be streamlined further between SEBI and the stock exchanges to obviate such issues.

SAT also called for uniformity in the approach of SEBI's adjudicating officers in similar cases, and also reaffirmed their duty to passed reasoned orders after considering relevant circumstances. The allegation was that the adjudicating officer in this case disregarded a contrary view of another officer in a different case without assigning reasons. SAT observed that:

The Adjudicating Officer in the case of Dewan Housing Finance Corporation Ltd. (Supra) has held that the words 'shares pledged or otherwise encumbered' used in the format appended to clause 35 of the Listing Agreement covers only pledge of shares. Admittedly, the above order was brought to the notice of the Adjudicating Officer in the present case but the Adjudicating Officer, without assigning any reason has taken a view contrary to the view taken in case of Dewan Housing Finance Corporation Ltd. (Supra).

Such an attitude on part of the Adjudicating Officer of SEBI deserves to be condemned. View taken by one Adjudicating Officer of SEBI cannot be disregarded by another Adjudication order without assigning any reasons. It is high time that SEBI takes remedial measures and ensure that its Adjudicating Officers respect orders passed by each other. We make it clear, respecting each others order does not mean that even an erroneously order, passed by the Adjudicating Officer must be followed blindly. In such a case, contrary view could be taken by recording reasons for taking such contrary view.

Conclusion

In this case it was unjustified on the part of the Assessing Officer to take a contrary view in case of Golden Tobacco Limited without assigning reasons thereto. Therefore (SAT) said in an order on 30th October set aside penalties totalling Rs 2.25 crore on Golden Tobacco and GHCL Limited imposed by Sebi in a matter related to disclosures of pledged shares by promoter entity on ground that the appellants have failed to disclose to the exchanges, fact that the shares of the appellant company held by the respective promoter/promoter group have been encumbered pursuant to an order passed by the arbitrator in the arbitration proceedings between the promoter/promoter group and some third party,"

This step would introduce greater consistency in SEBI's approach in similar cases.

-CS Manish Gupta, FCS

COMPANY SECRETARIES BENEVOLENT FUND

Be a proud member of CSBF-Saathi Haath Badhana

Dear Professional Colleagues,

As you may be aware that in recent past, some of our members have died leaving behind the spouse and minor children. In some cases providing adequate financial assistance to the bereaved family becomes an impediment. Although the Managing Committee of the CSBF wanted to help the bereaved family members, but it was constrained to do so in view of financial position of the Fund.

The fund can provide the much needed financial assistance in such cases if the corpus of the Fund increases substantially which is possible if more number of members are enrolled to the fund. The members in all earnestness are therefore sincerely requested to become the members of the CSBF by paying one time Life membership fee of ₹ 7,500/-.

The payments made to the Fund are exempted under Section 80G of the Income Tax Act, 1961.

Following benefits are presently provided by the CSBF:

Financial Assistance in the event of Death of a member of CSBF:	Other benefits subject to the Guidelines approved by the Managing Committee from time to time:
Upto the age of 60 years • Group Life Insurance Policy for a sum of ₹ 5,00,000 Above the age of 60 years • Upto ₹ 2,00,000 in deserving cases on receipt of request subject to the Guidelines approved by the Managing Committee from time to time.	Reimbursement of Medical Expenses • Upto ₹ 60,000/- Financial Assistance for Children's Education (one time) • Upto ₹ 40,000/- per child (Maximum for two children) in case of the member leaving behind minor children

I appeal to the members who have yet not become members of CSBF are requested to fill up Form-A (available on website of the Institute i.e. www.icsi.edu) and send the same along with a cheque for ₹ 7,500/- favouring 'Company Secretaries Benevolent Fund' payable at New Delhi to the Regional Director, NIRC of ICSI, 4, Prasad Nagar Institutional Area, New Delhi. Members may also apply online at www.icsi.edu

Looking forward to receive positive response for this noble cause.

Yours sincerely,

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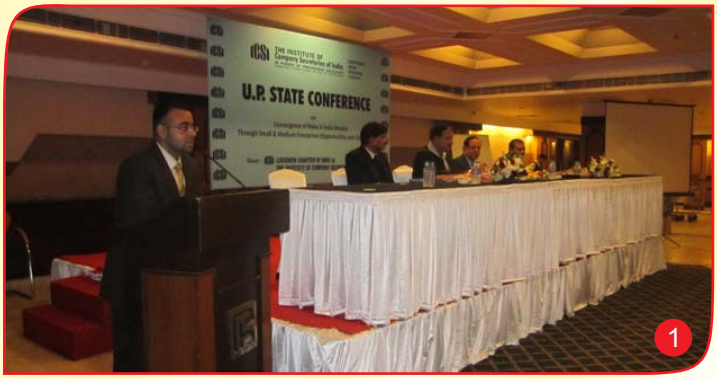

1 UP State Conference Host Lucknow Chapter: CS Hitesh Keshwani, CS Manoj K Mishra, CS Anuj K Tiwari, Shri Narender Kumar & CS Rupendra Kumar Porwal
2 Saraswati Moorti Sthapana Ceremony at NIRO: CS R Sridharan, CS Vikas Khare, CS Shyam Agrawal, CS Ranjeet Pandey, CS Sutanu Sinha, Mr. S K Nagar & CS Alka Arora
3 Swachh Bharat Mission – ICSI Cleanliness Drive: CS Shyam Agrawal and members
4 Bhoomi Poojan Ceremony of Udaipur Chapter: sitting from L to R CS S N Maheshwari, CS Sutanu Sinha, CS P K Mittal, Smt. Kiran Maheshwari, CS R Sridharan, CS Sanjay Grover, CS Sudhir Babu, CS Shyam Agrawal & CS Pawan Palesara
5 Inauguration of Bikaner Chapter: CS Shyam Agrawal, CS R Sridharan, Shri Gopal Krishan Joshi, CS Gir Raj Joshi & members

If undelivered, please return to :
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