STUDENT PROFESSIONALS TODAY

Volume 2 | Issue 12 | December 2018 | Pages 1-20 | Price Rs. 20

An Initiative by :

THE INSTITUTE OF
Company Secretaries of India
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

CONTENTS

INVITATION FOR CONTRIBUTING AN ARTICLE

Readers are invited to contribute article/s for the Journal. The article should be on a topic of current relevance on Corporate Law, Tax Law, or on any other matter or issue relating to Economic or Commercial Laws. The article should be original and of around 7-8 pages in word file (approx. 2500 words). Send your articles at email id : articles@vidhimaan.com along with your student registration number. The shortlisted articles shall be published in the Journal.

Printed and Published by B P Bhargava on behalf of Vidhimaan Publishers Pvt. Ltd.

Printed at Delhi Press Samachar Patra Pvt. Ltd., 36-A, UPSIDC, Site-4, Sahibabad and published at 158 Basant Enclave, Palam Road, New Delhi 110057.

Editor : B P Bhargava.

Correspondence:

Send your articles at email id : articles@vidhimaan.com

For non receipt of issue email id : notreceived@vidhimaan.com

For any other issue email id : info@vidhimaan.com

Annual subscription price Rs.750/- (January - December, 2018), send your cheque in favour of Vidhimaan Publishers Private Limited, at Krishna Law House, 128, Municipal Market, Super Bazar Compound, Connaught Place, New Delhi-110001. Tel.: 011-23417866, 64566061

MESSAGE FROM THE PRESIDENT

Dear Students,

If four things are followed – having a great aim, acquiring knowledge, hard work and perseverance – then anything can be achieved.

– A. P. J. Abdul Kalam

At the outset, I convey my wishes to all the students who are preparing for Company Secretaries Examination, December, 2018. As the examinations are approaching, the students are advised to schedule their studies effectively to ensure upright performance and positive results in the examination.

Examination time is a stressful time in student life as there is a high pressure to perform well and a lot of anxiety attached to it. But there are two sides to this stress, either you can let it be the cause of your downfall or you can use it to drive you to improve your effort.

My advice to you all is to put all your negative thoughts to one side and concentrate on the learning goals. Try not to panic and plan your studies in advance. This initial step will help you become more productive and motivated each day you approach your study by enhancing your learning process. Studying at a constant and steady pace, will help in understanding the concepts and achieve better results.

Prepare a study plan, map out all topics to be covered and make a timetable showing how much time to devote to each topic every day. Formulating a plan will improve the flow of the study process and organise your preparation in an efficient manner.

Most importantly, take good care of yourself during the examination time. It is very important to be in good mental and physical state while preparing for the exam. A small amount of stress is acceptable, but too much mental or physical strain can be detrimental to your performance. Therefore, once you finish studying, take some time to relax. Be focused and relaxed and try to keep a positive attitude while attempting the exam.

Friends never forget that 'Everything you want is out there waiting for you to ask Everything you want also wants you. But you have to take right action at right time to get through your aims', so take effective actions to embark on your aims and aspirations.

Once again, wishing you 'All the best' in all your endeavours !

CS Makarand Lele
President, ICSI

Key Amendments under the Companies (Amendment) Ordinance, 2018 : A Bird's Eye View

This article is a compilation and analysis of the key amendments under Companies (Amendment) Ordinance, 2018, Ordinance, promulgated by the President on 2nd November, 2018 for the purpose of liberalising various provisions of the Companies Act, 2013 and also to promote the ease of doing business in India.

T. H. Vishnu - Advocate

Email ID : vishnuth1994@yahoo.co.in

Introduction

1. The Ministry of Corporate Affairs ('MCA') constituted a 10 member Committee for reviewing certain significant provisions under the Companies Act 2013 ('Act'). The main agenda of the Committee was to provide recommendations to restructure and decriminalize corporate offences under the Act, de-clog the National Company Law Tribunal (NCLT) and also to provide recommendations with reference to corporate governance and compliances. The Committee submitted its report titled "Report of the Committee to Review Offences under the Companies Act, 2013"[1] (Report) on 27th August 2018. Considering the recommendations of the Committee, the President of India, under Article 123 of the Constitution, promulgated the Companies (Amendment) Ordinance 2018 ('Ordinance') on 2nd November 2018. The amendment was promulgated for the purpose of providing much needed relief to the companies by liberalizing various provisions of the Act and also to further the government's intent to promote the ease of doing business in India.

Commencement of Business Declaration – Section 10A of the Act

The amendment made a significant change in the Act by inserting a new section 10A thereby re-introducing the provisions relating to 'Commencement of Business Declaration'. This provision was earlier there in the Act under section 11 which was, however, omitted by the Companies (Amendment) Act, 2015. According to section 10A, a company having a share capital shall not commence business or exercise any borrowing power unless -

(i) a declaration is filed by a director within 180 days of the date of incorporation, confirming that every subscriber has paid up the value of shares agreed to be taken ;

(ii) company has filed the verification of its registered office with the Registrar of Companies ('RoC') ; and

(iii) and in case no declaration is filed within 180 days of incorporation and the RoC has reasonable cause to believe that the company is not conducting any business or operations, the RoC may initiate the removal of its name from the register of companies. This particular amendment is intended to reduce the problem of shell and defunct companies.

A shell company is a non-trading company used as a vehicle for various financial manoeuvres or kept dormant for future use in some other capacity. Whereas a defunct company refers to a company

1. Available at http://www.mca.gov.in/Ministry/pdf/ReportCommittee_28082018.pdf

that no longer exists, functions, or in use. Another amendment intended to curb the problem of shell and defunct companies can be seen in section 12 of the Act. A new sub-section (9) was inserted in that section empowering the RoC to conduct physical verification of the registered office and initiate strike-off of the company, if there is reasonable cause to believe that the company is not conducting any business or operations. Unlike section 11 of the Act, section 10A has done away with the minimum paid-up capital of the company and increased the penalty to be paid by the company for non-compliance of the section from Rs. 5,000 under section 11 to Rs. 50,000 up to maximum of 1 lakh under section 10A.

De-clogging the NCLT

The intention of introducing this amendment is to reduce the burden of the NCLT by enlarging the jurisdiction of the Regional Director ('RD') and also by vesting certain powers of the NCLT to the Central Government, thereby de-clogging the NCLT. The amendments can be understood as follows :

- *Enlarging the jurisdiction of RD – Section 441 of the Act* - Pre-amendment, the RD or any other officer authorised by the Central Government could compound only those offences where the maximum amount of fine which may be imposed for the offence did not exceed Rs. 5 lakh. Whereas post-amendment, the jurisdiction of RD to entertain compounding of offences has been enlarged to those offences whose penalty does not exceed Rs. 25 lakh, thereby reducing the burden of the NCLT.
- *Vesting powers of NCLT under clause (41) of section 2 and section 14 of the Act to the Central Government* - Pre-amendment, according to clause (*41*) of section 2, in case of Indian company having holding/ subsidiary/associate company situated outside India, it is allowed to alter the financial year as per such company with the approval of NCLT. Whereas post-amendment, this power of NCLT has been transferred and vested to the Central Government, thereby de-clogging NCLT.
- *Vesting power of NCLT to Central Government under section 14* - Similarly, the power of NCLT under section 14 to approve the conversion of a public company to a private company has now, post-amendment, been vested with the Central Government.

Re-structuring & Decriminalizing Offences

The Act imposed stringent punishments including payment of fine as well as imprisonment for non-compliance of various provisions. The Amendment Ordinance intends to revisit these offences and decriminalize and restructure the same for the purpose of promoting the ease of doing business in India. The (Amendment) Ordinance, interestingly, has diluted the punishments provided in various sections by changing the wordings of various sections from 'Punishable with Fine' to 'Liable to a Penalty' and also by taking away from the purview of various sections or making it optional, the punishments amounting to imprisonment of the defaulters.

- Sections which have been decriminalized by changing of words from **'punishable with fine' to 'liable to penalty'** are as follows :
  - 64(2) – Notice to be given to RoC for alteration of share capital
  - 92(5) – Failure or delay in filing annual return (in case of companies)
  - 102(5) – Statement to be annexed to Notice
  - 105(3) – Proxies
  - 117(2) –Resolutions / Agreements to be filed
  - 121(3) – Report of annual general meeting
  - 137(3) – Copy of financial statements to be filed (in case of companies)
  - 140(3) – Removal, resignation of auditor and giving of special notice

- ❖ 157(2) – Company to inform Director Identification Number to RoC
- ❖ 165(6) – Number of directorships
- ❖ 191(5) - Payment to director for loss of office, etc., in connection with transfer of undertaking, property or shares
- ❖ 197(15) - Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits
- ❖ 203(5) - Appointment of key managerial personnel
- ❖ 238(3) - Registration of the offer of scheme involving transfer of share.

- Sections, which **removed the punishment for imprisonment** for non-compliance of its provisions, are as follows :
- 53(3) – Prohibition of issue of shares at discount.
- 92(5) – Failure or delay in filing annual return (in case of officers of the companies)
- 137(3) – Copy of financial statements to be filed (in case of officers of the companies)
- Section, which made it **optional the punishment for imprisonment** for non-compliance with sections 152 and 155 is section 159 providing punishment for contravention in respect of DIN.

Significant Beneficial Ownership (SBO) – Section 90 of the Act

Although, the Amendment Ordinance decriminalized various offences under the Act, it also criminalized/enhanced punishment for certain offences. Considering the importance of disclosures, one such important enhancement of punishment was made in section 90 – Register of significant beneficial ownership in a company. The punishment under the section was enhanced from just payment of fine to punishable with fine or imprisonment or both. The company, under sub-section (7) of section 90, may approach the NCLT to impose restrictions on the rights attached to the shared if relevant disclosures are not made or is made, but is not satisfactory. Any person aggrieved by the order of the NCLT may file application to the NCLT under sub-section (9) of section 90 of the Act for lifting the same. Whereas, pre-amendment, the section did not contemplate any limitation period for filing such an application, whereas, post-amendment a limitation period of 1 year is imposed within which the aggrieved person has to file the application before the NCLT.

Disqualification of Director and Remuneration to Independent Director – Sections 164, 165 and 197

Section 164 lays down certain criteria which would lead to the disqualification of directors. Whereas, section 165 of the Act provides that a person cannot be appointed as a director of more than 10 public companies at the same time and in case of private companies, the cap is 20 companies at the same time. A new clause (h) is inserted in sub-section (1) of section 164 has added one more ground for disqualification of directors by which a person shall be subject to disqualification if he accepts directorships exceeding the maximum number of directorships provided in section 165.

With respect to the remuneration of independent directors, the Committee observed that monetary and non-monetary compensation from the company would undoubtedly rank as one of the most important factors which is likely to influence an individual's ability to exercise unbiased and independent judgement. Therefore, excessive remuneration could lead to potential erosion of independence. Prior to the Amendment Ordinance, the independent director was remunerated in following ways :

- Reimbursement of expenses for participation in the meetings of the board and other committees.
- Profit related commission as approved by the members.

Considering the recommendation of the Committee, sub-section (7) of section 197 of the Act which deals with the managerial remuneration of independent

directors has been omitted by the Amendment Ordinance.

Allowing Rectification of the default and prescribing stiffer penalties in case of repeated defaults

Considering the recommendations of the committee for ensuring compliance of the default, section 454 is being amended as follows:

- Sub-section (3) – That the adjudicating officer may, by order, direct the defaulter company or officer or any other person as the case may be, to rectify the default.
- Sub-section (8) – That a default would occur when the company or the officer in default would fail to comply with the order of the adjudicating officer or RD as the case may be.

Repeated Defaults

Further, a new section 454A – Penalty for Repeated defaults – is inserted providing that the person committing the same default within a period of three years from the date of order imposing penalty, passed by the adjudicating officer or Regional Director, as the case may be, it or he shall be liable for the second and every subsequent defaults for a amount equal to twice the amount provided for such default under the relevant provision of the Act.

This section was inserted as there was no section in the Act providing higher penalty for repeated offenders for a default which is subjected to the in-house mechanism.

Conclusion

The (Amendment) Ordinance definitely improves the existing regulatory framework under the Act and aims to achieve a marked improvement in corporate compliance and thereby, makes significant changes to various important provisions of the Act. De-clogging the NCLT, ensuring better corporate governance, decriminalizing the Act, etc. is definitely a major step forward in ensuring a better corporate realm.

■■■

KNOWLEDGE UPDATE

COMPANY LAW

Companies (Amendment) Ordinance, 2018

President of India has promulgated an Ordinance further to amend the Companies Act, 2013 on 2nd November, 2018

Establishment of the Office of the Registrar of Companies-cum-Official Liquidator at Dehradun

Central Government, *vide* Notification No. S.O. 5458(E) dated 26th October 2018, has established the office of the Registrar of Companies cum Official Liquidator at Dehradun, having territorial jurisdiction in the whole State of Uttarakhand for discharging the functions of the Registrar of Companies under the various provisions of the Act and appoints the Registrar of Companies cum Official Liquidator at Dehradun for the purpose of registration of companies and discharging the functions under the Act in the State of Uttarakhand.

Establishment of the Office of the Registrar of Companies at Vijayawada

Central Government, *vide* Notification No. S.O. 5457(E) dated 26th October 2018, has established the office of the Registrar of Companies at Vijayawada, having territorial jurisdiction in the whole State of Andhra Pradesh for discharging the functions of the Registrar of Companies under the various provisions of the Act and appoints the Registrar of Companies, Vijayawada as Registrar of Companies for the purpose of registration of companies and discharging the functions under the Act in the State of Andhra Pradesh.

Constitution of Committee for Finalizing Business Responsibility Reporting (BRR) format for Listed and Unlisted Companies

Central Government, *vide* F. No.10/19/2018-CSR (Part File-2) dated 14th November 2018, has constituted a Committee under chairmanship of Joint Secretary, MCA for finalizing the Business Responsibility Reporting (BRR) Format for Listed and unlisted companies based on the BRR Framework of the updated National Voluntary Guidelines.

An Era of Corporate Social Responsibility – An Overview

In this article, the author delves into multiple aspects of Corporate Social Responsibility as envisaged in section 135, Schedule VII of the Companies Act, 2013 and the Companies (CSR Policy) Rules, 2014.

Dharmendra Sharma – Company Secretary

Email ID : dharmendra.sharma@outlook.com

Introduction

Before 1947, the concept of Corporate Social Responsibility (CSR) is known for its charity and philanthropic nature. CSR was influenced by family values, traditions, culture and religion, as also industrialisation. The wealth of businessmen was spent on the welfare of society, by setting up charitable foundations, educational and healthcare institutions, and trusts for community development. During the Independence movement, Mahatma Gandhi urged rich industrialists to share their wealth and benefit the poor and marginalised in society. His concept of trusteeship helped socio-economic growth. Post-Independence, was the emergence of companies to ensure better distribution of wealth in society. In Indian legislation, no provisions related to CSR were incorporated under the erstwhile Companies Act, 1956.

First Step for Social Upliftment by Government

Ministry of Corporate Affairs (MCA) had issued **"Voluntary Guidelines on Corporate Social Responsibility, 2009"** as a first step towards mainstreaming the concept of business responsibilities**. Further, t**he National Voluntary Guidelines (NVGs) on Social, Environmental and Economic Responsibilities of Business[1] released by the MCA in July 2011, which stated a set of nine principles that offer Indian businesses an understanding and approach to inculcate responsible business conduct. These nine principles are as follows :

- Conduct and govern themselves with ethics, transparency and accountability
- Provide goods and services that are safe and that contribute to sustainability throughout their life cycle
- Promote the well-being of all employees
- Respect the interests of, and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalized
- Respect and promote human rights
- Protect and make efforts to restore the environment
- When engaged in influencing public and regulatory policy, they should do so in a responsible manner
- **Support inclusive growth and equitable development**

1. http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf

- Engage with and provide value to their customers and consumers in a responsible manner

NVG on "inclusive growth and equitable development" focuses on encouraging business action on national development priorities, including community development initiatives and strategic CSR based on the shared value concept. This guideline was subsequently translated into a mandatory provision of CSR in section 135 of the Companies Act, 2013 (the 'Act').

CSR under Companies Act, 2013

While section 135 contains CSR provisions, Schedule VII enumerates the activities that can be undertaken under CSR by companies and the Companies (CSR Policy) Rules, 2014, which were notified on 27th February, 2014, and came into force from 1st April 2014**.** Provisions of section 135 mandates every company with specified thresholds, *i.e*., (*i*) net worth of Rs. 500 crore or more, (*ii*) turnover of Rs. 1000 crore or more, or (*iii*) net profit of Rs. 5 crore or more during the immediately preceding financial year, to spend at least two per cent of the average net profits earned during the three immediately preceding financial years on CSR activities as specified in Schedule VII. The salient features of provisions are as follows:

- Each such company is required to constitute a CSR committee of the Board
- Board of each such company is required to have the company's CSR policy formulated and monitor its implementation
- First proviso to section 135(5) clearly specified that a company shall give preference to the local area
- Board's report shall include an annual report on CSR containing particulars specified in prescribed format
- Board's report shall specify the reasons for not spending the specified amount, if the company fails to spend such amount.

Method of Implementation of CSR

Rule 4 (2) of the Companies (CSR Policy) Rules, 2014 prescribes the methods of implementation of CSR by companies as follows:

- Directly by the company
- CSR companies may undertake the activities through a trust, registered society or non-profit company set up by them
- CSR activities of companies can be implemented through other NGOs/Trust/ registered society/ non-profit company etc. having three years' track record.
- CSR activities of companies can be implemented through other registered Trust/ society/section 8 company established by Central or State Government or any entity establish under an Act of Parliament or State legislature.
- In collaboration with other companies.

Activities Outside the Purview of CSR

Following are the activities that fall outside the purview of CSR as per Companies (CSR) Policy Rules, 2014 :

- Projects or programs or activities that benefit only the employees of the company and their families
- One-off events such as marathons/awards/ charitable contribution/ advertisement/ sponsorships of TV programmes, etc., would not be qualified as part of CSR expenditure.
- Expenses incurred by companies for the fulfillment of any Act/ Statute of regulations (such as Labour Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act
- Contribution of any amount directly or indirectly to any political party shall not be considered as a CSR activity

- Activities undertaken by the company in pursuance of its normal course of business, shall not be considered as CSR

Responsibilities of CSR Committee

The CSR Committee shall—

(i) formulate and recommend to the Board, a CSR Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(ii) recommend the amount of expenditure to be incurred on the activities; and

(iii) monitor the CSR Policy of the company from time to time.

The CSR Committee shall institute a transparent monitoring mechanism for implementation of the CSR projects or programs or activities undertaken by the company.

Schedule VII of the Companies Act, 2013

Activities which may be included by companies in their CSR Policies are as follows :

- Eradicating hunger, poverty and malnutrition, promoting health care including preventive health care and sanitation including contribution to the **Swach Bharat Kosh** set-up by the Central Government for the promotion of sanitationand making available safe drinking water.
- Promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly and the differently abled and livelihood enhancement projects.
- Promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups.
- Ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the **Clean Ganga Fund** set-up by the Central Government for rejuvenation of river Ganga.
- Protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional art and handicrafts.
- Measures for the benefit of armed forces veterans, war widows and their dependents.
- Training to promote rural sports, nationally recognised sports, paralympic sports and olympic sports.
- Contribution to the **prime minister's national relief fund** or any other fund set up by the central govt. for socio economic development and relief and welfare of the schedule caste, tribes, other backward classes, minorities and women.
- Contributions or funds provided to technology incubators located within academic institutions which are approved by the central government.
- Rural development projects.
- Slum area development.

Penalty for Non-Compliance of CSR

Under sub-section (4) of section 135 of the Act read with rule 9 of the Companies (CSR Policy) Rules, 2014 the Board of a company is mandated to make an annual disclosure on CSR in their Board's Report as well as on the company's website, if any. Further, second proviso to sub-section (5) of section 135 states: *"that if the company fails to spend such amount, the Board shall, in its report*

made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount." **Recently, Ministry has issued notices to the corporates for non-compliance of CSR provisions. Whether after giving reasons in Board's Report, companies are compliant to the law? It appears that merely providing explanation for not undertaking expenditure on CSR activities would not be considered as adequate compliance of law.**

CSR Expenditure

National CSR Data Portal *(www.csr.gov.in)* is an initiative by Ministry of Corporate Affairs, Government of India to establish a platform to disseminate CSR related data and information filed by the companies registered with it. Ministry has compiled data for CSR expenditure for three financial years as filed by companies at MCA21. The expenditure made by companies on CSR for the years 2014-15, 2015-16 and 2016-17, is as given below:

Financial Years	Total No. of Companies	Amount Spent (Rs. In Crore)	Total No. of CSR Projects
2014-15	16785	10,066.00	9391
2015-16	21498	14,366.00	18044
2016-17	19933	13,465.00	21171

(Source : https://csr.gov.in/CSR/index16.php)

Initiatives by Ministry of Corporate Affairs to Facilitate CSR Compliance

As the Act came into force from 1st April 2014, Ministry has acted as a regulator as well as an enabler for CSR provisions. Following are the steps taken by the Ministry to facilitate better compliance of CSR by companies:

- **Seminars / Workshops :** Sensitization workshops have been organized by the offices of Regional Directorate(s) under MCA, IICA and Institutes to ensure effective compliance of CSR provisions by companies.
- **Institution of National CSR Awards:** Ministry has instituted **National CSR Awards** to recognize CSR for inclusive growth and sustainable development. This Award seeks to recognize the companies that have made a transformative impact on society*(http://nationalcsrawards.iica.in/).*
- **Launch of National CSR Data Portal**:As a proactive initiative, the Ministry launched the **National CSR Data Portal***(www.csr.gov.in)* which is a significant step towards driving accountability and transparency in corporate India.
- **Centralized Scrutiny and Prosecution Mechanism:** Ministry established Centralized Scrutiny and Prosecution Mechanism to monitor compliance of CSR provisions by the companies.
- **Constitution of High-Level Committee: Recently,** Ministry has constituted High Level Committee on CSR under the chairmanship of Secretary, MCA to review the existing framework and guide and formulate the roadmap for a coherent policy on CSR.

■■■

Crack Down on Shell Companies: Government's Efforts

In this article, the author discusses efforts of the Government to crackdown on shall companies.

Mangesh Yardi – Student, CS Professional Program

Email ID : mangesh.yardi@gmail.com

Shell Companies

According to tax authorities, the shell companies support much of the fraud and embezzlement in India. The owners of these companies create elaborate smokescreens, including naming personal servants and chauffeurs as directors, obscure the ultimate beneficiaries, conceal political investment, route money to evade tax and commit fraud or manipulate tenders.

Current Scenario in India

The current remedial measures available with the authorities are strike off the company. At present, investigative agencies have been using the provisions of section 248 of the Companies Act, 2013 to remove the name of company from the register of companies. The name can be struck off if the Registrar has "reasonable cause to believe that (*i*) a company has failed to commence its business within one year of its incorporation ; (*ii*) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay within a period of one hundred and eighty days from the date of incorporation of a company and a declaration under section 11(1) to this effect has not been filed within one hundred and eighty days of its incorporation; or (*iii*) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455."

Remedial Measures Undertaken by Government

In February 2017, A 'Task Force on Shell Companies' was constituted under the Joint Chairmanship of Revenue Secretary and Secretary, Ministry of Corporate Affairs, to counter the malpractices by such shell/Ponzi/ khoka companies. In a release by the Press Information Bureau on 28th July 2017[1], the Task Force had accomplished the following:

- The Serious Fraud Investigation Office (SFIO) under the Ministry of Corporate Affairs has undertaken the exercise of preparing comprehensive digital database of shell companies and their associates that were identified by various law enforcement agencies.
- During last three financial years (2013-14 to 2015-16), investigations by the Income-tax Department led to detection of more than 1155 shell companies/entities which were used as conduits by over 22,000 beneficiaries. The amount involved in non-genuine transactions of such beneficiaries was more than Rs 13,300 crore. Criminal Prosecution complaints have been filed by the Income-tax Department against 47 such persons.
- Enforcement Directorate conducted nationwide searches in 16 states on 1st April,

1. http://pib.nic.in/newsite/PrintRelease.aspx?relid=169204

2017 in respect of shell companies and related professionals who were behind the creation and operation of these Companies.

- The CBI has registered 30 cases against 201 shell companies during the last 3 years 2014, 2015, 2016 and the current year as on 28th February, 2017.
- Out of these, charge-sheets have been filed in 17 cases.
- Ministry of Corporate Affairs removed 1,62,618 Companies from the Register of Companies by following the due process under Section 248 of the Companies Act, 2013. Further, the directors of the companies defaulting in filing of Financial Statements or Annual Returns for continuous period of three financial years have been disqualified under section 164(2) of the Companies Act, 2013.
- Financial Intelligence Unit-India has also alerted its Reporting Entities on shell companies for enhanced due diligence.
- SEBI has imposed trading restrictions on 162 listed entities as shell.
- SEBI has also asked the exchanges to conduct an independent audit of these companies, and if necessary, a forensic audit to be conducted as well.
- The Government has requested the RBI to circulate the details of defaulting companies to all the banks with the advice to exercise enhanced due diligence while dealing with these companies.
- Mechanism for sharing of information between various law enforcement agencies is already in place and a new Standard Operating Procedure (SOP) on sharing of information between various law enforcement agencies has been agreed to under the aegis of the Task Force

Observations

The high-level task force found that More than 400 companies with their listed address in a dimly-lit colonial-era building at 9/12 Lalbazaar Street, Kolkata. In its warren of offices were firms offering services such as earthmoving equipment, infrastructure financing, information technology consultants and many others which had office space the size of cubicles. Many were locked, with their padlocks coated in dust. Others were grimy residential quarters with laundry hanging from the windows. Data separately provided by Tofler, a company information database service, identified nearly 3,000 companies registered in two offices in the building. Some were named after flowers. A tax inspector said the Kolkata firms were a virtual money laundering industry and drew a parallel to the Panama legal firm Mossack Fonseca that emerged from obscurity last year after the leak of millions of documents from its offices that illustrated how the wealthy use offshore corporations to avoid taxes.

Challenges for Government

Despite of such accomplishments, the investigative agencies like the Enforcement Directorate and Serious Fraud Investigation Office have been hampered by the lack of a proper definition of 'shell companies' as the Companies Act, 2013 is silent on the matter. The MCA is looking to plug this breach by defining such firms as identification of such entities is the prerequisite to any kind of legal proceedings. Defining shell companies would give agencies such as the CBI, ED, Income Tax and SFIO more teeth to go after such companies. The MCA has sought inputs from SEBI too. SEBI has based a part of its inputs from its investigation into penny stocks, and also from the existing definition of shell companies by the US Securities and Exchange Commission.

Conclusion

The Demonetisation move has attracted a lot of criticisms from the experts and analysts and yet it has managed to gain support of the public at large too. Irrespective of the results, demonetisation has at least managed to point the Government in the right direction. The systematic crackdown on shell companies is perhaps one of the most tangible outcomes of demonetisation, which aimed to hit tax evasion and move India towardscashless, digital transactions that leave a paper trail.

Algorithm Trading : An Overview

In this article, the author gives an overview of Algorithm Trading, which is a platform or a process of using program to follow a defined set of instructions for placing trades to generate profits.

Meenu Gupta - Company Secretary

Email ID : guptameenu90@gmail.com

Introduction

Technology has been revolutionising the way we do things. The advancement in digital technology has been impacting almost every aspect of market whether it is in terms of the huge increase in accessibility of the market, the speed of making transactions or the ease with which resources can be mobilised and distributed across different segments and herein securities market is also not untouched. Algorithm trading first entered stock markets in mid-1980s. Algorithms are a set of instructions that perform various operations in market based on inputs given. Algorithm trading are used for research and analysis as well as trade execution. One of the early usages of algorithms in stock trading was to help better and faster execution of large orders to reduce their adverse impact on prices which was the case when such trades used to be executed manually. Algo is a platform or a process of using program to follow a defined set of instructions for placing trades to generate profits at a frequency as such trades are difficult to manage manually. A person can set defined rules based on price, quantity, timing, volumes and any other mathematical model.

Algorithmic trading or simply Algorithm trading involves the use of a basic algorithm, i.e., a set of rules or instructions, to feed orders into the market at preset intervals to minimise market impact cost. At its complex form, it may entail many algorithms that are able to assimilate information from multiple markets in different assets and to use this to implement a highspeed, multi-asset trading strategy that transacts numerous inter-related trades in fractions of a second. These mathematical models analyse every quote and trade in the stock market, identify liquidity opportunities, and turn information into intelligent trading decisions.

Benefits of Algorithm Trading

Algorithm trading can potentially help traders execute orders faster, expand strategy portfolios by using more advanced quantitative tools and remove human emotions that often affect the performance of trading strategies.Because of these reasons, algorithmic and quantitative trading strategies are getting more popular, as it can increase the likelihood of success with the backing of statistical rigor. Algorithm trading can be beneficial for small-time investors, as it increases liquidity in the market and thereby simplifies the entry and exit process. Increasing depth of algo trading would be good for capital markets as it will remove price inefficiencies in traded securities. Suppose a trader follows these simple trade criteria:

- Buy 50 shares of a stock when its 50-day moving average goes above 200-day moving average.
- Sell shares of the stock when its 50-day moving average goes below the 200-day moving average.

Using this set of two simple instructions, it is easy to write a computer program that will automatically monitor the stock price and place the buy and sell orders when the defined conditions are met. The trader no longer needs to keep watch for live prices or graphs, or put in the orders manually. The algo trading system automatically does it for him, by correctly identifying the trading opportunities.

Use of Algorithm Trading In Trading/ Investment Activities

It is used in many forms of trading and investment activities, including:

- Mid-to long-term investors or buy-side firms-pension funds, mutual funds, insurance companies use it to purchase stocks in large quantities when they do not want to influence stock prices with discrete, large-volume investments.
- Short-term traders and sell-side participants-market makers, speculators, and arbitrageurs-benefit from automated trade execution; in addition, algo-trading aids in creating sufficient liquidity for sellers in the market.
- Systematic traders-trend followers, hedge funds or pairs traders (a market-neutral trading strategy that matches a long position with a short position in a pair of highly correlated instruments such as two stocks, exchange-traded funds or currencies, etc-find it much more efficient to program their trading rules and let the program trade automatically.

Algorithm Trading provides a more systematic approach to active trading than methods based on a human trader's intuition or instinct.

Opening of Direct Market Access

SEBI allowed Algorithm trading in India in April 2008 by opening up Direct Market Access (Third Generation Reforms) to institutions. DMA is a computer to computer link (CTCL) facility which allowsbrokers to offer institutional clients' direct access to the exchange's trading system through the broker'sinfrastructure without manual intervention by the broker. DMA offered direct control of clientsover orders, faster execution of client orders, and reduced risk of errors associated with manual orderentry, greater transparency, increased liquidity, lower impact costs for large orders and better audittrails. DMA also helped in better use of hedging and arbitrage opportunities through the use ofdecision support tools like algorithms for trading.

The use of algorithms has matured enough and has now manifested as High Frequency Trading (HFT) and colocation which has increased the speed andefficiency of trading manifold. The fourth generation reforms have already started with block chain and distributed ledger techniques which have the potential for redefining the trading platforms.

Growth of Algorithm Trading

Today it constitutes nearly 70% of total trading volumes in developed markets. Since its inception, it has grown rapidly across asset classes and today, close to 50% of overall exchange volumes in F&O segment happen through algorithms. Even in cash market, the share has grown to more than 30%. Algorithm trading has much higher shares in developed market, specifically in US, where more than 70% of overall exchange volumes come through this route. In terms of adoption, the Indian market has already crossed the halfway of US and European market levels in last decade. Lower cost of technology, cheaper access to computing power and availability of skilled resources are likely to help fast track this transition. Asian countries were one of the first movers toembrace HFT in order to bring in market liquidity.In developed markets, Algorithmic Trading stands atabout 80% of the total turnover. In the NIFM study, ithas been found that around 50% plus of total ordersat both NSE and BSE are algo trades-client side. Proprietary side algo trades are 40% plus of total orders placed at both the exchanges. More than 80%of the algo trades are generated from the co-location at both the exchanges.

Advantages of Algorithm Trading

One of the biggest advantages of Algorithm Trading

is the ability to remove human emotions from the markets, as trades are constrained within a set of predefined criteria. As NASDAQ puts it, the two emotions that lead to poor decisions that algo traders are not susceptible to, are fear and greed. Further,it provided the traders, the ability to back test. They can run the algorithms based on past data to see if it would have worked in the past and help them in removing any flaws before it is actually run. Thus, Algos crystallise past trading wisdom of years to corner every profitable opportunities and arbitrage. As machines take over, transaction cost reduces since traders need not be glued to their systems, monitoring the news and price movements. Particularly for big institutional players, Algo trading can be used to break up a big purchase into small parcels so that the price of an asset is less affected than if it were to be bought in one single act of purchase. It helps short term traders and market makers to take advantage of short-term market inefficiencies like arbitrage. As the cliché goes, every coin has two sides. The proponents of Algorithm Trading argue that it has brought depth and much desired liquidity into the market while the counter view is that it brings price volatility and noise into the market. Algo Trading requires a lot of technical programming skills, which can take quite a while to learn. Further, automation can lead to lack of control. The main objective of Algo Trading is not necessarily to maximise profits, rather to control execution costs and market risks but the lack of control has led to systemic risks, such as flash crashes. As pointed out by International Organisation of Securities Commissions (IOSCO), if trading venues experience outages, and particularly if this is the result of technology not being managed effectively, investor confidence and market integrity as a whole can be negatively impacted.

Meanwhile, it has also been proved in the past that Algorithm trading and HFT can be used to manipulate market using techniques like quote stuffing, layering (spoofing) and momentum ignition. Evidence suggests that market manipulating algorithms lead to decreased liquidity, higher trading costs, increased short term volatility, impact performance and fill rates, and result in massive price moves, backed by false volume. Increased speed provides limited opportunities for regulators to intervene during high volatility/uncertainty. Further, cascading effects and negative network externalities of technical errors cannot be overlooked.

Though simple and easy, however, the practice of algorithmic trading is not that simple to maintain and execute. Remember, if we can place an algo-generated trade, so can the other market participants. Consequently, prices fluctuate in milli-and even microseconds. Further, there are additional risks and challenges as well, from system failure risks, network connectivity errors, time-lags between trade orders and execution, and most important of all, imperfect algorithms. The more complex an algorithm, the more stringent backtesting is needed before it is put into action.

Guidelines on Algos

SEBI came out with its first comprehensive guideline on Algos in March 2012 which were further revised in May 2013. In its Consultation Paper of August, 2016, SEBI has proposed certain options like minimum resting time for orders, time stamping, frequent batch auctions, random speed bumps or delays in order processing/matching etc. Separate queues for co-location and non-co-location orders have also been proposed. In fact, certain measures have already been put in place to improve order-to-trade ratios. SEBI has received comments from various stakeholders of the securities market on this and is examining the same.

Conclusion

No doubt Algo trading is beneficial for investors through increasing liquidity in the market and simplifying the entry and exit process, however, increasing depth of Algo trading would be encouraged for capital markets to remove price inefficiencies in traded securities.

KNOWLEDGE UPDATE

ARBITRATION LAW

Amendments in the Fourth Schedule to the Arbitration and Conciliation Act, 1996

Central Government, *vide* Notification No. S.O. 5674(E) dated 12th November 2018, has amended the Fourth Schedule to the Arbitration and Conciliation Act, 1996.

FOREIGN EXCHANGE MANAGEMENT LAW

Central Government Prescribes Additional Chief Secretary or Principal Secretary (Home) of the Concerned State Government or Union Territory, as Competent Authority for the purposes of section 15 of the Foreign Contribution (Regulation) Act, 2010

Central Government, *vide* Notification No. S.O. 5650(E) dated 5th November 2018, has prescribed the Additional Chief Secretary or Principal Secretary (Home) of the concerned State Government or Union territory (where the assets of the person whose registration has been cancelled under section 14 of the Foreign Contribution (Regulation) Act, 2010 are physically located), as competent authority for the purposes of section 15 of the Foreign Contribution (Regulation) Act, 2010.

External Commercial Borrowings (ECB) Policy – Review of Minimum Average Maturity and Hedging Provisions

RBI, *vide* Circular No. A.P. (DIR Series) Circular No.11 dated 6th November 2018, has amended Master Direction No.5 dated January 1, 2016 on "External Commercial Borrowings (ECB), Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers".

Foreign Exchange Management (Deposit) (Amendment) Regulations, 2018

RBI, *vide* Notification No. G.S.R. 1093(E) dated 9th November 2018, has amended the Foreign Exchange Management (Deposit) Regulations, 2016.

SEBI LAW

Securities and Exchange Board of India (Delisting of Equity Shares) (Second Amendment) Regulations, 2018

SEBI, *vide* Notification No. SEBI/LAD-NRO/GN/2018/46 dated 14th November 2018, has amended the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009.

Standardised Norms for Transfer of Securities in Physical Mode

SEBI, *vide* Circular No. SEBI/HO/MIRSD/DOS3/CIR/P/2018/139 dated 6th November 2018, has modified the documentation/procedure for transfer of physical securities as prescribed in regulation 40 and Schedule VII of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Guidelines for Enhanced Disclosures by Credit Rating Agencies (CRAS)

SEBI, *vide* Circular No. SEBI/ HO/ MIRSD/ DOS3/ CIR/ P/ 2018/ 140 dated 13th November 2018, has prescribed disclosures to bring greater transparency and quality of disclosures made by the Credit Rating Agencies.

Disclosure of Reasons for delay in Submission of Financial Results by Listed Entities

SEBI, *vide* Circular No. CIR/CFD/CMD-1/142/2018 dated 19th November 2018, has stated that if any listed entity does not submit its financial results in accordance with the timelines specified in Regulation 33 of Listing Regulations, the listed entity shall disclose detailed reasons for such delay to the stock exchanges within one working day of the due date of submission for the results as required under Regulation 33. However, if the decision to delay the results was taken by the listed entity prior to the due date, the listed entity shall disclose detailed reasons for such delay to the stock exchanges within one working day of such decision.

Disclosures Regarding Commodity Risks by Listed Entities

SEBI, *vide* Circular No. 3SEBI/HO/CFD/CMD1/CIR/P/2018/0000000141 dated 15th November 2018, has declared that it has accepted the following recommendations of the Corporate Governance Committee formed under the Chairmanship of Shri Uday Kotak on Corporate Governance-

- The listed entities should disclose their risk management activities during the year, including their commodity hedging positions in a more transparent, detailed and uniform manner for easy understanding and appreciation by the shareholders.
- For the consistent implementation of the requirements of the SEBI LODR Regulations regarding disclosure of commodity risks and other hedging activities across listed companies, a detailed format along with the periodicity of the disclosures may be outlined by SEBI which would depict the commodity risks they face, how these are managed and also the policy for hedging commodity risk, etc. followed by the company for the purpose of disclosures in the annual report.

CASE LAW

Erstwhile Companies Act, 1956

Non-attending of the meeting as per calendar of events cannot be held against a director for not attending meetings for the purpose of vacating the office of directorship under clause (g) of sub-section (1) of section 283.

Where the appellant failed to establish that a Board meeting was held to pass a resolution for invoking clause (g) of sub-section (1) of section 283 to show deemed vacation of the director and that calendar of events is not a sufficient notice non-attending of the meeting as per calendar of events cannot be held against a director for not attending meeting for the purpose of vacating the office and vacation of the office by director is invalid - *Ajith Kunimal Venugopal* v. *Oil Tools International Services (P.) Ltd.,* National Company Law Appellate Tribunal, CA (AT) No. 338 of 2017 dated 9th March 2018.

Companies Act, 2013

Where no document or resolutions make any particular person responsible for complying with specific provisions, company and every officer of company who is in default shall be liable.

Where no resolution passed or return filed has been brought to the notice of the Appellate Tribunal charging or fixing responsibilities, in the absence of bringing the same on record, and in the absence of specific pleadings in the petitions for compounding the offence by officer who is in default, of failure to file returns and appoint company secretary, the benefit under sub-section (3) of section 137 cannot be given. As such, no reason is found to interfere with the orders of the Tribunal – *Sanchar Tele Systems Ltd. v. Registrar Of Companies*, National Company Law Appellate Tribunal, CA (AT) No.411 of 2017 with Company Appeal (AT) No.412 of 2017 dated 9th March 2018

Where name of non-operational company is struck off for non-filing of statutory returns, there is no justification to restore its name just to go through the process of winding up or closure.

Where the name of the non-operational company is struck off by the Registrar of Companies exercising its power under section 248 read with the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, giving opportunity to the petitioner-company to file its statutory returns and upon non-filing of statutory returns the name of the company was struck off, there would be no justification to restore the name of the company only for the company to go through the process of winding up or closure- *Valuefab Solutions (P.) Ltd. v. RoC, National Company Law Appellate Tribunal, Company Appeal (AT) No. 147 of 2018, dated 22nd May 2018*

Transfer of substratum itself of the company is an exceptional circumstance to justify waiver of condition precedent because complaint by member of oppression/ mismanagement has to be decided by the Tribunal.

Where appellants object to the application for waiver of conditions precedent for moving an application against oppression and mismanagement that there was no exceptional circumstance made out for waiver, the Appellate Tribunal found that when it was shown that substratum itself of the company had been transferred, it was an exceptional circumstance, and waiver as sought should be granted. Where any member of the company complains of 'oppression and mismanagement', the issue has to be decided by the Tribunal, and only because the respondent filed suit in the High Court, that would not be bar to the application for waiver – *Photon Infotech (P.) Ltd. v. Medici Holdings Ltd.*, National Company Law Appellate Tribunal, CA (AT) No. 375 of 2017 dated 24th April 2018

Competition Act, 2002

Where a person is summoned for investigation by Director General, he has the right to be represented by an advocate, because the authority investigating is empowered to take evidence.

Where the Director General (DG) is collecting or recording evidence during investigation, since the powers of DG are so far reaching and the consequences of an investigation so drastic, it would be necessary that the right of a party/ person to be accompanied by an advocate be not taken away – *Competition Commission of India* v. *Oriental Rubber Industries (P.) Ltd.*, High Court of Delhi, LPA 607 of 2016 & CM Appl. 41020 of 2016 dated 24th May 2018.

Insolvency and Bankruptcy Code, 2016

Section 14, which provides for declaration of a moratorium after admission of an insolvency petition, does not apply to a personal guarantor of a corporate debtor which is undergoing an insolvency proceeding.

A plain reading of section 14 leads to the conclusion that the moratorium referred to in that section can have no manner of application to personal guarantors of a corporate debtor. On a careful reading of clause (e) of section 2 and section 60, it is clear that the Code will not apply to personal guarantors of corporate debtors and by section 60 proceedings against such personal guarantors will not show that such moratorium extends to the guarantor as well. Sub-section (1) of section 31 makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include a provision as to payment to be made by such guarantor - *State Bank of India* v. *V Ramakrishnan, Supreme Court of India, CA No. 4553 of 2018 dated 14th August 2018*

Where filing of petition under section 34 of the Arbitration and Conciliation Act against an arbitral award establishes pre-existing of dispute which continues till final adjudicatory process, all that has to be seen is whether the said debt can be said to be disputed.

Where the filing of a petition under section 34 of the Arbitration Conciliation Act against an arbitration award shows that a pre-existing dispute culminating in the first stage of proceeding in an award continues even after the award at least till the final adjudicatory process under sections 34 and 37 has taken place, insofar as operational debt under the Code is concerned all that has to be seen is whether the said debt can be said to be disputed- *K Kishan v. Vijay Nirman Co. (P.) Ltd, Supreme Court of India, CA Nos. 21824 & 21825 of 2017 dated 14th August 2018*

■■■

RNI Regd. No.DELENG/2017/71754
Posted on : 12-14 December 2018
Published on 9, 10 & 11 December 2018
DELHI POSTAL REGD. NO. DL-SW-1/4199/17-19
Place of posting : NDPSO, New Delhi
LICENSED TO POST WITHOUT PRE-PAYMENT No. U(SW)-20/2017-19

CASE LAWS

Declining to supplant the mechanism laid down in the Code for corporate insolvency resolution process by substituting them with a mechanism under judicial directions, the Supreme Court, issued directions for re-initiation of resolution of insolvency process afresh and renewing the period of 180 days prescribed for completion of resolution process.

In exercise of the power vested under article 142 of the Constitution, the Supreme Court, having regard to the facts and circumstances of the case, issued directions inter alia, for reviving the prescribed period by another 180 days for the completion of the resolution process, constituting a new committee of creditors to enforce the statutory status of the home buyers as financial creditors, permitting the insolvency resolution professional to invite fresh expressions for submission of resolutions plans, barring promoters from participating in the corporate insolvency resolution process, permitting Reserve Bank to direct banks to initiate corporate insolvency resolution proceedings and transferring Rs. 750 crores deposited in the court to the National Company Law Tribunal- *Chitra Sharma* v. *Union of India,* Supreme Court of India, WP (Civil) Nos. 744, 782, 783, 803, 805, 860 & 950 of 2017; 511 of 2018 and SLP (Civil) Nos. 24001, 24002, 36396 & 33267 of 2017 dated 9th August 2018

IBBI has no locus to file appeal in the Appellate Tribunal challenging finding of Adjudicating Authority. It is for resolution professional to find out that a resolution plan is contrary to section 29A

Where the Insolvency and Bankruptcy Board of India (IBBI), a regulatory body, has no locus standi, not being an aggrieved person, it cannot challenge the finding given by Adjudicating Authority, preferring an appeal under section 61. From clause (g) of section 196 relating to powers and functions of the Board, it is clear that it can only monitor the performance of the resolution professional and, in appropriate cases, may pass any direction as may be required for compliance of the provisions of the Code. Hence, the Appellate Tribunal is not inclined to entertain the present appeal at the instance of the IBBI, but give it liberty to inform the resolution professional to move appeal under section 61 to ensure that law is properly explained at the appellate stage. It is the duty of the resolution professional to find out whether a resolution plan submitted by an applicant is contrary to section 29A - *Insolvency and Bankruptcy Board of India v. Wig Associates (p.) Ltd.*, National Company Law Appellate Tribunal, Company Appeal (AT) (Insolvency) No. 415 of 2018 dated 1st August 2018

If undelivered, please return to:
Krishna Law House,
128, Municipal Market, Super Bazar Compound,
Connaught Place, New Delhi-110001.